

2012-210526

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED

MAR 30 2012

Doyet A Early III, Circuit Court Judge

S.C. Supreme Court

Case No 2006-CP-40-7215

Fariborz Z Babae and Malihe Babae,

Respondents,

v

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and Preferred Home
Inspections, Inc , Defendants

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is

Petitioner

APPENDIX - VOLUME I

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**APPENDIX
INDEX**

VOLUME I

Record on Appeal	1
Volume 1	1

VOLUME II

Record on Appeal	
Volume 2	500

VOLUME III

Record on Appeal	
Volume 3	991
Final Appellant's Brief of Appellant-Respondent Babae	1051
Final Responsive Brief of Appellant-Respondent Babae	1081
Final Reply Brief of Appellant-Respondent Babae	1108
Final Appellant's Brief of Respondent-Appellant Moisture Warranty	1122
Final Responsive Brief of Respondent-Appellant Moisture Warranty	1144
Final Reply Brief of Respondent-Appellant Moisture Warranty	1176
Court of Appeals Opinion dated January 25, 2012	1196
Moisture Warranty's Petition for Rehearing filed February 9, 2012	1202
Order Denying Petition for Rehearing filed March 2, 2012	1222

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Farly III Circuit Court Judge

Case No. 06-CP-40-7215

Fariborz Z. Babae and Malihe Babae

Appellants/Respondents

vs

Moisture Warranty Corporation d/b/a Moisture Free Warranty and
Preferred Home Inspections, Inc.
Defendants

Of Whom Moisture Warranty Corporation d/b/a Moisture Free Warranty is
Respondent/Appellant

RECORD ON APPEAL
Volume 1 of 3

INDEX
Volume 1

ORDERS

Order of October 2, 2007 1

Order of February 25 2009 6

JUDGMENTS

Verdict Form November 20, 2008 12

Form 4 Judgment November 21 2009 13

PLEADINGS

Complaint December 5 2006 14

Answer February 5 2007 35

Motion to Stay Discovery and Motion to Enforce Arbitration, February 1 2007 41

Plaintiffs Reply to Defendants Motion 60

Moisture Warrant Post Trial Motion November 26 2008 81

Moisture Warrant s Memorandum in Support of Post Trial Motion January 20 2009
with Exhibits 85

Plaintiffs Reply to Moisture Warranty s Post-Trial Motions 117

Notice of Appeal March 2 2009 124

Moisture Warranty s Amended Notice of Cross Appeal 132

TRANSCRIPTS

Trial Transcript November 17 2008 142
[pages 7-13 28 29 46 163]

Trial Transcript November 18 20 2008 268
[pages 6 43, 44 59 60 65 66 133 134 161, 161 230]

Volume 2

Trial Transcript November 18-20 2008 [pages 231 293 294 485 487 500, 502 558, 567-617 682 685 612 614, 616 617] Hearing, January 21 2009	494 871

PLAINTIFFS EXHIBITS

Exhibit 2 - Wood Moisture Control	888
Exhibit 19 - PrimeSouth Bid Sheet	889
Exhibit 20 - PrimeSouth Proposal	893
Exhibit 27 - Authorization Certificate without Exclusions	896
Exhibit 28 - Authorization Certificate with Exclusions	898
Exhibit 39 - Performance Exterior Proposal	900
Exhibit 30 - Clark Service Report November 8 2004	901
Exhibit 40 - Moisture Warranty Brochure	920
Exhibit 45 - Moisture Free Warranty Fax	931
Exhibit 47 - Email from Klaver to Hammett	934
Exhibit 43 - Clark Service Report November 3 2004	935

DEFENDANTS EXHIBITS

Exhibit 8 - PHI Report November 12 2004	940
Exhibit 10 - August Contract, August 29, 2004	961
Exhibit 11 - October Contract October 3, 2004	966
Exhibit 14 - November 4 2004 letter to Maolis	971
Exhibit 15 - November 8 2004 letter from Babaees to Lewis	972
Exhibit 19 - Letter of Approval dated November 11 2004	973
Exhibit 23 - HUD Settlement Statement	974

Exhibit 24 - Babaees January 3 2006 letter to Moisture Warranty 978

Volume 3

Exhibit 26 - Babaees January 11 2006 letter to Moisture Warranty with attachments 979

Exhibit 27 - Blackburn Report February 21 2006 1014

Exhibit 28 - Letter from McLain to Babae April 17 2006 996

Exhibit 29 - Warranty attached to McLain letter 997

Exhibit 30 - Babaees April 21 2006 fax to McLain 1029

Exhibit 33 - Moisture Warranty Letter from McLain and check for \$2500 July 31, 2006 1030

Exhibit 45 - Clemson's Wood Moisture Content Bulletin 1032

OTHER MATERIAL OR DOCUMENTS

Certificate of Appellant 1034

Form 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO 2006CP4007215

Plaintiff **Fariborz Z Babaee** vs **Moisture Warranty Corporation**

Defendant

CHECK ONE

- ☐ **JURY VERDICT** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON)** ☐ Rule 12(b) SCRPC ☐ Rule 41(a)
SCRPC (Vol Nonsuit) ☐ Rule 43(k) SCRPC (Settled) ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON)** ☐ Rule 40(j) SCRPC ☐ Bankruptcy
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award
☐ Other

IT IS ORDERED AND ADJUDGED

☒ See attached order

☐ Statement of Judgment by the Court

Dated at Columbia South Carolina, this ____ day of _____, 2007

PRESIDING JUDGE

This judgment was entered on the ____ day of _____ 2007 and a copy mailed first class this
3rd day of October 2007 to attorneys of record or to parties (when appearing pro se) as follows

Charles A. Krawczyk

ATTORNEY(S) FOR THE PLAINTIFF(S)

Charles Grant Blackburn
Anthony W. Livoti

ATTORNEY(S) FOR THE DEFENDANT(S)

SCPC APP 24/FORM 4

S/BARBARA A. SCOTT
Clerk of Court

0001

APP_0005

IN THE STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Fariborz Z Babae and
Malihe Babae,

Plaintiffs,

vs

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and
Preferred Home Inspections Inc ,

Defendants

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No 2006-CP-40-7215

**Order Denying Defendant Moisture
Warranty Corporation's Motion to
Stay Discovery and Compel Arbitration**

THIS MATTER is before the Court on the motion of Defendant Moisture Warranty Corporation d/b/a Moisture Free Warranty (hereinafter 'Moisture Warranty Corp ") seeking an order staying the instant action against Moisture Warranty Corp and compelling arbitration. A hearing was held on July 31, 2007 wherein Plaintiffs Fariborz Z Babae and Malihe Babae (hereinafter referred to collectively as the "Plaintiffs) were represented by attorney Robert B (Sam) Phillips and Defendant Moisture Warranty Corp was represented by attorney Anthony W Livoti Based on the record the pleadings on file and the arguments of counsel the Court DENIES Defendant Moisture Warranty Corp s motion

Factual Background

Plaintiffs purchased their home at 133 Beaver Dam Road in Richland County from Giuseppe and Maria Maoli on November 18, 2004 The Beaver Dam Road home is clad with a type of stucco known as an Exterior Insulation Finish System or EIFS " Defendant Moisture Warranty Corp markets and sells a product known as the 'MoistureFree Warranty that purports

to be a cost effective means of rendering an EIFS-clad home 'dry' and free of moisture damage Moisture Warranty Corp represents that it engages in a process to ensure than an EIFS-clad home is "dry" prior to issuing a MoistureFree Warranty It further represents that once a MoistureFree Warranty is in place, Moisture Warranty Corp will pay for the repair of the home's EIFS exterior whenever "excessive moisture" is discovered within or behind the EIFS cladding Moisture Warranty Corp further represents that an EIFS home which conforms with the MoistureFree Warranty standards will be dry and will not lose market value The aforementioned representations were made by Moisture Warranty Corp in its advertising and marketing materials

Based on the representations made by Defendant Moisture Warranty Corp in its advertising and marketing materials Plaintiffs purchased a MoistureFree Warranty for the Beaver Dam Road house on November 18 2004 At the time of the Plaintiffs purchase of the Moisture Free Warranty they allege they had not provided with any document claiming the Warranty was subject to arbitration Sometime after their purchase of the Warranty Plaintiffs received a MoistureFree Warranty Authorization Certificate No 411014 from Moisture Warranty Corp The Certificate referenced an information booklet titled *The Terms and Conditions of the MoistureFree Warranty* but it did not mention which of several versions of the booklet it referred to The terms and conditions set forth in the information booklet included the arbitration agreement that is the basis of the Defendant s motion Allegedly, Plaintiffs did not receive either the Certificate or the information booklet until after they purchased the MoistureFree Warranty

Legal Analysis

It is axiomatic that "in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the



) agreement” Player v Chandler, 299 S C 101, 105, 382 S E 2d 891, 893 (1989) (emphasis in original) Once a meeting of the minds is achieved, and the parties exchanges promises regarding future performance the agreement may only be modified “by a subsequent agreement of the parties [that] contains all the requisites [offer, acceptance, and valuable consideration] of a valid contract Sauner v Public Service Authority of South Carolina, 354 S C 397, 581 S E 2d 161 (2003) (quoting Florence City -0county Airport Comm’n v Air Terminal Parking Co., 283 S C 337, 341 322 S E 2d 471 473 (Ct App 1984)) A party claiming the existence or modification of a contract bears the burden on proving the existence or modification of such an agreement See e.g., Prescott v Farmers Telephone Co-op, Inc., 335 S C 330, 516 S E 2d 923 (1999) (using general principles of contract law to find that the proponent of a contract bears the burden of proving the existence of such a contract)

/ Defendant has failed to produce competent evidence that Plaintiffs entered into, or even were aware of, an arbitration agreement when they purchased the Moisture Free Warranty Moisture Warranty Corp has merely demonstrated that Plaintiffs were provided with an Authorization Certificate that made a non-specific reference to an information booklet containing an arbitration agreement *after* Plaintiffs purchased the MoistureFree Warranty Thus, there could not have been any meeting of the minds regarding arbitration when the parties entered into a contract for a MoistureFree Warranty

General contract principles apply to arbitration provisions, even when enforcement of the provision is sought under the Federal Arbitration Act (FAA ’ Munoz v Green Tree Financial Corp., 343 S C 531, 539 542 S E 2d 360, 364 (2001) It is axiomatic that ‘a post-contract, unbargained-for unilateral attempt to limit obligations under a contract’ is ineffective Gold

1 Kist, Inc v Citizens & Southern Nat Bank, 286 S C 272, 277, 333 S E 2d 67, 70 (Ct App 1985)

In the Gold Kist case the Court of Appeals held that disclaimers of certain implied warranties appearing on bags of seed were ineffective because the disclaimers were not delivered until after the purchase occurred and the seed bags were delivered 286 S C at 277, 333 S E 2d at 70-71

Allegedly, the only documents Plaintiffs received prior to their purchase of the MoistureFree Warranty were advertising and marketing materials produced by Moisture Warranty Corp These materials made no reference to the information booklet that contained the arbitration agreement

The Defendant can only demonstrate that Plaintiffs received the arbitration language in documents brought to their attention *after* their purchase of a MoistureFree Warranty Because South Carolina law does not permit the unilateral modification of the terms of a contract *after* a contract has been executed Moisture Warranty Corp cannot retroactively impose an arbitration agreement

1 after the Plaintiffs' purchase of the MoistureFree Warranty

THEREFORE, IT IS HEREBY ORDERED, that Defendant Moisture Warranty Corp s motion to stay the proceeding and compel arbitration is denied.

AND IT IS SO ORDERED



G Thomas Cooper Jr
Presiding Judge Fifth Circuit Court

Seamus 27 2007
Columbia, South Carolina

Form 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO 2006CP4007215

Fariborz Z Babae

vs

Moisture Warranty Corporation

Plaintiff

Defendant

CHECK ONE

- ☐ JURY VERDICT This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT This action came to trial or hearing before the court. The issues have been tried and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON)
- ☐ Rule 12(b) SCRPC ☐ Rule 41(c) SCRPC (Vol Nonsuit) ☐ Rule 43(k) SCRPC (Settled) ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON)
- ☐ Rule 40(j) SCRPC, ☐ Bankruptcy
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award
- ☐ Other

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)

☐ Affirmed ☐ Reversed ☐ Remanded, ☐ Other

NOTE ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IT IS ORDERED AND ADJUDGED

☒ See attached order

☐ Statement of Judgment by the Court

Dated at Columbia, South Carolina, this ____ day of _____, 2009

PRESIDING JUDGE

This judgment was entered on the ____ day of _____, 2009 and a copy mailed first class this ____ day of _____, 2009, to attorneys of record or to parties (when appearing pro se) as follows

Charles A. Krawczyk

ATTORNEY(S) FOR THE PLAINTIFF(S)

Charles Grant Blackburn, Anthony W Livot
Charles Mitchell Brown Allen Mattison Bogan

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeannette W. McBride

Clerk of Court

CRCP APP 24/FORM 4

0006

APP_0010

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Fariborz Z Babae and Malihe Babae,) Civil Action No 2006-CP-40-7215
)
)

Plaintiffs,)
)

vs)
)

Moisture Warranty Corporation d/b/a)
Moisture Free Warranty, and Preferred)
Home Inspections Inc)

Defendants)
)

**ORDER GRANTING MOISTURE
WARRANTY CORPORATION'S
MOTION FOR A NEW TRIAL *nisi*
REMITTITUR**

FILED
RICHLAND COUNTY
2009 FEB 11 AM 9 39
JEANE C. MCBRIDE

On November 26, 2008 Defendant Moisture Warranty Corporation d/b/a Moisture Free Warranty ('Moisture Warranty Corporation') moved this Court pursuant to Rules 50-59, and all other applicable rules of the South Carolina Rules of Civil Procedure for judgment notwithstanding the verdict, for a new trial absolute and failing the above new trial *nisi remittitur*. As outlined below, Moisture Warranty Corporation's motion for a new trial *nisi remittitur* is granted.

SUMMARY

A hearing on the motions was held on Wednesday, January 21, 2009. Having considered each and every ground set forth in Moisture Warranty Corporation's motions memoranda in support thereof, and the arguments submitted in support of the motions at the hearing before this Court, Moisture Warranty Corporation's motion for a new trial *nisi remittitur* is granted and the verdict is reduced as outlined herein. However, Moisture Warranty Corporation's motion for judgment notwithstanding the verdict and motion for new trial absolute are denied.

BACKGROUND

OAG
/

0007

On November 29, 2004, in connection with the purchase of their home, Plaintiffs were issued a 3 year limited warranty by Moisture Warranty Corporation. The limited warranty was subject to several Terms and Conditions that were detailed in the warranty provided to the Plaintiffs. The Plaintiffs were aware of the warranty as early as August 28, 2004, as it was provided to them when they signed the contract for the purchase of their home.

On December 8, 2006, Plaintiffs filed suit alleging various causes of action against Moisture Warranty Corporation, including but not limited to fraud, negligence, negligent misrepresentation, and violations of the South Carolina Unfair Trade Practices Act, related to the allegation that Plaintiffs' home was not moisture free. At the heart of the dispute, Plaintiffs claimed that Moisture Warranty Corporation failed to perform under the terms of the parties' agreement. This Court granted Moisture Warranty Corporation judgment on every claim except for Plaintiffs' breach of warranty claim. The breach of warranty claim proceeded to trial and on November 20, 2008, a jury returned a verdict in the amount of \$140,000 in favor of Plaintiffs. On November 26, 2008, Moisture Warranty Corporation timely filed its post trial.

LEGAL DISCUSSION

I Judgment Notwithstanding the Verdict (JNOV)

Moisture Warranty Corporation moved this Court for a judgment notwithstanding the verdict. Having considered each and every ground set forth in support of Moisture Warranty Corporation's JNOV motion, this Court denies that motion.

II New Trial Absolute

OK
/2

Moisture Warranty Corporation moved this Court for a new trial absolute. Having considered each and every ground set forth in support of Moisture Warranty Corporation's motion for a new trial absolute, this Court denies that motion.

III New Trial *Nisi Remittitur*

Moisture Warranty Corporation also moved this Court for a new trial *nisi remittitur*. Having considered each and every ground set forth in support of Moisture Warranty Corporation's motion for new trial *nisi remittitur*, this Court grants that motion and finds that the verdict in this case must be reduced.

In South Carolina, this Court *alone* has the power to grant a new trial *nisi* when it finds the amount of the verdict to be merely excessive. Easler v. Hejaz Temple, 285 S C 348, 329 S E 2d 753 (1985) (emphasis original). Further, this Court has wide discretionary power to reduce the amount of a verdict which is excessive. Johnson v. Life Insurance Company of Georgia, 227 S C 351, 88 S E 2d 260, 270 (1955).

A verdict is deemed to be excessive when it indicates "undue liberality on the part of the jury." Gray v. Davis, 247 S C 536, 148 S E 2d 682 (1966). In considering a motion for new trial *nisi*, this Court must evaluate the adequacy of the verdict in light of the evidence presented. Becker v. Wal-Mart Stores, Inc., 339 S C 629, 529 S E 2d 758 (Ct App 2000). Accordingly, when a verdict indicates an undue liberality on the part of the jury in light of the evidence presented, this Court has the power to reduce the verdict to an amount that reflects the evidence presented. See Becker v. Wal-Mart Stores, Inc., 339 S C 629, 526 S E 2d 758 (S C Ct App 2000) (affirming the trial court's decision to remit the verdict based on the finding that the verdict was excessive, Orangeburg Sausage

OK
/3

Co. v Cincinnati Ins. Co., 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994) (reducing a jury verdict to actual damages proven)

In this case, after reviewing the evidence, this Court finds that the verdict is "merely excessive" and that the verdict does not bear a reasonable relationship to the injuries sustained by Plaintiffs. First, this Court finds that the total verdict awarded is in excess of any actual damages recoverable under the express terms of the warranty. Pursuant to the express terms of the limited warranty, "Warrantor s [Moisture Warranty Corporation] total aggregate liability of this Limited Warranty is limited to \$20,000 per year and \$60,000 over the full term of the warranty." Thus, the \$140,000 awarded is not reasonably related to the evidence presented to the jury regarding the terms of the warranty. Second, Plaintiff's expert, Chris Cooper, testified regarding costs wholly unrelated and not covered by the warranty including but not limited to replacing the stucco exterior on parts of the home. As a result, this Court finds that Mr. Cooper's numbers were based on speculation and matters that were not consistent with the coverage provided under the express terms of the warranty.

Under these circumstances, a reduction of the verdict is warranted. As was shown at trial, the Plaintiffs made one claim under the warranty in early 2006. No other claims were submitted under the warranty. Hence, Moisture Warranty Corporation's request to reduce is granted and the verdict is hereby reduced to \$20,000, or one year of the maximum coverage under the express terms of the warranty.

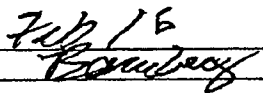
CONCLUSION

Accordingly the jury's verdict in this case must be reduced THEREFORE IT IS
HEREBY ORDERED, ADJUDGED AND DECREED that the verdict in this action is
reduced from \$140,000 to \$20,000 Should Plaintiffs decline to accept the amount of the
verdict as reduced a new trial is ordered See Hutson v Cummins Carolina, Inc., 280
S C 552, 314 S E 2d 19 (Ct App 1984) (demonstrating that the trial court must offer the
option of a new trial *must* when the court remits a verdict) Plaintiffs shall indicate
whether they accept the reduced award within 10 (ten) days of the date of this order

IT IS SO ORDERED



The Honorable Doyet A. Early, III
South Carolina Circuit Judge


_____, 2009
_____, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Fariborz Z Babae and Malihe Babae,

Plaintiffs,

vs

Moisture Warranty Corporation d/b/a Moisture
Free Warranty, and Preferred Home
Inspections, Inc

Defendants

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action No 2006-CP-40-7215

VERDICT FORM

FILED
NOV 21 AM 10 58
C C & G S

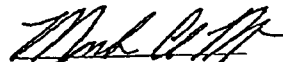
- 1 Do you the jury find that the Defendant Moisture Warranty Corporation, breached its warranty that it issued to the Plaintiffs?

☒ Yes ☐ No

If you answered yes, go to question Number 2 If you answered, No, stop and deliberate no further

- 2 State the amount of damages you find Plaintiff has sustained as a result of Defendant's breach of the warranty

\$140,000.00


Jury Foreperson

DATE 11/20/08

0012

APP_0016

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS

CASE NO 06 -CP-40- 7215

Fariborz Z Babaei

Moisture Warranty Corp.

PLAINTIFF(S)

DEFENDANT(S)

FILED
RICHLAND COUNTY
NOV 21
AM 10:58
C.C. & S.

CHECK ONE

- ☐ **JURY VERDICT** This action came before the court for a trial by jury The issues have been tried and a verdict rendered
- ☐ **DECISION BY THE COURT** This action came to trial or hearing before the court The issues have been tried or heard and a decision rendered
- ☐ **ACTION DISMISSED** (CHECK REASON) ☐ Rule 12(b) SCRPC ☐ Rule 41(a), SCRPC (Vol Nonsuit) ☐ Rule 43(k) SCRPC (Settled) ☐ Other _____
- ☐ **ACTION STRICKEN** (CHECK REASON) ☐ Rule 40(j) SCRPC, ☐ Bankruptcy, ☐ Other _____

IT IS ORDERED AND ADJUDGED ☐ See attached order ☐ Statement of Judgment by the Court

Judgement in the amount of \$140,000 for plaintiff

Dated at COLUMBIA South Carolina this _____ day of _____
19____

MA Early
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 19____, and a copy mailed first class the _____ day of _____, 19____ to attorneys of record or to parties (when appearing pro se), follows

Howard Sheftman

Charles Grant Blackburn

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC FORM 4
(Rev 2/96)



CLERK OF COURT

0013

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Fariborz Z. Babaei and Malihe Babaei,
Plaintiff(s)

vs

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and Preferred Home
Inspections, Inc ,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

- CP -

(Please Print)

Submitted By Charles A. Krawczyk, Esquire

Address Finkel Law Firm LLC

1201 Main Street, Suite 1800 (29201)

Post Office Box 1799, Columbia, SC 29202

SC Bar # 16832

Telephone # 803-765 2935

Fax # 803-252-0786

E-mail ckrawczyk@finkellaw.com

NOTE The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law This form is required for the use of the Clerk of Court for the purpose of docketing It must be filed and completely signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint ☐ NON-JURY TRIAL demanded in complaint
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules
☐ This case is exempt from ADR (certificate attached)

NATURE OF ACTION (Check One Box Below)

Contracts	Torts Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Label (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	☐ Notice/ File Med Mal (230)	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☒ Breach of Contract (140)	☐ Other (299)	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)		☐ Personal Injury (350)	☐ Possession (450)
		☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)
-
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Sexual Predator (510)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Mandamus (520)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Habeas Corpus (530)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
☐ Other (599)	☐ Transcript Judgment (740)	☐ Forfeiture (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Other (899)	☐ SCDOT (950)
	☐ Other (799)		☐ Worker's Comp (960)
			☐ Zoning Board (970)
			☐ Administrative Law Judge (980)
			☐ Public Service Commission (990)
			☐ Employment Security Comm (991)
			☐ Other (999)
-
Special/Complex /Other	
☐ Environmental (600)	☐ Pharmaceuticals (630)
☐ Automobile Arb (610)	☐ Unfair Trade Practices (640)
☐ Medical (620)	☐ Out-of State Depositions (650)
☐ Other (699)	

Submitting Party Signature

Date 5 Dec 2008

Note Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP Rule 11 and the South Carolina Frivolous Civil Proceedings Sanctions Act, S C Code Ann §15 36 10 et seq

IN THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT

Farborz Z. Babaee and
Mahihe Babaee,

Plaintiffs,

vs

Moisture Warranty Corporation d/b/a
Moisture Free Warranty; and
Preferred Home Inspections Inc.,

Defendants

Civil Action No

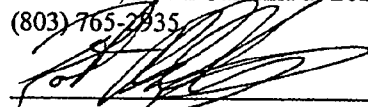
SUMMONS
(Jury Trial Demanded)

RICHLAND COUNTY
FIFTH JUDICIAL CIRCUIT
2006 DEC -5 PM 3 58
BARBARA A. SCOTT
C.C.C. & G.S.

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action
a copy of which is hereby served upon you, and to serve a copy of your Answer to the said
pleading upon the subscribers at their offices 1201 Main Street, Suite 1800 Post Office Box
1799 Columbia, South Carolina 29202 within thirty (30) days after service hereof, exclusive of
the day of such service and if you fail to answer the Complaint within the time aforesaid
judgment by default will be rendered against you for the relief demanded in the Complaint

FINKEL LAW FIRM LLC
Post Office Box 1799
1201 Main Street Suite 1800
Columbia, South Carolina 29202
(803) 765-2935

BY


Charles A. Krawczyk, Esquire
Robert B. (Sam) Phillips Esquire
Attorneys for the Plaintiff

Columbia, South Carolina
December 4, 2006

0015

APP_0019

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Fariborz Z Babae and
Malihe Babae,

Civil Action No 06 CP-40-

Plaintiffs,

vs

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and
Preferred Home Inspections, Inc ,

Defendants

COMPLAINT
(Jury Trial Demanded)

FILED
2006 DEC -5 PM 3 58
BARBARA A SCOTT
CLERK & G S
RICHLAND COUNTY

Plaintiffs, by and through their undersigned counsel would respectfully allege as follows

PARTIES AND JURISDICTION

1 The Plaintiffs Fariborz Z Babae and Malihe Babae (hereinafter referred to collectively as the 'Plaintiffs or the Babaees ') are citizens and residents of Richland County, South Carolina

2 The Plaintiffs own a residence located at 133 Beaver Dam Road Richland County South Carolina (hereinafter, the 'Property')

3 Defendant Moisture Warranty Corporation d/b/a Moisture Free Warranty (hereinafter referred to as 'Moisture Free ') is organized and exists according to the laws of the State of North Carolina, with its principal offices in Cornelius, North Carolina Defendant purposefully directs its products into South Carolina. Upon information and belief, Defendant is not registered to transact business in South Carolina with the South Carolina Secretary of State's Office

(Page 1 of 19)

0016

APP_0020

4 Plaintiffs purchased a Moisture Free Warranty for the subject Property from Defendant Moisture Free

5 Defendant Preferred Home Inspections Inc (hereinafter referred to as PHI) is organized and exists according to the laws of the State of South Carolina, with its principal offices in Columbia, South Carolina Defendant PHI is a certified inspector of Defendant Moisture Free

6 Upon information and belief, PHI was an agent, either actual or apparent, of Defendant Moisture Free in the marketing, inspection process and issuance of a Moisture Free Warranty for the subject Property

FACTUAL BACKGROUND

7 Giuseppe Maoli and Maria Vittoria Maoli (hereinafter collectively referred to as the 'Maolis') contracted with Kendrick Builders, Inc in or about February of 1996 for the construction of the subject Property

8 The Property's exterior is clad with a type of stucco known as an Exterior Insulation Finish System or by its acronym EIFS

9 EIFS are complete building systems which integrate a resinous exterior cladding with a continuous layer of insulation, wrapped around the exterior of buildings These systems are comprised of five component layers an exterior finish, a reinforcing mesh to protect the system, an insulator, in this case of polyisocyanurate an adhesive substance or mechanical binder that attaches the polyisocyanurate to the building, and a substrate to which the insulator is attached

10 Upon information and belief, the Maolis periodically hired Defendant PHI to inspect the Property's EIFS exterior while they owned the Property

11 Plaintiffs purchased the Property from the Maolis on or about November 18, 2004

(Page 2 of 19)

0017

APP_0021

12 Defendant Moisture Free markets and sells a warranty for EIFS homes that is known as the MoistureFree Warranty

13 Defendant Moisture Free represents that a properly installed EIFS exterior will protect a home from moisture intrusion and resulting moisture damage

14 Defendant Moisture Free represents that a properly installed EIFS exterior will provide 'worry-free protection' from moisture intrusion and related moisture damage

15 Defendant Moisture Free represents that a properly installed EIFS exterior will keep a home "dry "

16 Defendant Moisture Free represents that an improperly installed EIFS exterior can be modified or repaired to provide the same level of protection from moisture intrusion and moisture-related damage as a properly installed EIFS exterior

17 Defendant Moisture Free represents that it and its agents are skilled in determining whether an EIFS exterior is properly installed

18 Defendant Moisture Free represents that it and its agents are skilled in determining whether an EIFS clad home is "dry "

19 Defendant Moisture Free represents that it and its agents are skilled in determining what modifications or repairs are necessary for correcting the deficiencies of an improperly installed EIFS exterior and whether those repairs are sufficient to prevent moisture intrusion and keep the property dry

20 Defendant Moisture Free represents that it and its agents are skilled in monitoring EIFS clad homes to ensure they remain dry and free of moisture intrusion

(Page 3 of 19)

0018

APP_0022

21 Defendant Moisture Free represents that it and its agents are skilled in preventing moisture intrusion into EIFS clad homes

22 Defendant Moisture Free represents that it has developed inspection protocols and warranty standards that ensure a home's EIFS exterior will prevent moisture intrusion and moisture-related damage thereby keeping the EIFS-clad home 'dry'

23 Defendant Moisture Free markets and sells the MoistureFree Warranty as a means of preserving the value of a EIFS home

24 Defendant Moisture Free markets and sells the MoistureFree Warranty as a means of improving the resale value of an EIFS home

25 Defendant Moisture Free markets and sells the MoistureFree Warranty as a cost-effective means of rendering an EIFS clad home 'dry' and free of moisture damage

26 Defendant Moisture Free represents that it engages in a process to ensure that an EIFS-clad home is 'dry' prior to issuing the home a MoistureFree Warranty

27 Defendant Moisture Free represents that once a MoistureFree Warranty is in place, Defendant Moisture Free is obligated to pay for the repair of the home's EIFS exterior whenever "excessive moisture is discovered within or behind the EIFS cladding

28 Defendant Moisture Free represents that an EIFS home which conforms with Moisture Free's warranty standards will be dry and will not lose any market value

29 The MoistureFree Warranty defines excessive moisture as a moisture reading that is equal or greater than 25% as measured by an electrical resistance-type moisture meter

(Page 4 of 19)

0019

APP_0023

30 Defendant Moisture Free represents that it will oversee necessary inspection(s) and, if necessary repairs to ensure that a warranted home s EIFS is properly installed so that the home will remain ' dry '

31 Defendant Moisture Free trains and certifies building inspectors and utilizes inspections and reports produced by those inspectors when issuing a MoistureFree Warranty

32 Defendant PHI is a certified MoistureFree Warranty inspector

33 Defendant Moisture Free represented that Defendant PHI had the skill necessary to inspect an EIFS clad home for purposes of issuing a MoistureFree Warranty

34 In undertaking to certify inspectors, like PHI Defendant Moisture Free undertook a duty to do so with due care and ensure such inspectors had the knowledge experience skills and/or expertise to inspect EIFS cladding in accordance with Defendant Moisture Free s standards and protocols

35 Upon information and belief, Defendant PHI did not have the necessary knowledge, experience, skills, and/or expertise to properly inspect the Property in accordance with the Moisture Free standards and protocols

36 Upon information and belief, Defendant Moisture Free knew or should have known that Defendant PHI did not possess the necessary knowledge experience, skills, and/or expertise to inspect the Property in accordance with Moisture Free standards and protocols thereby breaching its duty to do so with due care

37 Based on the aforementioned representations, Plaintiffs sought to purchase a MoistureFree Warranty from Defendant Moisture Free based on representations in Defendant Moisture Free s advertising and marketing materials

(Page 5 of 19)

0020

APP_0024

38 Upon information and belief, Defendant PHI undertook the inspections and submitted the documentation required by Defendant Moisture Free in order to issue a Moisture Free Warranty

39 On or about November 29, 2004, Defendant Moisture Free issued a MoistureFree Warranty to the Plaintiffs for the subject Property (MoistureFree Warranty Authorization Certificate No 411014) hereinafter referred to as 'Subject Warranty'

40 Prior to the issuance of the Subject Warranty, Plaintiffs were not provided with a copy of the terms and provisions of the Warranty

41 Upon information and belief, standards set forth by Clemson University and incorporated into the Regulatory Code of South Carolina, moisture readings of 25% or higher are considered 'catastrophic'

42 In or about July of 2006, the Plaintiffs retained William Flaherty of All-American Home Services, Inc (hereinafter collectively referred to as AAHS) to inspect their home

43 Plaintiffs' learned from AAHS that their home s EIFS exterior did not conform with Defendant Moisture Free's warranty standards in that penetrations in the EIFS were not properly sealed, horizontal EIFS surfaces were not properly sloped, and the EIFS did not possess appropriate expansion joints

44 Plaintiffs further learned from AAHS that portions of their home was so damaged the affected had lost its ability to retain moisture

45 Plaintiffs further learned from AAHS that the Moisture Free Warranty tolerated levels of moisture in and behind the EIFS that were detrimental to their home s structure and required immediate attention

(Page 6 of 19)

0021

APP_0025

FOR A FIRST CAUSE OF ACTION
(Fraud)

The allegations of the foregoing paragraphs are incorporated hereinbelow as if set forth verbatim

46 Through various representations, advertisements, and discussions, the Defendants committed fraud in the sale and marketing of the MoistureFree Warranty

47 Through various representations, advertisements, and discussions, the Defendants misrepresented the condition of the subject Property, the amount of protection afforded that Property by the MoistureFree Warranty, and the extent to which Defendant MoistureFree would act to repair the Property and protect the Property from future moisture intrusion

48 **Representation and/or Omission** Defendants made the aforementioned representations concerning their expertise with EIFS their ability to keep the subject Property dry, and the MoistureFree Warranty

49 **Representation and/or Omission** Defendants made the aforementioned representations concerning the installation of the EIFS on the Subject property the condition of the Property, and the conformance of the Property with the MoistureFree Warranty standards

50 **Representation and/or Omission** Defendants made the aforementioned representations concerning the existence of moisture and moisture-related damage within the subject Property

51 **Representation and/or Omission** Defendants failed to acknowledge that the MoistureFree Warranty allowed for a level of moisture intrusion that was injurious to subject Property

(Page 7 of 19)

0022

APP_0026

52 **Falsity of Representation and/or Omission** The Defendants' aforementioned actions and statements falsely represented the Defendants' expertise and ability to keep the subject Property dry

53 **Falsity of Representation and/or Omission** The Defendants' aforementioned actions and statements falsely represented the installation of the subject Property's EIFS, the condition of the subject Property, and the conformance of the Property with MoistureFree Warranty standards

54 **Falsity of Representation and/or Omission** The Defendants' aforementioned actions and statements falsely represented the existence of moisture and moisture-related damage within the subject Property

55 **Falsity of Representation and/or Omission** The Defendants' aforementioned actions and statements falsely represented the terms and conditions of the MoistureFree Warranty

56 **Falsity of Representation and/or Omission** The Defendants' failed to inform Plaintiffs that the MoistureFree Warranty allowed for a level of moisture intrusion that was injurious to subject Property before Defendant Moisture Free would undertake any repairs to prevent further moisture intrusion

57 **Materiality of Representations and Omissions** Plaintiffs relied on the representations of the Defendants concerning the market value of the Property in determining the condition of the subject Property

58 **Materiality of Representations and Omissions** Without the Defendants' representations concerning the condition of the subject Property and the protection afforded the

(Page 8 of 19)

0023

APP_0027

Property in the future by the MoistureFree Warranty, the Plaintiffs would not have purchased either the Property or the MoistureFree Warranty

59 **Knowledge of the Falsity** Upon information and belief, the Defendants knew of their falsity of the representations to the Plaintiffs as all times material to this action

60 **Intent that the Representation be Relied Upon** The misrepresentations, half-truths, and omissions of the Defendants were intended to cause the Plaintiffs to purchase the subject Property and a MoistureFree Warranty for the Property

61 **Hearer's Ignorance of the Falsity** The Plaintiffs did not know of the falsity of the Defendants representations and could not have discovered the falsity through the exercise of reasonable care

62 **Hearer's Reliance on the Truth** Plaintiffs relied on Defendants representations

63 **Hearer's Reliance on the Truth** But for Defendants' representations, Plaintiffs would not have purchased the Moisture Free Warranty

64 **Hearer's Right to Rely on the Representations** The Plaintiffs were engaged in the purchase of a home that was completely clad with a product known to allow moisture intrusion and a significant amount of hidden moisture damage Such moisture intrusion and related damage could not be detected by a layperson Plaintiffs had a right to rely on the Defendants representations concerning their skill and experience in detecting and remedying such moisture problems

65 **Hearer's Proximate Injury** As a direct and proximate result of the Defendants' mis representations, half-truths, and omissions, the Plaintiffs purchased the subject Property and MoistureFree Warranty on the belief that the home is dry and would remain dry due to the operation

(Page 9 of 19)

0024

APP_0028

of the MoistureFree Warranty Plaintiffs have discovered that the home is far from dry and will require expensive repairs for which MoistureFree Warranty will not pay

66 As the result of moisture intrusion, the Property s market value has been injured

67 As the proximate result of the Defendant s conduct, the Plaintiffs have been damaged in an amount to be proven at trial

68 Because the Defendants actions were wilful malicious and/or in reckless disregard for the severe harm to be caused by the Plaintiffs, the Plaintiffs are entitled to punitive damages

FOR A SECOND CAUSE OF ACTION
(Constructive Fraud)

The allegations of the foregoing paragraphs are incorporated hereinbelow as if set forth verbatim

69 The Defendants made the aforementioned representations to the Plaintiffs

70 The Defendants knew, or should have known, that their representations were both false and material to the purchase of MoistureFree Warranty and the Property

71 Upon information and belief, the Defendants knew or should have known that their inspection protocols were insufficient to ensure that an EIFS-clad home in South Carolina would remain "dry"

72 Upon information and belief, the Defendants knew or should have known that their warranty standards were insufficient to ensure that an EIFS clad home in South Carolina would remain "dry"

73 Upon information and belief, the Defendants knew or should have known that the MoistureFree Warranty permitted levels of moisture to exist within a warranted home that were injurious to the home's structure

(Page 10 of 19)

0025

APP_0029

74 Upon information and belief, the Defendants knew or should have known that the MoistureFree Warranty did not preserve the market value of a warranted home

75 The Defendants' false representations related to a present or preexisting fact that the MoistureFree Warranty and the events required for its issuance, would not render the subject Property 'dry' and would not protect the Property from moisture damage

76 The Defendants knew the representations were false, or recklessly disregarded the truth or falsity of the representation

77 Relying on the Defendants' false representations, the Plaintiffs purchased the subject Property and a MoistureFree Warranty

78 The Plaintiffs was unaware of the falsity of the Defendants' representations

79 The Defendants intended to deceive the Plaintiffs about the condition of the Property's EIFS and the amount of moisture tolerated by the MoistureFree Warranty

80 The Defendant's intended that the Plaintiffs act upon their false representations

81 The Plaintiffs justifiably relied on the Defendants' representation

82 The Plaintiffs had a right to rely on the Defendants' representation

83 The Defendants profited from the Plaintiffs' reliance on the false representations

84 Because of the Defendants' fraud in the inducement to enter the purchase contract the Plaintiffs have proximately and consequently suffered damages as outlined and as shall be proven at trial

FOR A THIRD CAUSE OF ACTION
(Negligence & Negligent Supervision)

The allegations of the foregoing paragraphs are incorporated hereinbelow as if set forth verbatim

(Page 11 of 19)

0026

APP_0030

85 The Defendants owed the Plaintiffs a duty of due care in making representations of material fact concerning the condition of the subject Property

86 The Defendants owed the Plaintiffs a duty of care in representing the terms and conditions of the Moisture Free Warranty

87 The Defendants owed the Plaintiffs a duty of due care in making representations of material fact concerning the appropriateness of the installation of EIFS upon the subject Property

88 The Defendants owed the Plaintiffs a duty of due care in making representations of material fact concerning what repairs, if any, were required to make the installation of EIFS upon the subject Property an appropriate installation that would keep the Property "dry" and prevent moisture related damage

89 The Defendants owed the Plaintiffs a duty of due care in making representations of material fact concerning the performance of the subject Property's EIFS over time

90 Defendant Moisture Free owed the Plaintiffs a duty of care in supervising Defendant PHI at all time relevant to the issuance of the MoistureFree Warranty

91 Each of the respective Defendants failed to perform these duties with due care

92 Defendants were negligent, grossly negligent, reckless, willful and wanton in breaching these duties

93 The Defendants breached the aforementioned duties to the Plaintiffs by intentionally and/or negligently making false representations and/or failing to disclose material facts about, *inter alia* the following

(A) the condition of the subject Property,

(B) the scope and effectiveness of the inspections associated with the Moisture Free Warranty,

(Page 12 of 19)

- (C) the appropriateness of the installation of the EIFS on the subject Property and the ability of the installation to prevent moisture intrusion and moisture-related damage,
- (D) the terms and conditions of the MoistureFree Warranty,
- (E) the amount of moisture and moisture-related damage tolerated by the MoistureFree Warranty,
- (F) the quality and accuracy of the work performed by Defendant PHI, and
- (G) the ability of the MoistureFree Warranty to prevent moisture intrusion and moisture-related damage in the future

94 As a result of these breaches of duties, Plaintiffs have suffered damages as outlined above and as shall be proven at trial

95 Defendants breaches of duties have proximately caused these damages

96 As a result of Defendants negligent grossly negligent, reckless, willful and wanton conduct, Plaintiffs are entitled to recover from Defendants all direct, consequential and punitive damages that are provable in a court of law

FOR A FOURTH CAUSE OF ACTION
(Negligent Misrepresentation)

The allegations of the foregoing paragraphs are incorporated hereinbelow as if set forth verbatim

97 The Defendants owed the Plaintiffs a duty of due care in making representations of material fact concerning the condition of the subject Property This duty included an obligation to not conceal material facts about the Property and the terms and conditions of the Moisture Free Warranty

98 The Defendants owed the Plaintiffs a duty of due care in making representations of material fact concerning the appropriateness of the installation of EIFS upon the subject Property

(Page 13 of 19)

99 The Defendants owed the Plaintiffs a duty of due care in making representations of material fact concerning what repairs, if any, were required to make the installation of EIFS upon the subject Property an appropriate installation that would keep the Property dry” and prevent moisture related damage

100 The Defendants owed the Plaintiffs a duty of due care in making representations of material fact concerning the performance of the subject Property’s EIFS over time

101 The Defendants owed the Plaintiffs a duty of due care in making representations of material fact concerning the terms and conditions regarding the MoistureFree Warranty the Plaintiffs purchased

102 Defendant Moisture Free owed the Plaintiffs a duty of due care in making representations of material fact concerning the skill and expertise of Defendant PHI and its work product

103 The Defendants’ breached the aforementioned duties to the Plaintiffs by intentionally and/or negligently making false representations and/or failing to disclose material facts about, *inter alia* the following

- (A) the condition of the subject Property,
- (B) the scope and effectiveness of the inspections associated with the Moisture Free Warranty
- (C) the appropriateness of the installation of the EIFS on the subject Property and the ability of the installation to prevent moisture intrusion and moisture-related damage,
- (D) the terms and conditions of the MoistureFree Warranty,
- (E) the amount of moisture and moisture-related damage tolerated by the MoistureFree Warranty, and

(Page 14 of 19)

(F) the ability of the MoistureFree Warranty to prevent moisture intrusion and moisture related damage in the future

104 Upon information and belief, Defendant PHI did not have the necessary knowledge, experience, skills, and/or expertise to properly inspect the Property in accordance with the Moisture Free standards and protocols

105 Upon information and belief Defendant Moisture Free knew or should have known that Defendant PHI did not possess the necessary knowledge, experience skills, and/or expertise to inspect the Property in accordance with Moisture Free standards and protocols

106 The Plaintiffs justifiably relied on the Defendants representations and thereby suffered a pecuniary loss as a direct and proximate result of his reliance upon the representation

FOR A FIFTH CAUSE OF ACTION
(Breach of Express Warranty)

The allegations of the foregoing paragraphs are incorporated hereinbelow as if set forth verbatim

107 The Defendants expressly warranted that the subject Property was dry

108 The Defendants expressly warranted that the subject Property s EIFS was properly installed and capable of preventing moisture damage

109 The Defendants expressly warranted that the MoistureFree Warranty would repair the Property s EIFS if any moisture intrusion was detected so as to prevent further moisture intrusion

110 The Defendants expressly warranted that the subject Property would remain dry in the future

111 The Defendants breached their express warranties to Plaintiffs in that the subject Property s EIFS is not properly installed to prevent moisture damage, the Property is not dry, and the MoistureFree Warranty has refused to make the repairs necessary to render the Property dry

(Page 15 of 19)

0030

APP_0034

112 As the result of the aforementioned breaches, Plaintiffs have suffered direct and consequential injury including but not limited to causing physical damage to their Property, promoting insect infestation and mold, mildew and fungal growth in the wall systems of their Property, as well as causing a diminution in the value of their Property

FOR A SIXTH CAUSE OF ACTION
(Violation of South Carolina's Unfair Trade Practices Act)

The allegations of the foregoing paragraphs are incorporated hereinbelow as if set forth verbatim

113 Plaintiffs are consumers who purchased a Moisture Free Warranty to protect their EIFS-clad home

114 Defendants are engaged in the advertising and sale of Moisture Free Warranty products to the citizens of South Carolina and other states

115 The Defendants knew, or should have known, that their representations to the Plaintiffs were material in making the decision to purchase the subject Property and the MoistureFree Warranty

116 The Defendants knew, or should have known, that their representations to the Plaintiffs concerning the condition of the subject Property and the terms and conditions of the MoistureFree Warranty were deceptive

117 Upon information and belief the Defendants knew or should have known that their inspection protocols were insufficient to determine whether an EIFS-clad home in South Carolina was or would remain, dry

(Page 16 of 19)

0031

APP_0035

118 Upon information and belief, the Defendants knew or should have known that their warranty standards were insufficient to ensure that EIFS-clad homes in South Carolina would remain dry

119 Upon information and belief, the Defendants knew or should have known that the MoistureFree Warranty permitted levels of moisture to exist within a warranted home that were injurious to the structure of the home

120 Upon information and belief the Defendants knew or should have known that the MoistureFree Warranty did not preserve the market value of a warranted home

121 The Defendants knew their representations were false, or recklessly disregarded the truth or falsity of the representations

122 Upon information and belief the Defendants explicitly intended homeowners and prospective homeowners in South Carolina, such as the Plaintiffs, to rely on the aforementioned misrepresentations and purchase MoistureFree Warranties as a result of those misrepresentations

123 Defendants conduct as heretofore described has the potential for repetition

124 Plaintiffs were unaware of the falsity of the Defendants' misrepresentations, and relied on those misrepresentations when deciding to purchase both the subject Property and a MoistureFree Warranty for the Property

125 Plaintiffs had a right to rely and so relied on the Defendants' representations

126 The Defendants profited from the Plaintiffs' reliance on the false representations

127 Because of the Defendants' fraud, the Plaintiffs have suffered proximate and consequent damages as outlined and as shall be proven at trial

(Page 17 of 19)

0032

APP_0036

128 Plaintiffs requests relief for Defendants' intentional violation of South Carolina's unfair business practices acts as set forth below

FOR A SEVENTH CAUSE OF ACTION AS TO DEFENDANT MOISTURE FREE
(Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act, and Breach of the Implied Covenants of Good Faith and Fair Dealing)

The allegations of the foregoing paragraphs are incorporated hereinbelow as if set forth verbatim

129 The Agreement between Defendant Moisture Free and Plaintiffs called for the Defendant to inspect the subject Property ensure the Property s EIFS exterior met Defendant s warranty standards, and take those steps necessary to ensure the Property would remain dry during the term of the Moisture Free Warranty or pay for repairs to make it dry

130 Defendant breached the Agreement by failing to ensure the subject Property met its warranty standards

131 Defendant further breached the Agreement by representing that the Property was dry

132 Defendant further breached the Agreement by failing to take those steps necessary to make and keep the Property dry during the warranty period

133 Defendant breached the implied covenants of good faith and fair dealing by misrepresenting and by failing to fully and fairly disclose the condition of the Property and the terms and conditions of the MoistureFree Warranty

134 Plaintiffs have been damaged as a result of Defendant s breach of contract

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs requests the Court grant the following relief

- (a) Actual damages sustained by Plaintiffs with regard to their purchase of the subject Property and MoistureFree Warranty,
- (b) Actual, consequential and punitive damages sustained by the Plaintiffs,

(Page 18 of 19)

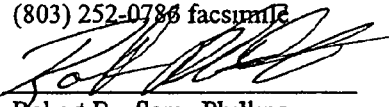
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APP_0037

- (c) Treble damages plus reasonable attorneys' fees pursuant to S C Code § 39 5-140,
- (e) The costs of this action, and
- (f) Such other and further relief as this court deems just and proper

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Columbia, South Carolina
December 5, 2006

(Page 19 of 19)

0034

APP_0038

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action No 2006-CP-40-7215

Fariborz Z Babae and Malihe Babae,
Plaintiffs,

**ANSWER OF MOISTURE WARRANTY
CORPORATION D/B/A MOISTURE
FREE WARRANTY**

vs

Moisture Warranty Corporation d/b/a Moisture
Free Warranty, and Preferred Home
Inspections, Inc

Defendants

**TO CHARLES A KRAWCZYK, ESQUIRE, ATTORNEY FOR THE PLAINTIFFS
AND TO THE PLAINTIFFS ABOVE NAMED**

The Defendant Moisture Warranty Corporation d/b/a Moisture Free Warranty (' Moisture Free') herein file this Answer to the Plaintiffs Complaint and would respectfully show as follows

FOR A FIRST DEFENSE

1 Each and every allegation of the Plaintiff's Complaint not hereinafter admitted is expressly denied

FOR A SECOND DEFENSE

2 Moisture Free admits, upon information and belief, that Plaintiffs own a residence located at 133 Beaver Dam Road, Richland County, South Carolina, that Moisture Free is organized and exists according to the laws of the State of North Carolina, that Plaintiffs purchased a Moisture Free Warranty for the subject property from Moisture Free, all remaining allegations of the Plaintiffs' Complaint are again denied.

0035

APP_0039

FOR A THIRD DEFENSE

3 Plaintiffs claims are subject to mandatory, binding arbitration and should be dismissed

FOR A FOURTH DEFENSE

4 Plaintiff has failed to provide this Defendant Moisture Free with adequate notice and opportunity to cure pursuant S C Code Ann § 40 59 810 Et Seq , and Plaintiffs' claims should be stayed until such time as Plaintiff has satisfied the statutory requirements and for ninety (90) days thereafter

FOR A FIFTH DEFENSE

5 The Defendant Moisture Free would herein allege that the Complaint fails to state facts sufficient to constitute a cause of action against the Defendant Moisture Free

FOR A SIXTH DEFENSE

6 The Defendant Moisture Free would herein allege that the Plaintiffs Complaint is barred by the applicable statute of limitations and/or the doctrine of laches

FOR A SEVENTH DEFENSE

7 The Defendant Moisture Free would allege that the Plaintiffs have waived any claims that they may have against the Defendant Moisture Free

FOR AN EIGHTH DEFENSE

8 The Defendant Moisture Free would allege that the Plaintiffs are estopped to assert claims against the Defendant Moisture Free

FOR A NINTH DEFENSE

9 The Defendant Moisture Free would allege that any injuries and damages of the Plaintiffs, if any, were due to and caused by their own negligence, gross negligence, willfulness, wantonness, and unlawfulness in those particulars set forth in Plaintiffs Complaint, that the

aforementioned conduct on the part of the Plaintiffs were greater than any alleged wrongful conduct on the part of the Defendant Moisture Free and that under the comparative negligence doctrine this fact operates as a complete bar to the Plaintiffs' claim, alternatively, if any wrongful conduct on the part of Plaintiffs were less than that of the Defendant Moisture Free, then Plaintiffs' claims should be reduced and apportioned to the extent of their own wrongful conduct

FOR A TENTH DEFENSE

10 The Defendant Moisture Free would allege that the Plaintiffs' Complaint is frivolous and Defendant Moisture Free is entitled to costs and attorneys fees against the Plaintiffs pursuant to § 15-36 10 of the South Carolina Code

FOR AN ELEVENTH DEFENSE

11 Plaintiffs' claims if any, are the result of acts and omissions of other entities over whom this Defendant had no control, which bars Plaintiffs' claims against this Defendant

FOR A TWELFTH DEFENSE

12 Plaintiffs claims are, upon information and belief, barred as the Plaintiffs have failed to make a claim against Defendant Moisture Free within the applicable warranty

FOR A THIRTEENTH DEFENSE

13 Plaintiffs failed to give Defendant Moisture Free reasonable notice of the existence of the alleged defects claimed in the Complaint due to alleged faulty workmanship and/or materials and failed to provide Defendant Moisture Free a reasonable opportunity to correct any such alleged defects Plaintiffs failure to give Defendant Moisture Free notice of an opportunity to correct any alleged defects due to faulty workmanship and/or materials constitutes a complete defense to all claims of breach of warranty

FOR A FOURTEENTH DEFENSE

14 Defendant Moisture Free states, upon information and belief that any express or implied warranties were limited in duration from the date of completion acceptance and/or occupancy of the residence by the Plaintiffs. The failure of the Plaintiffs, within the warranty period from the date of completion and acceptance of the project by the Plaintiffs, to give notice or make any claim for alleged deficiencies in the workmanship and/or materials provided by Defendant Moisture Free, constitutes a complete defense to all claims asserted by the Plaintiffs.

FOR A FIFTEENTH DEFENSE

15 The alleged damages about which Plaintiffs' Complaint arose is a result of acts or omissions of others over whom Defendant Moisture Free had no control which occurred after Defendant Moisture Free had fully performed its duties. If Defendant Moisture Free were negligent in the manner provided by the Plaintiffs, which is denied, the acts or omissions of others superseded and were a proximate cause of any damages suffered by the Plaintiffs.

FOR A SIXTEENTH DEFENSE

16 Plaintiffs' Complaint is deficient in that Plaintiffs have failed to add indispensable parties in this case.

FOR A SEVENTEENTH DEFENSE

17 Plaintiffs are not entitled to recover in tort for purely economic losses.

FOR AN EIGHTEENTH DEFENSE

18 That upon information and belief, Plaintiffs have failed to properly maintain the residence.

FOR A NINETEENTH DEFENSE

19 Plaintiffs' claims against Defendant Moisture Free may be barred by applicable statute of frauds.

FOR A TWENTIETH DEFENSE

20 That the injuries and damages of Plaintiffs were caused by an Act of God over which Defendant Moisture Free had no control and for which they are not responsible

FOR A TWENTY-FIRST DEFENSE

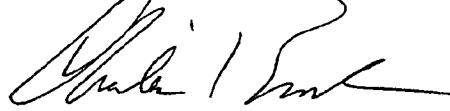
21 Plaintiffs' claim for punitive damages seeks a remedy that is unconstitutional

FOR A TWENTY-SECOND DEFENSE

22 Defendant Moisture Free reserves the right to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses

WHEREFORE the Defendant Moisture Free prays that the Complaint be dismissed and that it be awarded costs and attorney's fees against the Plaintiffs

MURPHY & GRANTLAND, P A.



Anthony W Livoti Esquire
Charles G Blackburn, Esquire
Murphy & Grantland P A
Post Office Box 6648
Columbia, SC 29260
Attorneys for Moisture Warranty Corporation
d/b/a Moisture Free Warranty

Columbia, South Carolina
February 1, 2007

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action No 2006-CP-40 7215

Fariborz Z Babae and Malihe Babae,

Plaintiffs,

CERTIFICATE OF SERVICE

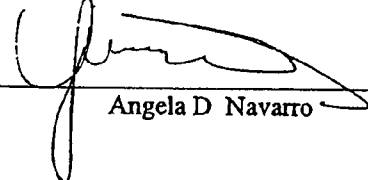
vs

Moisture Warranty Corporation d/b/a Moisture
Free Warranty, and Preferred Home
Inspections, Inc

Defendants

I, the undersigned employee of the law offices of Murphy & Grantland, P A., Attorneys for the Defendant, do hereby certify that I have served a copy of the Answer as well as a copy of a Notice of Motion and Motion to Stay Discovery and Motion to Enforce Arbitration regarding the above-referenced case to all counsel of record by placing a copy of the same in today s mail, via U S Mail postage paid to the following address

Charles A. Krawczyk, Esquire
Finkel Law Firm, LLC
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, SC 29202



Angela D Navarro

Columbia, South Carolina
February 1, 2007

0040

APP_0044

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Fariborz Z Babace and Malihe Babace,

☐ Plaintiffs

vs

Moisture Warranty Corporation d/b/a Moisture
Free Warranty, and Preferred Home Inspections,
Inc

☒ Defendants

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No 2006 CP-40 7215

**MOTION INFORMATION FORM
AND COVER SHEET**

Plaintiff's Attorney
Charles A. Krawczyk, Esquire
Finkel Law Firm, LLC
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia SC 29202
Phone (803) 765 2935 Fax (803) 252-0786

Defendant's Attorney
Anthony W Livoti, Esquire
Charles G Blackburn, Esquire
Murphy & Grantland, PA
2110 Beltline Boulevard (29204)
P O Box 6648
Columbia, SC 29260
Phone (803)782-4100 Fax (803)782-4140

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I Hearing Information

Nature of Motion Motion To Stay Discovery and Motion to Enforce Arbitration

Estimated Time Needed 30 min Court Reporter Needed ☒ YES / ☐ NO

SECTION II Motion Type

☒ Written motion attached
☐ Form Motion

I hereby move for relief or action by the court as set forth in the attached proposed order

February 1, 2007

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

Date submitted

SECTION III Motion Fee

☒ PAID - AMOUNT \$25 00

☐ EXEMPT

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v Indigent Party

☐ Sexually Violent Predator Act ☐ Post Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court or

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter

☐ Other

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order

☐ Other

JUDGE

CODE Date

CLERK'S VERIFICATION

Date Filed

Collected by

Set - @

You are responsible for notifying opposing
counsel/party Failure to do so will result
in the dismissal of this motion

☐ MOTION FEE COLLECTED

\$

☐ CONTESTED - AMOUNT DUE

\$

SCCA/233 (1/2003)

0041

APP_0045

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action No 2006-CP-40-7215

Fariborz Z Babae and Malihe Babae,

Plaintiffs,

vs

Moisture Warranty Corporation d/b/a Moisture
Free Warranty; and Preferred Home
Inspections, Inc

Defendants

**NOTICE OF MOTION AND MOTION
TO STAY DISCOVERY AND
MOTION TO ENFORCE ARBITRATION**

**TO CHARLES A KRAWCZYK, ESQUIRE, ATTORNEY FOR THE PLAINTIFFS
AND TO THE PLAINTIFFS ABOVE NAMED**

The Defendant Moisture Free hereby moves for an Order to Enforce Mandatory Arbitration as to any claims asserted against it in this matter Defendant Moisture Free further moves for an Order Staying Discovery until the Motion to Enforce Arbitration can be heard This Motion is made pursuant to the provisions of the Federal Arbitration Act (9 U S C § 1, et seq), the South Carolina Rules of Civil Procedure the express terms of the Moisture Free Warranty (a copy of which is attached hereto as Exhibit A) and will be supplemented and supported by such Affidavits, Memoranda of Law and such other documents as may become available or that the Court may deem appropriate

Signature on Following Page

0042

APP_0046

**NOTICE OF MOTION AND MOTION
TO STAY DISCOVERY AND
MOTION TO ENFORCE ARBITRATION**
Civil Action No 2006-CP-40-7215

MURPHY & GRANTLAND, P A



Anthony W Livoti, Esquire
Charles G Blackburn, Esquire
Murphy & Grantland, P A.
Post Office Box 6648
Columbia, SC 29260
Attorneys for Moisture Warranty Corporation
d/b/a Moisture Free Warranty

Columbia, South Carolina
February 1, 2007

Exhibit A

0044

APP_0048



MoistureFree Warranty



THE TERMS AND LIMITATIONS OF THE

MOISTUREFREE WARRANTY LIMITED WARRANTY

NOTICE

The MoistureFree Limited Warranty does require the current homeowner to perform normal maintenance on the home during the term of the warranty or risk voiding all or part of the warranty benefits. These normal maintenance requirements include caulking, repair of rotted wood and/or painting of high risk areas identified in the periodic moisture inspections. Normal maintenance also includes maintenance of gutters and downspouts as well as automatic sprinkler systems that should not allow moisture to consistently contact the home.

THIS LIMITED WARRANTY IS NOT VALID WITHOUT THE MOISTUREFREE WARRANTY AUTHORIZATION CERTIFICATE

No MoistureFree Warranty is valid without a MoistureFree Warranty Authorization Certificate which describes the specific limits of the warranty. Following the review of a qualified moisture inspection and acceptance of an application for warranty, a MoistureFree Warranty Authorization Certificate will be mailed to the warranty holder within 60 days of approval.

This limited warranty does not cover consequential or incidental damages. Warrantor's total aggregate liability of this Limited Warranty is limited to the amounts specified in the MoistureFree Warranty Authorization Certificate. There are no warranties which extend beyond the face of this Limited Warranty. There are no implied warranties or any other warranties express or implied in connection with this Limited Warranty or the MoistureFree Warranty Authorization Certificate on the warranted home and all such warranties are unconditionally excluded from this Limited Warranty.

To Apply For And Purchase A MoistureFree Warranty

Call 1-800-400-8679

For Claims Qualification Call 704-896 0339

The MoistureFree Warranty is backed by Western Pacific Mutual Insurance Company

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0045

APP_0049

Dear Homeowner,

Moisture problems related to EIFS (synthetic stucco) hardcoat/traditional stucco, brick, lap siding and other claddings have created serious concerns for homeowners. The MoistureFree Warranty was designed to eliminate most of these concerns by providing a cost effective way to protect homeowners from moisture-related damage to their homes exterior. By combining the MoistureFree Warranty with a comprehensive moisture inspection of the home, homeowners can be assured of having the information they need to prevent moisture from further damaging their home and a warranty to protect them in the case that moisture is located during the term of the warranty.

This booklet explains the MoistureFree Warranty in its entirety, and we encourage you to take the time to **READ THIS INFORMATION CAREFULLY**.

This is not a warranty service contract, but a written Limited Warranty which specifically covers areas of your home directly related to your home's EIFS (Synthetic Stucco) or hardcoat stucco system. See "Definitions" section for clarification of these terms.

Please take time now to read this booklet. Familiarize yourself with the Warranty and its limitations. If you have specific questions about your stucco system after reading this information, contact your builder, stucco installer, repair contractor, or moisture inspector first. If you have questions specifically about warranty, including how to purchase a MoistureFree warranty, please call (800) 400-8679.

Table Of Contents

Section I— Definitions	3
Sections II—The Limited Warranty	4-7
Section III—Warranty Standards	8-12
Section IV—Requesting Warranty Performance	13-15

This Limited Warranty is administered by
Moisture Warranty Corporation
20306 North Main St.
Cornelius, North Carolina 28031
704-896-0339

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Section I - Definitions

- 1 Administrator—RWC Stucco Warranty Corporation (RWCSWC) is the administrator of this warranty RWCSWC is neither Warrantor nor Insurer
- 2 Arbitrator—A representative of the Academy of Conciliators or other independent arbitration service agreed upon by you the Purchaser and the Administrator to determine coverage on an Unresolved Warranty Issue
- 3 Cladding—The material used to cover the exterior of the home that is attached directly to the substrate or framing of the home For the purposes of this Limited Warranty, cladding is defined as Synthetic Stucco (EIFS) or Traditional (hardcoat) Stucco, unless otherwise specified in the Authorization Certificate
- 4 Consequential Damage—All consequential damage including, but not limited to damage to the Home that is caused by a warranted Defect but is not itself a warranted Defect and costs of shelter, transportation food moving storage or other incidental expenses related to relocation during repairs
- 5 Defect—A condition of any item warranted by this Limited Warranty which exceeds the allowable tolerances specified in this warranty Specifically, any warranted area of the home's exterior cladding system which contains moisture equal to or in excess of 25% when measured in the framing wood behind the cladding
- 6 Effective Date of Warranty—The effective date is indicated on the MoistureFree Warranty Authorization Certificate The effective date will be on or around the date of the original moisture inspection which qualified the home for a MoistureFree Warranty
- 7 Stucco—A generic term used for this warranty language and refers to either EIFS (Exterior Insulating and Finishing System, or synthetic stucco) or traditional hardcoat Portland cement stucco
- 8 Home—The single family dwelling identified on the MoistureFree Authorization Certificate The home may be a townhome, condominium, or duplex
- 9 Limited Warranty—The terms and conditions in this book including any applicable addenda
- 10 Purchaser—You or perhaps someone else, such as a builder or contractor, who purchased this Limited Warranty on your behalf
- 11 MoistureFree Warranty Application Form—This form is completed by either the inspector who tests the home for moisture, or by a representative of MoistureFree who uses the moisture inspector's information to complete the form.
- 12 MoistureFree Warranty Authorization Certificate—This certificate is proof of the home's warranty coverage and contains information about the specific limits of coverage for a particular home, if any
- 13 Moisture Inspection—A moisture inspection of a home performed by a qualified individual using the MoistureFree Inspection Protocol which is used to assess the moisture content of the exterior framing and sheathing of a home
- 14 Moisture Location—A location is any area equal to or less than 36' in diameter which contains a moisture reading which is equal to or in excess of 25%
- 15 Normal Maintenance—Caulking, sealing, or painting which helps to prevent weather damage to exterior elements of the home Cleaning and maintenance of gutters and downspouts
- 16 Unresolved Warranty Issues—All requests for warranty performance, demands, disputes, controversies and differences that may arise between the parties to this Limited Warranty that cannot be resolved among the parties
- 17 Warrantor—Western Pacific Mutual Insurance Company a Risk Retention Group (WPIC) is the Warrantor

Section II

The Limited Warranty

A. Introduction to the Limited Warranty

- 1 This booklet provides specific details conditions and limitations of the Limited Warranty, including procedures for requesting warranty performance and for binding arbitration, in accordance with the procedures of the Federal Arbitration Act. Additional information can be received by calling MoistureWarranty Corporation at (704) 896-0339. Read this document in its entirety to understand the protection it affords, the exclusions applicable to it, the Warranty Standards which determine its interpretation and operation, and your responsibilities.
- 2 This is NOT an insurance policy, a maintenance agreement or service contract. It is an explanation of what you, the Purchaser, can expect from this Limited Warranty.
- 3 You are responsible for the Normal Maintenance of your Home. General and preventive maintenance are required to prolong the life of your Home.
- 4 This Limited Warranty is AUTOMATICALLY TRANSFERRED to subsequent Owners during the term of this Limited Warranty, provided the existing or new owner notifies MWC.
- 5 This Limited Warranty is subject to changes required by various regulating bodies.

B. Terms of Warranty

- 1 In the event of the failure of a sealant or flashing on the home's exterior, Warrantor will have a qualified repair contractor make repairs or modifications to the sealant or flashing as necessary to seal or flash the area from future failure.
- 2 Warrantor may also, at its sole discretion, choose to pay the homeowner to have repairs made to the extent of the warranty coverage. A sealant or flashing failure is defined as the inability of a sealant or flashing to adequately prevent excessive moisture from entering into or behind the exterior cladding of the home.
- 3 Excessive moisture is defined as any moisture reading equal to or above 25% which is determined by using an electrical resistance-

type moisture meter.

- 4 Warrantor will be responsible only for the improvement of the sealant or flashing component, and is not responsible for any damage that may, or may not, have been present at or around the specific area of the sealant or flashing failure before the warranty was in effect.
- 5 All claims of failure are limited to a per Moisture Location limit, as stated in the MoistureFree Warranty Authorization Certificate and up to 40 Moisture Locations per home with a maximum per policy annual limit, which is also stated in the MoistureFree Warranty Authorization Certificate.
- 6 Warrantor reserves the right to make repairs or modifications to the area of failure based on standard industry practices and will have full discretion over the type of repair or modification that is to be made at the specific area that is determined to have high moisture behind the exterior cladding.

C. Exclusions and Special Provisions

- 1 Areas of the home that are damaged while under warranty with the damage being caused by naturally occurring weather forces such as tornadoes, hurricanes, floods, winds in excess of 70 miles per hour, or damage caused by abuse such as, but not limited to, pressure washing or automatic sprinkler over spray of the exterior cladding, are excluded from coverage and will not be repaired under this warranty.
- 2 Warrantor shall not be responsible for any Defect that can be shown to be caused by the failure of the Homeowner, after the Effective Date of the Warranty, to perform Normal Maintenance.
- 3 This Limited Warranty shall be interpreted and enforced in accordance with the laws of the state in which the home is located.
- 4 If any provision of this Limited Warranty is determined by a court of competent jurisdiction to be unenforceable, that determination will not affect the validity of the remaining provisions.
- 5 If actions by the Warrantor on any obligations under this Limited Warranty are delayed by an event beyond its control, such performance will

be excused until the delaying effects of the event are remedied. Such events include, but are not limited to, acts of God, acts of the common enemy, war, riot, civil commotion or sovereign conduct, or acts or omissions by you or any other person not a party of this Limited Warranty.

- 6 Under this Limited Warranty, the Warrantor is not responsible for exact color, texture or finish matches in situations where materials are replaced or repaired, or for areas repainted or when original materials are discontinued.
- 7 This warranty specifically covers areas affected by high moisture behind the exterior cladding of the property, and may include areas that are structurally unstable where the damage is directly associated with a failure of the cladding system. This may include the repair of framing or substrate in order to stabilize the affected area in order to install flashing or caulking as needed. The Administrator will have sole discretion in determining if framing or substrate repairs are necessary to complete an adequate modification of the affected area to prevent future moisture intrusion. The Administrator will also have sole discretion in determining if an area is structurally unstable due to a failure of the cladding. Elements of the wall often become wet without being damaged, and areas that have been wet or may have limited damage will not be repaired unless the Administrator deems the area to be compromised to an extent that affects the stability of the wall.
- 8 This warranty does not provide coverage for structural defects or damage except as required to adequately protect or stabilize the area from future moisture intrusion. It does not provide coverage for moisture damage to any fenestrations (breaches in the cladding) including windows and doors. It does not provide coverage for moisture damage to drywall, wallpaper, carpets, floors, or any other interior elements of the home.
- 9 Pre-existing damage of any kind is not covered by this limited warranty. Pre-existing damage includes any damage that was likely to exist prior to the moisture inspection that was conducted and used to qualify for the warranty, but was not revealed in the qualifying inspection. If the area in question experiences high moisture during the term of the warranty, then the area may be modified under the terms of warranty, but repair of any damage to the area will be at the discretion of the Administrator.
- 10 Moisture accumulation or damage caused by condensation within the wall cavity is NOT covered by this warranty. Moisture condensation within the wall cavity is typically caused by combinations of moisture/vapor barriers within the wall and humidity and temperature variations, the evaluation of which is beyond the scope of the required moisture inspection.
- 11 This warranty DOES NOT cover in any way problems associated with, caused by, contributed to, or aggravated by mold, mildew, or fungus and DOES NOT cover in any way health related problems or conditions associated with, caused by, contributed to, or aggravated by mold, mildew or fungus. This warranty specifically excludes bodily injury or property damage which would not have occurred, in whole or in part, but for the actual alleged or threatened inhalation of ingestion of contact with exposure to, existence of or presence of, any fungi or bacteria on or within a building or structure including its contents regardless of whether any other cause, event, material, or product contributed concurrently or in any sequence to such injury or damage. This warranty does not cover any loss, cost, or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating, or disposing of, or in any way responding to, or assessing the effects of, fungi or bacteria, by any insured or by any other person or entity.
- 12 This Limited Warranty does NOT cover moisture problems that are not related directly to the cladding. This includes moisture problems or damage caused by roof leaks, foundation leaks, at- or below grade framing and/or substrate, basement leaks, moisture from swimming pools/spas, improper drainage, pest infestation, downspouts, gutters, or the failure of any flashing or sealant joint that is not in direct contact with the cladding system.
- 13 This warranty does NOT provide any coverage for repairs or modifications related to wood-destroying insects, such as termites and ants. It

does not cover damage or moisture caused by rodents or birds

- 14 This Limited Warranty does not cover exterior knee walls columns tile patios with EIFS below such patios non-insulated walls or moisture damage found therein

D Methods For Making Repair Claims

- 1 A qualified interim moisture inspection must be performed on the home Unless an interim moisture inspection is specifically included in your Limited Warranty agreement, this test must be performed at the expense of the homeowner, unless specifically stated otherwise
- 2 If at the time of the moisture test, elevated moisture readings (in excess of 25%) are found at locations covered in the MoistureFree Warranty Warrantor will make necessary repairs or modifications based on the terms of the Limited Warranty and reimburse the homeowner for inspection fees up to \$150.00

E Resolving Warranty Issues

- 1 You can contact Moisture Warranty Corporation at any time to discuss a possible claim or sue at (704) 896-0339
- 2 Your request for warranty performance should be in writing to Moisture Warranty Corporation Include name MoistureFree Warranty Authorization Certificate number, address and evidence supporting your warranty claim request including photos, if available
- 3 Your request for warranty performance must be postmarked no later than 30 days after the expiration of the applicable warranty period

F Arbitration

- 1 If a request for warranty performance to the Warrantor does not result in satisfactory action within a reasonable time written notice must be given to RWCSWC, 5300 Derry Street, Harrisburg, Pennsylvania 17111-3598, Attn: Warranty Resolution Department.
- 2 This notice should describe each deficiency in reasonable detail and should be forwarded by certified mail return receipt requested
- 3 Please note that a written request for warranty performance must be postmarked no later than

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thirty (30) days after the expiration of the applicable warranty period.

- 4 Your notice to RWCSWC must contain the following information

A MoistureFree Warranty Authorization Certificate number and effective date of your warranty

B Your name, address and phone number (including home and work numbers)

C Reasonably specific description of the warranty item(s) to be reviewed

D A copy of any previous written notice to RWCSWC

E Photograph(s) may be required

G Conditions of Arbitration

- 1 You have an obligation to cooperate with RWCSWC's investigation of your warranty request
- 2 From time to time RWCSWC may request information from you regarding an alleged defect. Failure by you or your appointed representative to respond with the requested information within thirty (30) days of the date of RWCSWC's request can result in the closing of your warranty file
- 3 When a request for warranty performance is filed and the deficiency cannot be observed under normal conditions, it is your responsibility to substantiate that the need for warranty performance exists including any cost involved. If properly substantiated you will be reimbursed by the Warrantor
- 4 You begin the arbitration process by giving RWCSWC written notice of your request for arbitration of an unresolved warranty issue. Within twenty (20) days after RWCSWC's receipt of your notice of request for arbitration any unresolved warranty issue that you have with the Warrantor shall be submitted to an independent arbitration service. This binding arbitration is governed by the procedures of the Federal Arbitration Act, 9 U.S.C. 1 et. seq. If you submit a request for arbitration, you must pay the arbitration fees before the matter is submitted to the arbitration service

- 5 After arbitration, the Arbitrator shall have the power to award the cost of this fee to any party or to split it among the parties to the arbitration
- 6 The arbitration shall be conducted in accordance with this Limited Warranty and the arbitration service's rules and regulations to the extent that they are not in conflict with the Federal Arbitration Act. Within one (1) year after an arbitration award either party may apply to the U S District Court where the Home is situated to confirm the award
- 7 RWCSWC's receipt of a written request for arbitration in appropriate form shall stop the running of any statute of limitations applicable to the matter to be arbitrated until the Arbitrator renders a decision The decision of the Arbitrator shall be final and binding upon all parties
- 8 Since this Limited Warranty provides for mandatory binding arbitration of unresolved warranty issues, if any party commences litigation in violation of this Limited Warranty such party shall reimburse the other parties to the litigation for their costs and expenses including attorney fees incurred in seeking dismissal of such litigation
- 9 The Warrantor shall have sixty (60) days from the date RWCSWC receives the Arbitrator's award to comply with the Arbitrator's decision
- 10 Warranty compliance will begin as soon as possible and will be completed within the sixty-day compliance period with the exception of any repair that would reasonably take more than sixty (60) days to complete including, but not limited to repair delayed or prolonged because of inclement weather
- 11 The Warrantor will complete such repair or replacement as soon as possible without incurring overtime or weekend expenses
- 12 You may request a compliance arbitration within twenty (20) days after the sixty day compliance period has expired by giving RWCSWC written notice of your request. You must pay the fees for the compliance arbitration prior to the matter being submitted to the arbitration service
- 13 You must provide the Warrantor, or if applicable RWCSWC with reasonable weekday access during normal business hours in order to perform its obligations Failure by you to provide such reasonable access to the Warrantor may relieve the

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Warrantor of its obligations under this Limited Warranty

Section III

Warranty Standards

The following Warranty Standards are applicable to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

<u>1 Stucco Systems</u>	<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
	1.1 Small cracks appear on the surface of the stucco	No action required. Most stucco systems have incidental hairline cracks on the surface which rarely allow moisture penetration.	This is only considered a deficiency if the immediate areas around the cracks test positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	1.2 Stucco appears wavy or uneven along the plane of a wall or accent	Uneven application of the stucco system will not typically cause moisture penetration.	Uneven application may need to be repaired for aesthetic reasons but is not covered under the Limited Warranty.
	1.3 Styrofoam like insulation layer of the stucco system continues below the soil level	All insulated stucco systems should terminate at least 4 to 8 inches above the soil line to prevent termites and other pests from entering into the wall system.	The Limited Warranty does not cover modifications to the home related to pest control.
	1.4 Stucco accents over doors, windows, and other areas are flat and deeper than 1/8" (at a 90 degree angle to the wall) and may collect water	All flat accents deeper than 1/8" should be caulked to prevent moisture from penetrating the system through faults or cracks.	This is only considered a deficiency if the immediate areas around the accent test positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
<u>2 Caulking</u>	<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
	2.1 Caulking around doors, windows, vents, fixtures, utility breaches, hose bibbs, or any other breaches of stucco system appears to be failing	Caulking is a critical element in the upkeep of any home and requires regular maintenance by the homeowner. Any area where caulking appears to be failing should be repaired as soon as possible.	This is only considered a deficiency if the immediate areas around the caulking test positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	2.2 Caulking (glazing) on the glass of windows and doors appears to be failing	Glazing caulk should be replaced anywhere it appears to be failing. The builder or door/window manufacturer's warranty may be applicable to this type of problem. Contact either the builder or the product manufacturer to check warranty status.	Windows and doors which have glass elements often experience failures with the glazing caulk. This failure is not applicable to this limited warranty. However, the window or door manufacturer may have a warranty for such occurrences.
	2.3 No expansion joints (backer rod joints) are installed around doors, windows, or other breaches	Recessed backer rod joints are now recommended by many stucco manufacturers at the time of original construction. However, these types of joints should typically not be retrofitted on existing homes.	The limited warranty may apply to areas affected by the lack of, or failure of, a backer rod joint. However, installation of recessed backer rod joints is not required for warranty compliance.

2 Caulking (cont.)

<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
2 4 Caulk on some areas of the home is fine while other areas appear to be fading peeling, cracking or chipping	Caulk has a variable service life depending on exposure expansion, climate, and other factors Homeowners should take steps to repair any areas of caulk that appear to be failing	Caulking is a normal maintenance requirement for any home and a caulking deficiency is only warranted if the immediate areas around the failed caulk test positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.

3 Flashing Systems

<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
3 1 Kickout flashings (rake flashings or diverter flashings) appear to be missing or failing	All kickout flashings should be visually checked from time to time in order to assure that they are unobstructed and functioning properly	All stucco homes should have kickout flashings installed at appropriate locations This limited warranty applies to failing kickout locations that have not been specifically excluded from the limited warranty
3 2 Flashing around decks stairways porches, chimneys windows or other attachments appears to be failing	Severe weather may cause flashing to momentarily fail under extreme conditions No action is typically required unless failure occurs more than occasionally, or is extreme in nature.	Flashings that cannot be inspected using visual observation are not applicable to this limited warranty
3 3 Head flashing above windows and doors is missing or failing	If an area above or around a window or door is being damaged by the lack of, or improper function of a head flashing modifications should be made to correct the problem	Areas around windows or doors that experience elevated levels of moisture are applicable to this limited warranty if they have not been specifically excluded and are within the limits of the warranty
3 4 The chimney chase is constructed of wood and does not appear to have a chimney cap or proper flashing	Chimney chases attached to the side of a home commonly are missing kickout flashings which must be installed Also a chimney cap which covers the entire chimney and continues down the edges 4 should be installed	Only chimneys that are reasonably accessible to testing are applicable to this Limited Warranty This is only considered a deficiency if the immediate area of the chimney tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined
3 5 Stucco has been used to cover a flat area (wider than 1 5') over a wall chimney top canopy or other area	Stucco finishes are not designed to be used as roofing or flashing materials These areas should be modified so that the stucco is protected from moisture	Areas of the home that use stucco as a waterproofing system, roofing, or flashing system are not applicable to this Limited Warranty
3 6 Gutters are overflowing in some places and the downspouts leak onto the stucco surface	It is VERY important to keep gutters and downspouts clear of debris Leaking or improperly installed gutters should be fixed to prevent any moisture from contacting the stucco surface	Gutter systems can significantly contribute to moisture problems related to stucco systems and must be regularly maintained by the homeowner Moisture problems caused by gutters or downspouts are NOT covered by the warranty

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<u>4 Window Systems</u>	<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
	4.1 Windows appear to have rotted around sill, sash, jamb or molding	All windows with wood elements require proper maintenance which includes periodic caulking and painting. Areas of extreme rot may need to be replaced	Rotted wood is common in all types of wood windows and is not applicable to this warranty. Failures directly related to excess moisture around the windows are limited to modifications necessary to prevent moisture from penetrating into or behind the stucco system.
	4.2 Water is entering into the interior of the home through a faulty window	Windows which do not close properly or have warped may need to be replaced in order to stop interior leakage	This is only considered a deficiency if the immediate area around the exterior of the window tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	4.3 Wooden windows (with or without vinyl or metal cladding) appear to be staining in the corners or are missing caulk.	All windows need to be caulked at the lower joints of the sill and the jamb. Removal of the sash track may be necessary in order to assure a complete seal of the joint. Further modification may be necessary if the joint cannot be adequately sealed including window pans or window replacement.	This is considered a deficiency only if the immediate area around the exterior of the window tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined. Areas specifically identified in the MoistureFree Warranty Authorization Certificate will not apply to this Limited Warranty.
	4.4 Windows within doors (patio doors, French doors, sliding doors, etc.) appear to have gaps between the glass and the wood or metal	Glazing and caulking are common maintenance issues in any window or door. Homeowners should make periodic checks of these areas to assure that the caulking or glazing is adequate	Glazing and caulking of the window construction may be warranted by the window or door manufacturer. This is considered a deficiency only if the immediate area around the exterior of the door or window tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	4.5 The glass within the window is cloudy and appears to have moisture trapped between the panes	Leaks or cracks in the thermal seal of a window allow moisture to get trapped between the glass panes. The window must be replaced to correct the problem	Broken or leaking window seals are not problems related to the stucco system and are not applicable to this Limited Warranty.

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<u>5 Other Areas</u>	<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
	5 1 The exterior stucco cladding has experienced impact damage	Most impact damage to the stucco system is superficial and requires aesthetic repair only	This is not a warranted defect. Areas effected by impact damage is not covered by the warranty and is considered to be homeowner maintenance
	5 2 Ivy or other vine type plants have attached to the stucco cladding	All landscaping should be planted or trimmed back at least 12" from the exterior in order to prevent damage to the stucco and to allow for adequate inspection	This is not a warranted defect. Areas that can not be effectively tested due to landscaping may be excluded from this Limited Warranty
	5 3 Moss, mold, or algae have discolored the surface of the stucco	Northern and southern exposures of homes typically have discoloration due to algae growth. This rarely affects the condition of the stucco and the algae can be removed using approved cleaners. NEVER USE A HIGH PRESSURE WASHER ON THE SURFACE OF STUCCO	This is not a warranted defect. Algae growth on walls is common and often mistaken to be associated with interior moisture in the walls
	5 4 The automatic sprinkler system is overspraying onto the home	Sprinkler heads should be adjusted or changed to ensure that water does not hit the surface of the home	This is not a warranted defect and may void this Limited Warranty if found to be the cause of moisture in otherwise warranted areas of the home
	5 5 Interior leaks are occurring around or directly below the chimney area	Chimneys should be covered with a chimney cap which covers the entire horizontal exposure of the top of the chimney and continues down each side at least 4". Flashing around the chimney at the roof line should also be checked for proper function	This is not a warranted defect. Stucco should not be used as a roofing or flashing substitute. If possible, check with the original builder to request repair or modifications or with the builder's insurance company
	5 6 Small rust-colored spots and streaks appear on the surface of the stucco	Typically, these rust-colored spots and streaks are caused by iron fragments in the finish coat of the stucco. No action is required, but removal of the iron fragments at the surface will often solve the problem	Discoloration in the stucco is an aesthetic issue and is not a warranted defect.
	5 7 Loose, chipping paint on the surface of the stucco	The finish coat of the stucco has most likely been painted. Once the stucco home has been painted, it will need to be maintained and repainted to maintain the appearance.	Aging and failure of paint are typically not related to interior wall moisture and therefore are not applicable to this Limited Warranty

Ver 2.06

5 Other Areas (cont)

<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
5 8 White chalky or yellowish deposits or stains are found on the stucco finish	These stains referred to as efflorescence, can be cleaned using special cleaners designed for this problem. The source of the stain should be sealed to prevent damage to the finish and base coat of the stucco system.	Efflorescence often occurs under decks, stairs, or other attachments to the home. It is not related to interior wall moisture and is not applicable to this Limited Warranty.
5 9 Shutters are attached through the stucco and do not appear to be sealed.	Shutter attachments that leave a hole should be removed and caulked to reduce the chance of leaking. Snap-on shutter brackets are preferable and reduce the chance of future problems.	This is considered a deficiency only if the immediate area around the shutter tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
5 10 Dead valleys or roof and wall intersections where the roof is angled down toward a wall or a corner which does not appear to drain properly.	Roof-to-wall intersections which do not allow proper drainage should be modified in order to create a slope that allows drainage. Wall flashing should extend 8" to 14" up the wall and run to the end of roof/wall edge and be properly finished.	Poor roof/wall intersection designs can contribute to leaks in the interior of the home, but are not typically related to the stucco cladding and are not applicable to this Limited Warranty.
5 11 Deck, stair railing, or other attachments appear to penetrate the stucco and are not sealed.	Stresses on attachments to the house can expose openings in the stucco which must be sealed with an appropriate flexible caulk. Attachments to the home can loosen over time and should be secured to prevent movement.	This is considered a deficiency only if the immediate area around the attachment tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
5 12 At or below-grade framing and/or substrate that may be in contact with surface moisture allowing moisture penetration into the wall.	At or below-grade framing and/or substrate should be appropriately waterproofed and may require the removal of the exterior soil to allow drainage or replacement of the construction elements with no rot materials.	Moisture intrusion related to at or below-grade framing and/or substrate cannot be visually confirmed in most cases and is typically not related to the stucco cladding. Repairs related to below-grade framing are not applicable to this Limited Warranty.
5 13 Patios, stairs, planters, flower boxes, or other attachments may have stucco between the foundation or framing and the attachment.	If the stucco was applied to the home before the exterior attachments, there is a possibility that the stucco is trapped between the home and the attachment. If the stucco system includes an insulation board component, moisture or pest problems may occur in this area. Further destructive inspection of the area may be required.	The inspection protocol required for this Limited Warranty does not include any type of destructive testing and therefore cannot comment on areas that cannot be tested or observed. Unobserved areas or areas that are impossible to test are excluded from this Limited Warranty.

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Section IV Requesting Warranty Performance

A Notice To Warrantor

If a warranted defect occurs that cannot be resolved directly with Moisture Warranty Corporation you must notify the Administrator to review the item. All such notices must be presented in writing to RWCSWC, Administrator, 5300 Derry Street, Harrisburg Pennsylvania 17111-3598, Attn: MoistureFree Warranty Resolution Department, by certified mail return receipt requested, within a reasonable time after the situation arises. Requests for warranty performance postmarked more than thirty days after the expiration of the term of this Limited Warranty will not be honored.

B Purchaser's Obligations

- 1 Your notice to the Administrator must include the following items:
 - a MoistureFree Authorization Certificate number and the Effective Date Of Warranty
 - b Your name address and phone number (include home and work numbers)
 - c Reasonably specific description of the warranty item(s) to be reviewed
 - d Photograph(s) may be required
- 2 You have an obligation to cooperate with the Administrator's mediation, inspection and investigation of your warranty request. From time to time, the Administrator may request information from you regarding an alleged defect. Failure by you or your appointed representative to respond to the requested information within thirty (30) days of the date of the Administrator's request can result in the closing of your warranty file.

C Mediation and Inspection

Within thirty (30) days following the Administrator's receipt of proper notice of request for warranty performance, the Administrator may review and mediate your request by communicating with you, and any other individuals or entities who the Administrator believes possesses relevant information. If, after thirty (30) days, the Administrator has not been able to successfully mediate your request, the Administrator will notify you that your request has become an Unresolved Warranty Issue. At any time following the receipt of proper notice of your request for warranty performance the Administrator may schedule an inspection of the item. You must provide the Administrator reasonable access for any such inspection. When a request for warranty performance is filed and the deficiency cannot be observed under normal conditions it is your responsibility to substantiate that the need for warranty performance exists including any costs involved. If properly substantiated, you will be reimbursed by the Administrator.

D Arbitration

- 1 You begin the arbitration process by giving the Administrator written notice of your request for arbitration of an Unresolved Warranty Issue. Within twenty (20) days after the Administrator's receipt of your notice of request for arbitration, any Unresolved Warranty Issue that you have with the Warrantor shall be submitted to the National Academy of Conciliators or another independent arbitration service upon which you and the Administrator agree. The **BINDING** arbitration is governed by the procedures of the Federal Arbitration Act, 9 U.S.C. 1 et. seq. If you submit a request for arbitration, you must pay the arbitration fees before the matter is submitted to the arbitration service. After arbitration the Arbitrator shall have the power to award the cost of this fee to any party or split it among the

Ver 2.06

parties to the arbitration. The arbitration shall be conducted in accordance with this Limited Warranty and the arbitration rules and regulations to the extent that they are not in conflict with any Federal Arbitration Act. Within one (1) year after an arbitration award, either party may apply to the U S District Court where the Home is situated to confirm the award. The Administrator's receipt of written request for arbitration in appropriate form shall stop the running of any statute of limitations applicable to the matter to be arbitrated until the Arbitrator renders a decision. The decision of the Arbitrator shall be final and binding on all parties. Since the Limited Warranty provides for amendatory binding arbitration of Unresolved Warranty Issues, if any party commences litigation in violation of this Limited Warranty such party shall reimburse the other parties to the litigation for their costs and expenses, including attorney fees incurred in seeking dismissal of such litigation.

- 2 The Warrantor shall have sixty (60) days from the date the Administrator receives the arbitrator's award to comply with the Arbitrator's decision. Warranty compliance will begin as soon as possible and will be completed within the sixty-day compliance period with the exception of any repair that would reasonably take more than sixty (60) days to complete, including but not limited to, repair delayed or prolonged by inclement weather. The Warrantor will complete such repair or replacement as soon as possible without incurring overtime or weekend expenses. You may request a compliance arbitration within twenty (20) days after the sixty day compliance period has expired by giving the Administrator written notice of your request. You must pay fees for the compliance arbitration prior to the matter being submitted to the arbitration service.
- 3 You must provide the Warrantor with reasonable weekday access during normal business hours in order to perform its obligations. Failure by you to provide such access to the Warrantor may relieve the Warrantor of its obligations under the terms of this Limited Warranty.

E Cancellation

- 1 The holder of this warranty shall be entitled to make a direct claim against the insurer if the issuer of the warranty fails to pay any claim or to refund the consideration paid by the holder within sixty (60) days after the request for warranty performance has been filed with the Administrator.
- 2 The warranty shall be non-cancelable by the issuer except for fraud, material misrepresentation, or failure to pay the consideration due therefore. The holder may cancel at any time upon demand and surrender of the warranty whereupon the issuer shall refund the excess of the consideration paid for the warranty above the customary short rate for the expired term of the warranty. For Georgia residents the cancellation shall be in writing and shall conform to the requirements of Georgia Insurance Code Section 33-24-44.

F Conditions of Warranty Performance

- 1 When your request for warranty performance is determined to be a warranted issue, the Warrantor reserves the right to repair or replace the warranted item, or to pay you the reasonable cost of repair or replacement up to the limits of the warranty.
- 2 If the Warrantor pays the reasonable cost of repairing a warranted item, the payment shall be made to you and to any mortgage or mortgage's successor as each of your interests may appear, provided that the mortgagee has notified the Administrator in writing of its security interest in the Home prior to such payment. Warrantor shall not have any obligation to make payment jointly to the Purchaser and the mortgagee where the mortgagee has not notified the Administrator in writing of its security interest in the Home prior to such payment. Any mortgagee shall be completely bound by any mediation or arbitration relating to a request for warranty performance between you and the Warrantor.

- 3 Prior to payment for the reasonable cost of repairs or replacement of warranted items, you must sign and deliver to the Administrator a full and unconditional release, in recordable form, of all legal obligations with respect to the warranted Defect and any condition arising from the warranted item
- 4 The repaired or replaced warranted item will continue to be warranted by this Limited Warranty for the remainder of the applicable period of coverage
- 5 If the Warrantor repairs, replaces or pays you the reasonable cost to repair or replace a warranted item, the Warrantor shall be subrogated to all your rights of recovery against any person or entity You must execute and deliver any and all instruments and papers and take any and all other actions to secure such rights including but not limited to assignment of proceeds of any other insurance or other warranties to the Warrantor
- 6 Any Warrantor obligation is conditioned upon your proper maintenance of the Home common elements and grounds to prevent damage due to neglect, abnormal use, or improper maintenance
- 7 If request for performance under this Limited Warranty involves a common element in a condominium, the request must be made by an authorized representative of the condominium association
- 8 If the request for warranty performance under the Limited Warranty involves a common element affecting multiple units, and all affected units are not warranted by the MoistureFree Warranty the Insurer's liability will be limited to only those units warranted by the MoistureFree Warranty The limit of liability shall be prorated based upon the number of units warranted by this Limited Warranty

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IN THE STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Fariborz Z Babae and
Malihe Babae,

Plaintiffs,

vs

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and
Preferred Home Inspections, Inc

Defendants

Civil Action No 06-CP-40-

**PLAINTIFFS' REPLY
TO DEFENDANT'S MOTION TO
COMPEL DISCOVERY**

2011-05-31 11:55 AM

**TO CHARLES G BLACKBURN, ESQUIRE AND ANTHONY W LIVOTI, ESQUIRE,
ATTORNEYS FOR DEFENDANT MOISTURE FREE WARRANTY
CORPORATION D/B/A MOISTURE FREE WARRANTY**

Plaintiffs Fariborz Z Babae and Malihe Babae (hereinafter referred to collectively as the
"Plaintiffs" or the Babaes) ask this Court to DENY the motion of Defendant Moisture Warranty
Corporation d/b/a Moisture Free Warranty (hereinafter referred to as "Moisture Warranty Corp ")
to stay discovery and compel arbitration

Plaintiffs believe there is no basis in law or fact to support the motion of Moisture Warranty
Corp in that

- 1) There is no evidence in the record of an arbitration agreement between Plaintiffs and
Moisture Warranty Corp ,
- 2) Any allegation of an arbitration agreement must necessarily rely on materials that
were not provided to the Plaintiffs before they entered into an agreement with
Moisture Warranty Corp , and
- 3) Even if the Plaintiffs' agreement included an arbitration provision it would
be unenforceable due to unconscionability

(Page 1 of 7)

0060

APP_0064

Factual Background

The Plaintiffs purchased their home at 133 Beaver Dam Road in Richland County from Giuseppe and Maria Maoli on November 18, 2004 *Compl* at ¶¶ 2, 7, & 11. As an incentive to purchase the Beaver Dam home, the Maolis through their real estate agent offered to fund the Plaintiffs purchase of a 'MoistureFree Warranty' from Moisture Warranty Corp for the home. The Maolis cooperation in the purchase of the Warranty was critical as the Beaver Dam house had to be inspected and possibly repaired under the supervision of Moisture Warranty Corp before the Warranty could be issued. The Maolis provided the Plaintiffs with a brochure from Moisture Warranty Corp that purported to explain the terms and conditions of the MoistureFree Warranty.¹ In this brochure Moisture Warranty Corp claims its MoistureFree Warranty is issued after a three step inspection/repair process that is supervised by one of its Warranty Specialists to ensure the subject property is 'dry'. Exhibit A at p. 4. The brochure goes on to claim that the subject property will remain dry or Moisture Warranty Corp will pay to have necessary repairs made to return the home to a 'dry' condition. *Id.* see also *Compl* at ¶¶ 22, 25, 28, & 30. Plaintiffs agreed to purchase the Maolis' home allow them to fund the MoistureFree Warranty and thereafter closed the transaction on November 18, 2004. Sometime after the closing Plaintiffs received a one page document from Moisture Warranty Corp entitled "Authorization Certificate 411014" that identified their Beaver Dam home as the subject of a three (3) year MoistureFree Warranty.² There is no mention of arbitration provision in the Authorization Certificate.

¹A copy of the brochure is attached hereto as EXHIBIT A

²A copy of the Authorization Certificate is attached hereto as EXHIBIT B

Legal Analysis

It is axiomatic that a party claiming the benefit of a certain contractual agreement bears the burden on proving the existence of such an agreement. See e.g., Prescott v. Farmers Telephone Co. op., Inc. 335 S.C. 330, 516 S.E.2d 923 (1999) (using general principles of contract law to find that the proponent of a contract bears the burden of proving the existence of such a contract). In the instant action, the Defendant has failed to meet its burden.

Plaintiffs did not execute any written or oral agreement with the Defendant that called for this dispute or any other dispute, to be decided by arbitration. Moisture Warranty Corp. has failed to advance any credible evidence that any arbitration agreement exists with the Plaintiffs. The Defendant can advance no evidence that Plaintiffs were provided with the actual terms and condition of a MoistureFree Warranty prior to November 2004 because the Plaintiffs were not provided with such information until well after their purchase of the product. *Compl.* at ¶ 40. In fact, Moisture Warranty Corp. does not require that the terms and conditions of its products be provided to homeowners prior to a purchase. As set forth in the Authorization Certificate that was issued the Plaintiffs, warranty-holders who did not obtain a copy of an information booklet containing terms and conditions prior to the purchase are instructed as to who to obtain such information. See Exhibit B at p. 1.

As if to demonstrate the Defendant's lack of concern regarding its customers' familiarity with the terms and conditions of its warranty product, the Defendant attaches a document to the instant motion entitled "The Terms and Limitations of the MoistureFree Warranty Limited Warranty." Moisture Warranty Corp. argues that the attached document binds the Plaintiffs to arbitration, but even a cursory review of the document reveals it was not promulgated by the

(Page 3 of 7)

0062

APP_0066

Defendant until February of 2006, more than one (1) year *after* the Defendant issued the Plaintiffs its MoistureFree Warranty Authorization Certificate³ Defendants failure to provide the Plaintiffs, or this Court, with a contemporaneous written agreement purporting to bind Plaintiffs to an arbitration procedure is fatal to its motion

A A Contract May Not be Unilaterally Altered After it is Consummated

General contract principles apply to arbitration provisions even when enforcement of the provision is sought under the Federal Arbitration Act (‘FAA’) Munoz v Green Tree Financial Corp., 343 S C 531, 539, 542 S E 2d 360, 364 (2001) It is axiomatic that “a post contract, unbargained for unilateral attempt to limit obligations under a contract” is ineffective Gold Kist, Inc v Citizens & Southern Nat Bank 286 S C 272 277, 333 S E 2d 67, 70 (Ct App 1985) In the Gold Kist case the Court of Appeals held that disclaimers of certain implied warranties appearing on bags of seed, were ineffective because the disclaimers were not delivered until after the purchase occurred and the seed bags were delivered 286 S C at 277 333 S E 2d at 70-71 In the instant case, the only document the Plaintiffs received prior to their purchase of the MoistureFree Warranty was the brochure attached hereto as Exhibit A As discussed earlier the brochure did NOT contain an arbitration provision, outlined a inspection/repair process that did not occur and warranted a ‘dry’ home that the terms and conditions now advanced by the Defendant does not support At best Defendant can only claim that the Plaintiffs received an agreement containing arbitration language in documents produced *after* their purchase of a MoistureFree Warranty Because South Carolina law does not support the unilateral modification of the terms of a contract *after* a contract has been

³The date a particular version of the MoistureFree Warranty was produced is indicated on the bottom of the warranty See Deposition of MoistureFree Warranty President Christopher Burton at p 108, lines 17 - 20, attached hereto as EXHIBIT C

executed Moisture Warranty Corp could not have imposed an arbitration provision on the Plaintiffs even if it demonstrate that one was in existence at the time of the Plaintiffs purchase

B Imposition of an Arbitration Provision Would Be Unconscionable

Even if the instant action was subject to an arbitration agreement, this action would not be subject to arbitration The Moisture Warranty Corp marketed the MoistureFree Warranty to the Plaintiffs as a mechanism to ensure their home would remain “dry” The term ‘dry’ was not defined in the materials provided the Plaintiffs See Exhibit A The Plaintiffs did not learn until well after their purchase that the MoistureFree Warranty contemplated and allowed levels of moisture in excess of twenty-four percent (24%) within their home and that such levels are considered excessive by Clemson University *Compl* at ¶41 see also, 23A S C Code Ann Regs R 27-1085 (j)(1) (defining moisture readings of 20% or greater as ‘excessive’) Assuming *arguendo* that the Plaintiffs were subject to the arbitration provision advanced by the Defendant this dispute does not fall within the ambit of that provision

“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit’ Zabinski v Bright Acres Assocs., 346 S C 580 596-97, 553 S E 2d 110 118-19 (2001) To determine whether a matter falls within the ambit of arbitration, courts look to whether the terms of a broadly-worded arbitration agreement bear a ‘significant relationship’ to the claims advanced Id Where a plaintiff alleges torts ‘that are unforeseeable to a reasonable consumer in the context of normal business dealings’ our Supreme Court has determined that arbitration can not be compelled Aiken v World Finance Acceptance Corp., 373 S C 144 151, 644 S E 2d 705, 709 (2007) ‘To interpret an arbitration agreement to

(Page 5 of 7)

0064

APP_0068

apply to actions completely outside the expectations of the parties would be inconsistent with this goal 373 S C at 152, 644 S E 2d at 710

The Plaintiffs' expectations regarding the MoistureFree Warranty could only be drawn from the material they were provided prior to its purchase the brochure attached hereto as Exhibit A. That brochure made no mention of moisture levels, but merely claimed that the Plaintiffs' home would remain dry, or Moisture Warranty Corp would pay to have the home made dry. The actual terms and conditions of the warranty were not made available to anyone involved in the purchase. In fact, Moisture Warranty Corp markets the MoistureFree Warranty to home sellers and their real estate agents as a 'solution' for selling a home with moisture problems. No mention is made of the moisture the Warranty allows to exist within the home although there is a representation that the MoistureFree Warranty allows [t]he seller and real estate professional involved in the sale [to] rest assured that the transaction won't come back to haunt them later due to problems with the stucco system not because the MoistureFree Warranty keeps the house dry, but because it reduces the seller and real estate agents' risk of being involved in lawsuit over moisture problems. See EXHIBIT D at p. 3. By offering realtors and sellers the opportunity to purchase lawsuit protection from a possible suit by a buyer, Moisture Warranty Corp is ensuring that the absence of terms and conditions will not be an issue for those arranging for the purchase of a MoistureFree Warranty.

Lastly, the MoistureFree Warranty can not be subject to an arbitration provision even if all of the aforementioned issues were either resolved or did not arise. As the Warranty was marketed and sold to the Plaintiffs, it was a policy of insurance rather than a warranty. In South Carolina, an insurance policy is 'a contract whereby one undertake[s] to indemnify another or pay a specified amount upon determinable contingencies.' S C Code Ann. §38-1-20(19) (2003). An insurance

(Page 6 of 7)

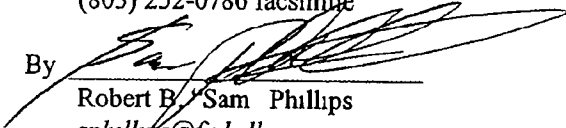
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APP_0069

contract can not be subject to arbitration provision, even if contained in a properly executed contract
See S C Code Ann §15 48 1(b)(4) (2003) Although the MoistureFree Warranty purports to be a
warranty it does not possess the characteristics of a warranty A warranty promises indemnity
against defects in the article sold, while insurance indemnifies against loss or damage resulting from
perils outside of and unrelated to defects in the article itself State ex rel Duffy v Western Auto
Supply Co 16 N E 2d 256 (Ohio 1938) Although Moisture Warranty Corp purports to undertake
an inspection and repair process prior to issuing a warranty in this case no such process occurred
The Plaintiffs home became the subject of a MoistureFree Warranty without Moisture Warranty
Corp taking any steps to modify or repair the structure to bring in into accord with its inspection and
repair protocols As the structure lacks the characteristics of a "Moisture Warranty House," the
MoistureFree Warranty does nothing more than promise to indemnify the Plaintiffs against the
outside peril of moisture intrusion As such the MoistureFree Warranty is more a contract of
insurance than a warranty

For the foregoing reasons Plaintiffs ask that the Defendants motion be denied

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By 

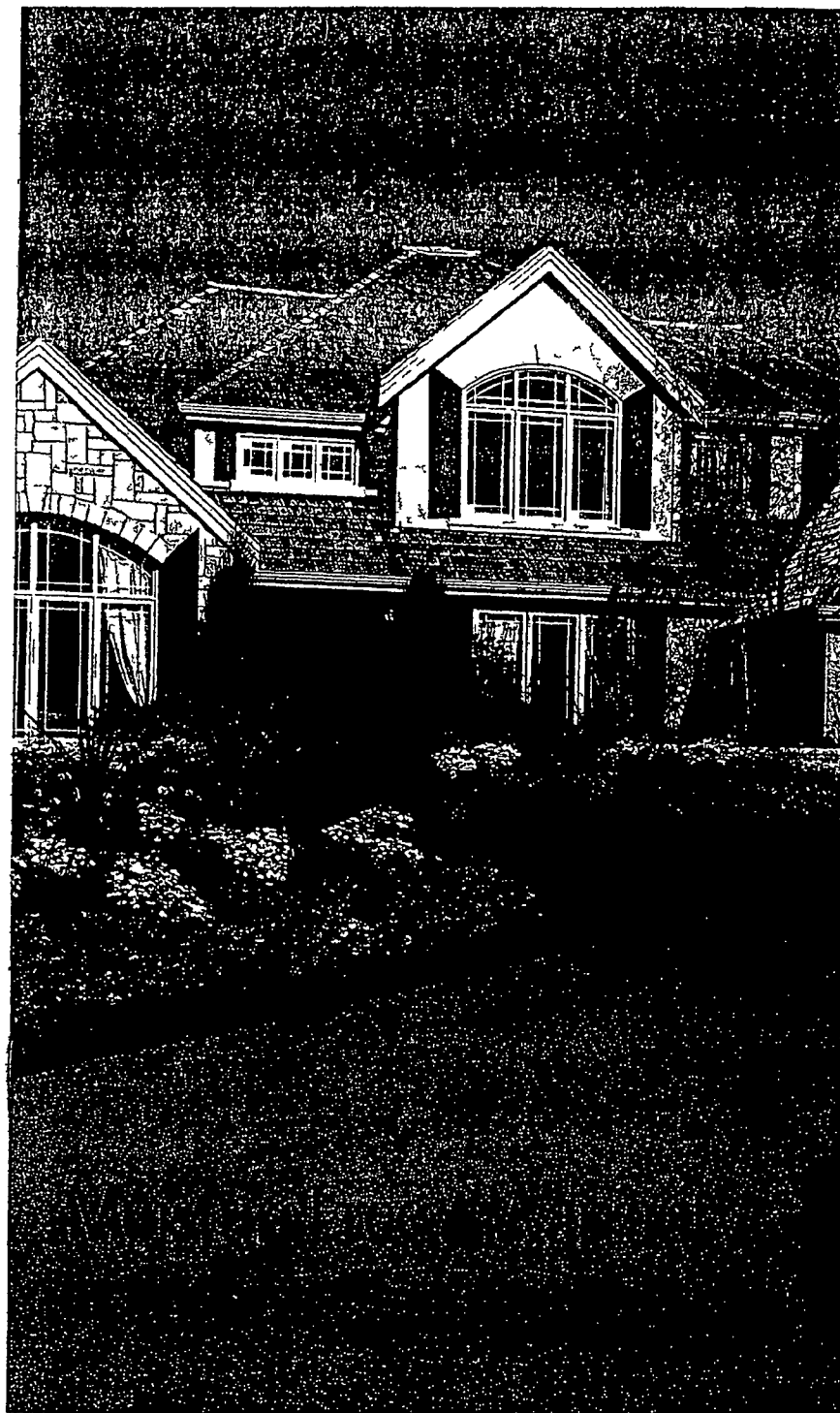
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Columbia, South Carolina
July 30, 2006

(Page 7 of 7)

0066

APP_0070

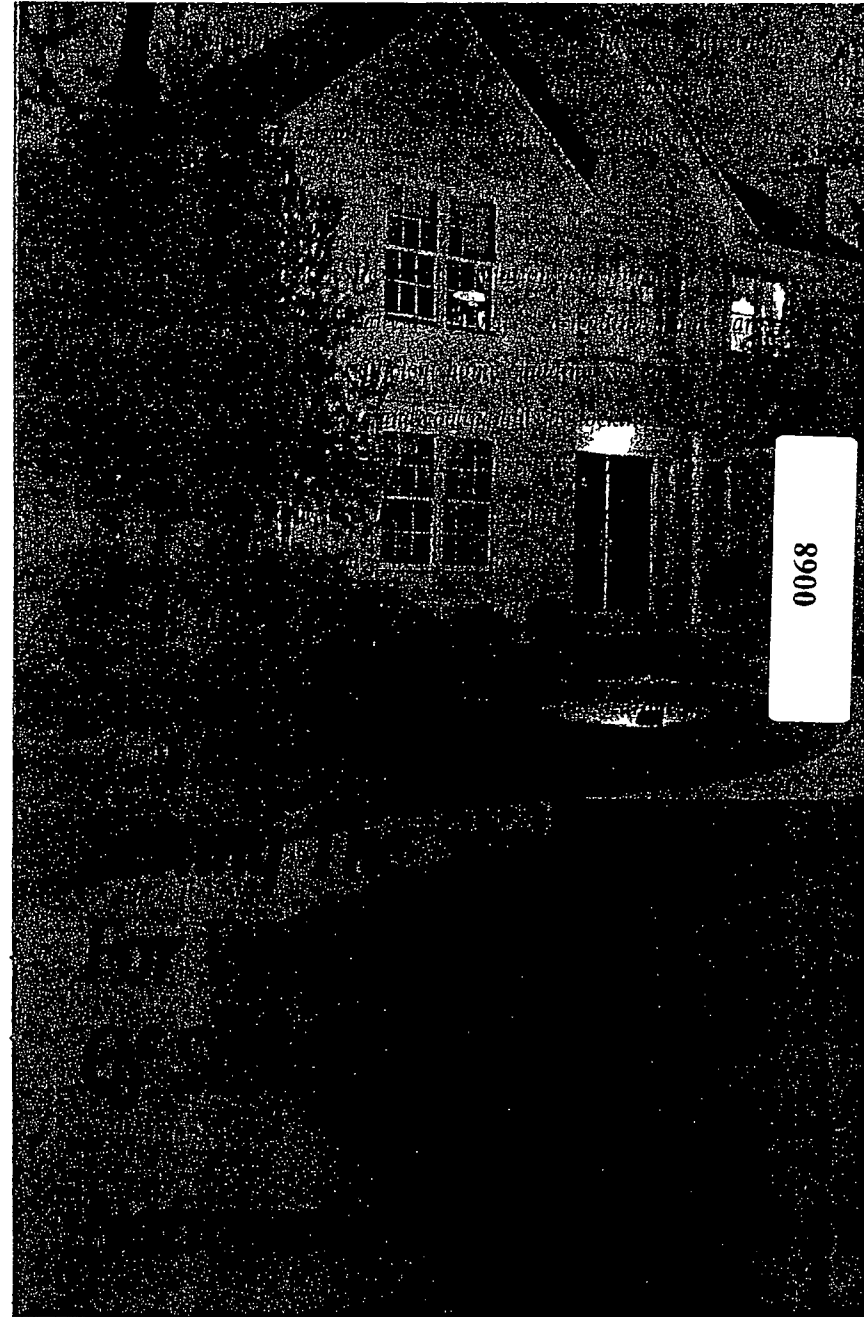


0067



APP_0071

*"Our mission is to protect
stucco homes from moisture
intrusion and preserve the value
of these homes nationwide."*



APP_0072

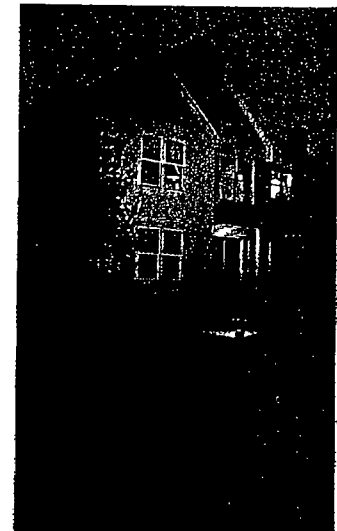


L nationwide to protect stucco homes from moisture intrusion. There are two types of stucco home cladding systems – synthetic stucco and traditional stucco (which is usually referred to as hardcoat stucco).

Synthetic stucco, or EIFS (exterior insulation and finishing system) is often referred to generically as "Dryvit®" a leading proprietary brand. EIFS is an energy-efficient home cladding system designed to substantially reduce heating and cooling bills by locking the weather's heat and cold out. When installed properly, it's a homeowner's dream. When it's not, it can turn into a nightmare of rotten wood and costly repairs. The good news is that all EIFS homes can be modified to provide a beautiful and reliable cladding system.

Hardcoat stucco, sometimes called traditional or "European" stucco, is constructed using a wire lath attached to the home over a moisture barrier and finished with Portland cement worked into the lath using a trowel. Hardcoat stucco is typically 1/2 to one inch thick.

It is important to understand that both types of stucco are susceptible to moisture intrusion, but both types can be fixed and then warranted, protecting the home and its value for years to come.



0069

The professionals at MoistureFree Warranty have years of experience dealing with stucco homes. Our warranty specialists are trained to guide you through the process of inspecting, repairing, and protecting your home with a MoistureFree Warranty. From our years of experience, we know what steps to take to assure homeowners that their home is dry, and we guarantee their home will remain dry during the term of the warranty, or we'll pay to get it dry. When you choose the MoistureFree Warranty to protect your home and its value, you can relax and live in your home worry-free, knowing you are dealing with people you can trust to solve the problem and keep the moisture out. Our goal is the same as the homeowners': a dry home.

Solid Backing From A Company You Can Trust

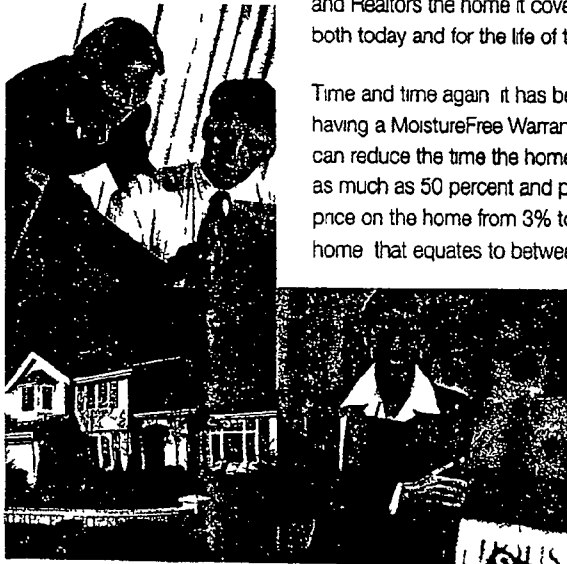
Unlike so-called "stucco guarantees" on the market, our warranty is backed by a division of Residential Warranty Corporation, a trusted national company with over 20 years of home warranty experience. In short, we'll be there when you need us.

What Realtors Or Home Sellers Should Know

Savvy Realtors know the MoistureFree Warranty is a valuable tool for buying and selling stucco homes. When a MoistureFree Warranty is issued on a property, it gives prospective buyers the peace of mind they need to purchase a stucco home, and it gives Realtors the confidence they need to sell a stucco home. A MoistureFree Warranty acts as a seal of approval to tell prospective buyers

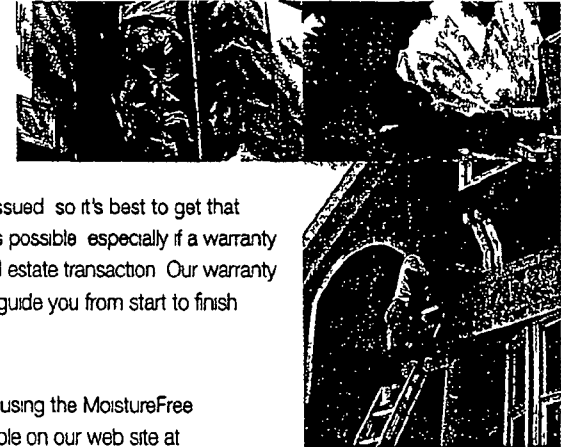
and Realtors the home it covers is free of moisture both today and for the life of the warranty.

Time and time again, it has been shown that having a MoistureFree Warranty on a listed home can reduce the time the home is on the market by as much as 50 percent and preserve the asking price on the home from 3% to 16%. On a \$250,000 home, that equates to between \$7,500 and \$40,000 in home value protection at the time of sale!



Steps To A MoistureFree Warranty

A three-step process must take place before a MoistureFree Warranty is issued, so it's best to get that process started as soon as possible, especially if a warranty is needed to facilitate a real estate transaction. Our warranty specialists will be there to guide you from start to finish.



Inspection

Have the home inspected using the MoistureFree Inspection Protocol (available on our web site at www.moisturewarranty.com) or by calling us. If the home has had an inspection within the past 90 days, that inspection may be mailed or emailed to us.

Review and Recommendations

The inspection is reviewed by one of our Warranty Specialists. If repairs are necessary to meet warranty requirements, we are available to guide you through the repair process and will even provide you with a list of contractors in your area who are familiar with our repair standards. If repairs are required, an inspector must visit the home and verify repairs have been made effectively and according to MoistureFree Warranty standards.

Warranty Issued

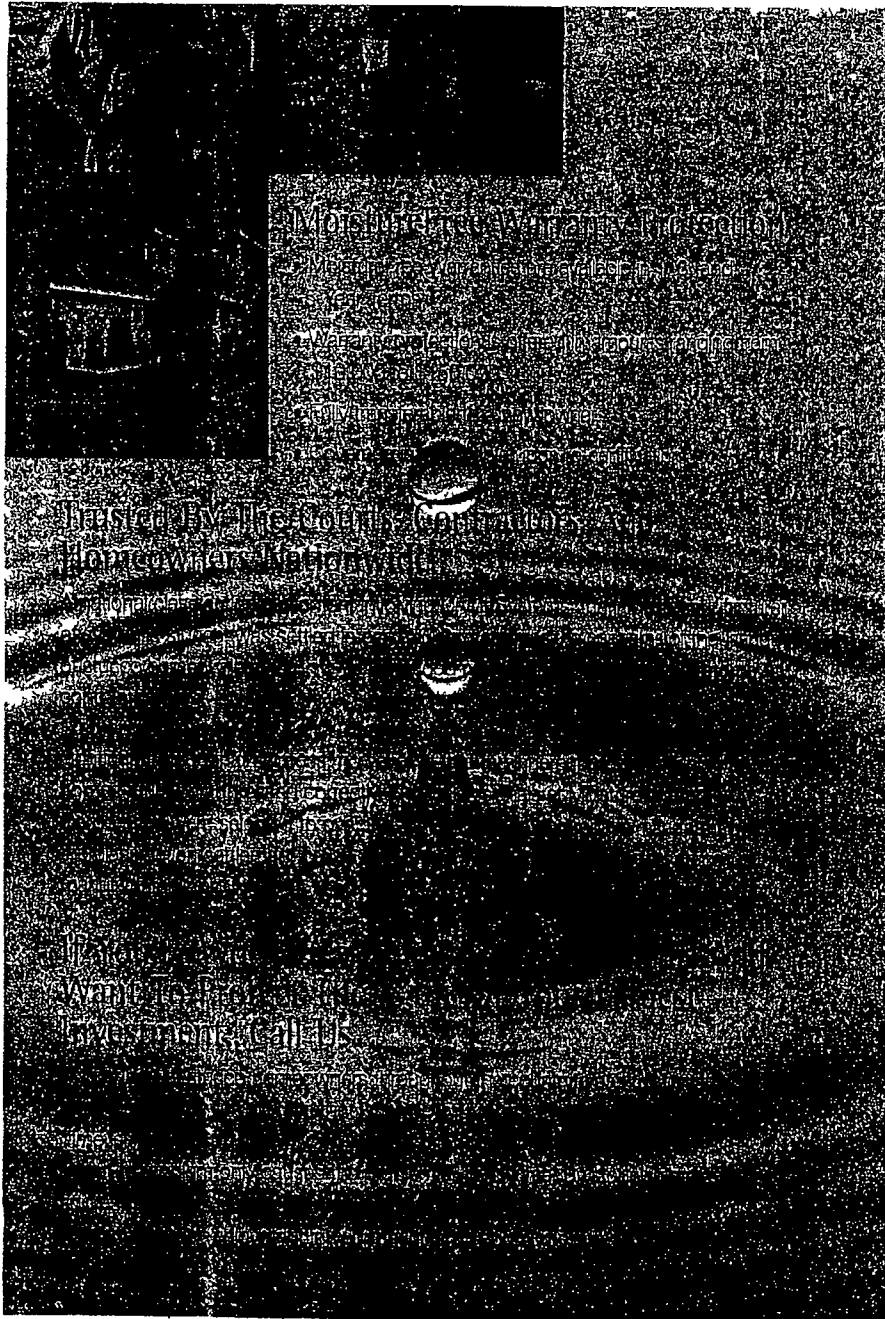
Moisture Warranty Corporation issues a Warranty Authorization Certificate that warrants the home is dry and will remain dry during the term of the warranty, or we will pay to get it dry, based on the terms of the warranty.

Follow-Up

As part of the MoistureFree 3 Year and 5 Year Warranties, interim inspections (at 18 month intervals) are included. This saves you the cost and hassle of getting your home inspected.

0070

APP_0074



I can now show stucco homes with confidence knowing both the buyers and I are protected long after the sale Homes that I would not have shown before now become very sellable thanks to the MoistureFree Warranty The staff at Moisture Warranty is wonderful to work with professional in every way Nothing is lacking and the process goes smoothly! MoistureFree Warranty is simply the best!

- Constance Goins Realtor Coldwell Banker Roswell GA

The MoistureFree Warranty made it possible for us to sell our home that had been on the market for many months Having the warranty made our buyer feel more assured that there wouldn't be any problems associated with buying a stucco house and that any stucco problems would be discovered and repaired. The Moisture Warranty Corporation was easy to work with and the warranty process went very smoothly As a buyer we wouldn't buy a stucco house without a stucco warranty and as a home seller it made our house more marketable Having the MoistureFree Warranty made the eventual sale go more smoothly and probably more quickly

- Jerry and Melanie Wright Stucco Home Seller Charlotte NC

The MoistureFree Warranty made it possible for me to purchase my new stucco home If I couldn't have gotten a warranty on the house I would not have bought it I plan to keep a MoistureFree Warranty on my house until I eventually sell it someday It's very important to show a potential buyer that you've had a warranty on the house It gives them the peace of mind they need to purchase the home

- John DesChamps Stucco Home Buyer Columbia SC

As stucco homeowners we know how important it is to keep up with regular maintenance on our stucco home We have our home tested annually and we have the MoistureFree Warranty in place to protect our home should any problems occur It gives us the peace of mind we need just knowing our home is protected, and we have the documentation to provide a prospective home buyer if we ever do decide to sell our home

- Steve and Lynda Solimine Stucco Homeowners Hoover AL

MoistureFree Warranty

1-800-400-8679 or www.moisturewarranty.com
20306 North Main St • Cornelius NC 28031 • Fax 704 896 3426
info@moisturewarranty.com

0072

APP_0076

MoistureFree Warranty



AUTHORIZATION CERTIFICATE

411014

For The Property Located At

133 BEAVER DAM ROAD
COLUMBIA, SC 29223

This MoistureFree Authorization Certificate confirms that a three (3) year Limited Warranty has been issued on the property listed above

The term of the limited warranty begins on November 29, 2004 and terminates on November 29, 2007

Read The Terms and Conditions

The terms and conditions of this Limited Warranty are detailed in the information booklet titled *The Terms And Conditions of the MoistureFree Warranty*. If you do not have a copy of the terms and conditions of this warranty, call 1-800-400-8679 and a copy will be mailed to you immediately, or you can print a copy from the MoistureFree Warranty web site at www.moisturewarranty.com. You should thoroughly read and understand the terms and limits of this Limited Warranty. In general, this limited warranty is to provide additional assurance that moisture problems limited to the stucco/EIFS cladding have been resolved.

Interim Inspections

Three year warranties include an interim inspection, at no cost to the homeowner, at approximately 16 to 20 months into the term of the warranty. Five Year warranties include two interim inspections, at no cost to the homeowner, at approximately 16 to 20 month intervals. One year warranties DO NOT include an interim inspection.

Required Normal Maintenance

The homeowner is required to perform normal maintenance on the home during the term of the warranty. This maintenance is limited to normal painting or caulking and cleaning and maintenance of the drainage systems (such as gutters and downspouts) that may be necessary to protect the home from moisture intrusion.

Independent MWC Protocol Inspection

MoistureFree was NOT a party to or involved with the moisture inspection conducted on the home being warranted. MoistureFree Warranty has used the information provided in the moisture inspection to determine the terms of this specific Limited Warranty. False, misleading, or otherwise inaccurate information contained in the moisture inspection may void all or part of the MoistureFree Warranty.

Limited Warranty

This limited warranty does not cover consequential or incidental damages. Warrantor's total aggregate liability of this Limited Warranty is limited to \$20,000 per year and \$60,000 over the full term of the warranty. There are no warranties which extend beyond the face of this Limited Warranty. There are no implied warranties or any other warranties, express or implied, in connection with this Limited Warranty or the MoistureFree Warranty Authorization Certificate on the warranted home, and all such warranties are unconditionally excluded from this Limited Warranty.

Seal

Page 1 of 2 Pages

0073

PLAINTIFF'S
EXHIBIT

B

APP_0077

A thorough moisture inspection of the warranted property was conducted as a condition of the issuance of this Limited Warranty. MoistureFree has issued this Limited Warranty with the understanding that the following areas of the warranted home have been excluded from the warranty protection due to unacceptable observed or measured conditions that existed at the time the home was inspected for moisture. These areas may be included in the Limited Warranty only if they are repaired, modified, inspected and accepted by MoistureFree for coverage under terms and conditions of this Limited Warranty. No area will be included in the Limited Warranty unless an addendum Authorization Certificate is specifically issued for these areas.

Based on the moisture inspection of the above mentioned home, the following areas are **NOT** included in the Limited Warranty. These areas are excluded along with areas that are excluded as mentioned in the *Terms and Conditions of the MoistureFree Warranty*.

	<u>Photo & Grid No./ Location</u>	<u>Item Description</u>
1		No exclusions apply
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		



THIS CERTIFICATE OF AUTHORIZATION SHOULD
CONSIST OF TWO (2) PAGES ONLY



0074

APP_0078



Southern Reporting, Inc

Condensed Transcript of the
Deposition of

Christopher Burton

March 26, 2007

Treon, et al v Dryvit Systems, Inc , et al
2002-CP-07-1377

COPY

Southern Reporting, Inc

Phone 803 749 8100

Fax 803 749 9991

Email SouthernReporting@sc rr com

0075



APP_0079

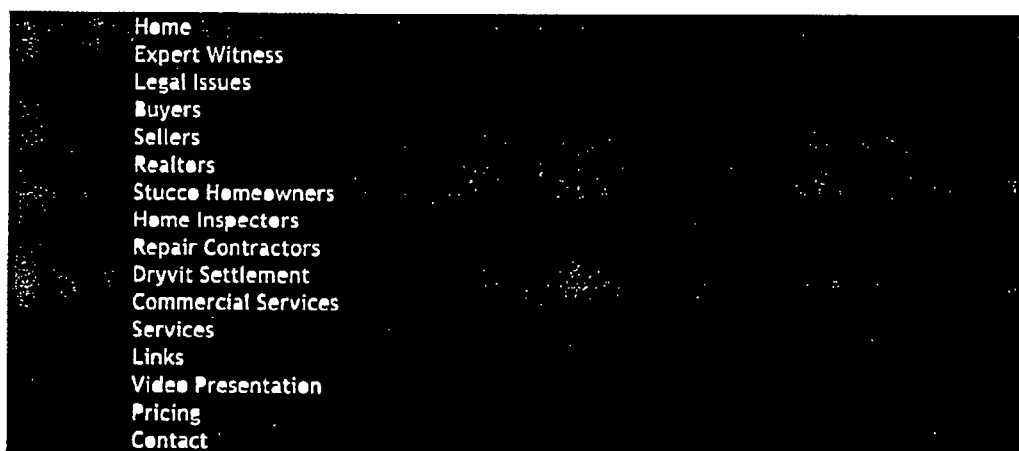
Page 108	Page 110
1 title or -- 2 A I think it's called the same thing. It's just the 3 manual that goes with the 4 Q Okay 5 A -- video training 6 Q All right. The -- these changes in the repair 7 techniques, is that -- we discussed earlier how 8 there was one version of the training video that 9 wasn't released because of changes, is this one of 10 the changes that was discussed? 11 A It looks like it's just a clarification 12 Plaintiff's Exhibit No. 7 Repair 13 Standards and Options 45 pages 14 Q Okay. I want you to look at this "Repair Standards 15 and Options." Are you familiar with this document? 16 A Yes. 17 Q When was it produced? 18 A I believe the first version of it was produced. It 19 looks like 3/15/02. I mean we put the date on the 20 version at the bottom typically. 21 Q Okay. And does -- do you know if that occurs on 22 every version of Moisture warranty documents? 23 A No, it doesn't. 24 Q Okay. Do you recall whether it -- it -- it occurs 25 on every version of the "Repair Standards and	1 Q All right. 2 A -- that are out there. There's so there's 3 different repair techniques. These are the ones 4 that we wanted done. 5 Q Okay. "These," meaning Exhibit 7 are the ones that 6 you wanted done. 7 A No. I would say the final version of Moisture 8 Warranty's Repair Standards and Options. 9 Q Okay. 10 A Not this version. 11 Q Okay. So -- 12 A That's -- the D indicates draft. So. 13 Q All right. 14 A -- it's a draft of it. 15 Q Okay. I -- and just -- just so I'm clear, then 16 This is the draft of the repair standards. There's 17 a -- at least one -- one other version, a final 18 version of it. 19 A There is. 20 Q And it changed based on negotiation amongst 21 Moisture Warranty Company -- Corporation and 22 counsel for the plaintiff, counsel for the 23 defendant in the Posey action in Tennessee. 24 MS HAULSEE. Object to the form. 25 A Among many other reasons it changed. Yeah. Just
Page 109	Page 111
1 Options? 2 A Well, we try to. 3 Q Okay. 4 A If somebody remembers to do it, yes. 5 Q The and this is -- this is the only version that I 6 found in the Tennessee file. Do you recall if this 7 is the initial version? A subsequent version? 8 anything like that? 9 A I cannot tell you. I don't know. I would guess 10 that it is not the final version. And that's 11 because the -- it doesn't coincide with the video 12 training and the issuance of the video training 13 which was directly related to the workbook or the 14 the manual that we -- accompanied the video 15 training. So I -- I imagine that is not the final 16 version. 17 Q Okay. The improved repair techniques that you make 18 reference to in Exhibit 6, would they have been 19 incorporated into this document? 20 A I don't think so. No. 21 Q Okay. Well, I -- I guess, then, what's -- what 22 then is the difference between a repair technique 23 and then these repair standards and options? 24 A Well, the ones in here are the ones that we're 25 endorsing. There's other repair standards to --	1 edits, modifications. There's, there was a 2 draft, and so it got modified for many reasons. 3 Q Was it modified, to the best of your knowledge, 4 because of any input of objectors to the class in 5 Tennessee? 6 A I imagine it was. But I can't. I can't. I 7 don't know directly. 8 Q Do you -- 9 A Communications to me came back through class 10 counsel or through Dryvit in these discussions. So 11 if they had discussions, which I assume they did 12 relative to that, I would've got it through them. 13 I would've not been talking directly with class 14 members, especially at that time. 15 Q Who handled those negotiations for Moisture 16 Warranty Corporation? 17 A I did. 18 Q Anyone else? 19 A No. For the most part, it was me. 20 Q Okay. Who was involved in the drafting of this 21 document and several changes to it? 22 MR. GRIMBALL. I'm sorry? 23 A Several -- 24 Q Uh-huh. 25 MR. GRIMBALL. I'm sorry.



Engineered Moisture
Solutions

1-800-400-
8679

From The Experts



0077



APP_0081

Contact A
Moisture
Specialist
Now

Required Fields

Full Name

Your E mail:

Phone Number

State

* Contact Type

☐ Email

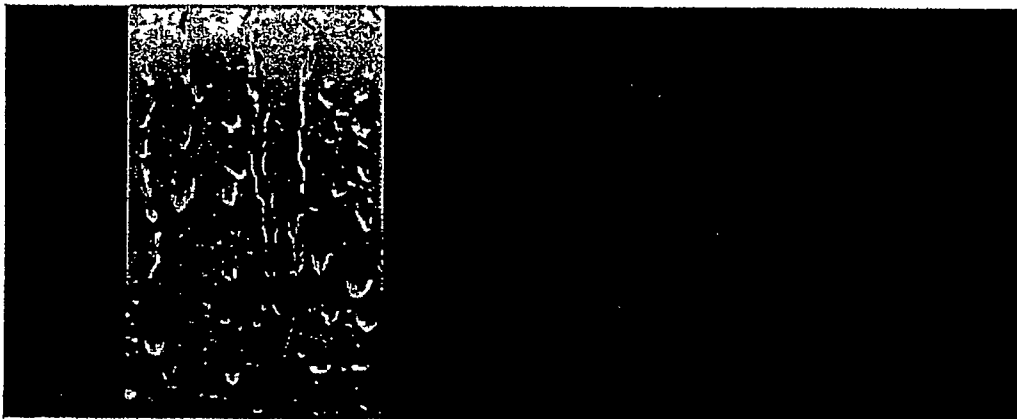
☐ Phone

Question

☒ Suggestions

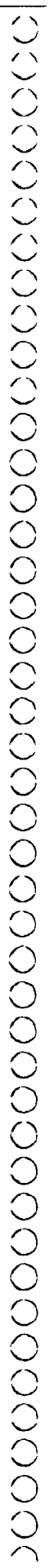
Feedback

Submit



0078

APP_0082

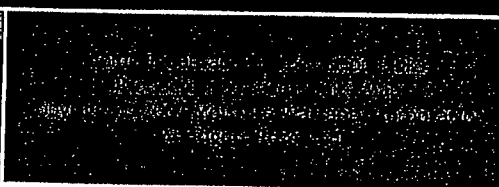




You & MWC
Why MWC
Q & A
Marketing ToolKit
Testimonials
Georgia Realtors

As a real estate professional, you're undoubtedly aware of the stigma associated with stucco homes, and the real estate transactions that have been ruined by the problems related to stucco. You get a listing on one of these homes, a moisture inspection is completed on it, and any problems that are discovered lead to complications closing the sale. Maybe you've experienced it firsthand; maybe you've experienced it firsthand, or just heard about it from associates. But you don't live in fear of it. *Now there is a solution - the MoistureFree Warranty.*

A MoistureFree Warranty provides protection for new homeowners against any moisture problems related to their stucco cladding, but the protection doesn't stop there. The seller and the real estate professional involved in the sale can rest assured that the transaction won't come back to haunt them later due to problems with the stucco system. Some agents have been named in lawsuits by stucco homeowners because of their participation in the sale of a stucco home that had problems after the sale. Reduce your risk with a MoistureFree Warranty.



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Fariborz Z. Babaee and Malihe Babaee

☐ Plaintiffs

vs

Moisture Warranty Corporation d/b/a Moisture Free
Warranty and Preferred Home Inspections, Inc

☒ Defendants

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action No 2006-CP-40 7215

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney Howard Sheftman, Esquire Robert B "Sam" Phillips Esquire Finkel Law Firm, LLC 1201 Main Street, Suite 1800 Post Office Box 1799 Columbia, SC 29202 Phone (803) 765-2935 Fax (803) 252 0786	Defendant's Attorney Anthony W. Livoti, Esquire Charles G. Blackburn, Esquire Murphy & Grantland, PA 4406-B Forest Drive (29204) P O Box 6648 Columbia SC 29260 Phone (803)782-4100 Fax (803)782-4140
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I Hearing Information Nature of Motion. Notice of Motion and Motion in Support of Moisture Free's Post-Trial Motions Estimated Time Needed. 30 minutes Court Reporter Needed ☒ YES / NO	
SECTION II Motion Type ☒ Written motion attached ☐ Form Motion I hereby move for action by the court as set forth in the attached proposed order November 26, 2008 Date submitted Signature of Charles G. Blackburn Attorney for Moisture Warranty Corporation d/b/a Moisture Free Warranty	
SECTION III Motion Fee ☒ PAID - AMOUNT \$25.00 EXEMPT ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69 SCRPC) ☐ Proposed order submitted at request of the court, or, <u>reduced to writing from motion made in open court per judge's instructions</u> Name of Court Reporter _____ ☐ Other	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order ☐ Other	JUDGE CODE _____ Date _____
CLERK'S VERIFICATION Collected by _____ Date Filed _____ ☐ MOTION FEE COLLECTED _____ ☐ CONTESTED - AMOUNT DUE _____	

SCCA/233 (11 2003)

0080

APP_0084

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Civil Action No 2006-CP-40-7215

Fariborz Z. Babae and Malihe Babae,

Plaintiffs,

vs

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and Preferred
Home Inspections, Inc.

Defendants

DEFENDANT MOISTURE WARRANTY
CORPORATION D/B/A MOISTURE FREE
WARRANTY'S NOTICE OF MOTION
AND MOTION IN SUPPORT OF
DEFENDANT MOISTURE FREE'S
POST-TRIAL MOTIONS

C C C & G S

2008 NOV 26 PM 1 59

The Defendant Moisture Warranty Corporation d/b/a Moisture Free Warranty
(hereinafter referred to as "Moisture Free"), by and through its undersigned counsel, submits the
following in support of Defendant Moisture Free's post trial motions

I

Defendant Moisture Free moves for a judgment notwithstanding the verdict in that
Moisture Free produced and offered evidence to show that the Plaintiffs breached the warranty
and that the Plaintiffs prevented Moisture Free from completing repairs on the home in
accordance with the warranty. Furthermore, that Moisture Free did not breach the warranty and
that it was entitled to a directed verdict and Moisture Free, therefore, moves for a judgment
notwithstanding the verdict in its favor on those grounds.

II

Defendant Moisture Free moves for a new trial *nisi remittitur* in that the verdict in this
case is excessive and that the Plaintiffs are not entitled to an award of \$140,000.00 and,
therefore, Defendant Moisture Free moves for a new trial due to the excessiveness of the verdict.

0081

APP_0085

or, in the alternative, that the verdict be reduced to \$60,000 00 which was the maximum amount obtainable under the subject warranty. If the Plaintiffs do not accept a *remittitur* to \$60 000 00, Moisture Free moves for a new trial due to the excessiveness of the verdict.

III.

Defendant Moisture Free moves for a new trial absolute in that the amount of the verdict was so excessive to be the result of passion, prejudice, caprice or some other undue influence outside the evidence. The verdict is clearly excessive and reflects an improper consideration by the jury.

IV

Alternatively, Defendant Moisture Free moves for a new trial on the grounds that the court failed to allow evidence in of Plaintiffs' receipt of \$110,000 00 to repair the home for pre-existing stucco damages and that failure to present this evidence to the jury did not allow the jury to consider this evidence in awarding any damages. Moisture Free was prejudiced by its inability to present this evidence at trial and, therefore, Moisture Free seeks a new trial based on the failure of the court to admit this evidence at trial.

V

Defendant Moisture Free moves for a setoff of \$110,000 00 from the jury's verdict of \$140,000 00. Moisture Free proffered evidence that Plaintiffs received \$110 000 00 in reduction of the purchase price of the home to specifically make repairs to the stucco for pre-existing stucco damages and Moisture Free moves to have that \$110,000 00 applied as a setoff to reduce the amount of the jury's verdict against Defendant Moisture Free.

VI

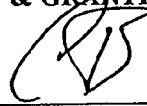
Defendant Moisture Free moves for a new trial on the grounds that the Court refused to allow evidence of the arbitration provision contained in the warranty issued to the Plaintiffs by Moisture Free. The jury requested the Court to consider the arbitration provision and the Court refused to allow the Plaintiffs to consider the arbitration provision contained in the Moisture Free Warranty. Moisture Free was prejudiced by its inability to present this evidence at trial and, therefore, Moisture Free seeks a new trial based on the failure of the Court to admit this evidence at trial.

VII

Defendant Moisture Free moves for a new trial on the grounds that the Court refused to allow evidence that the case is subject to arbitration pursuant to the terms and conditions in the warranty issued to the Plaintiffs by Moisture Free. Moisture Free was prejudiced by its inability to produce evidence at trial and therefore Moisture Free seeks a new trial based on the failure of the Court to admit this evidence at trial.

Respectfully submitted this the 26th day of November, 2008, in Columbia, South Carolina.

MURPHY & GRANTLAND, P A



Charles G. Blackburn, Esquire
Anthony W. Livoti, Esquire
Post Office Box 6648
Columbia, South Carolina 29260
Tel (803) 782-4100, ext. 1209
Fax (803) 782-4140
Email awlivoti@murphygrantland.com,
cblackburn@murphygrantland.com
Attorneys for Defendant Moisture Warranty
Corporation d/b/a Moisture Free Warranty

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Civil Action No 2006 CP-40-7215

Fariborz Z. Babae and Malihe Babae,

Plaintiffs,

CERTIFICATE OF SERVICE

vs

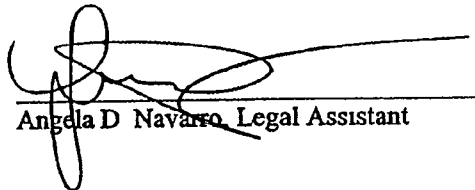
Moisture Warranty Corporation d/b/a Moisture
Free Warranty, and Preferred Home
Inspections, Inc

Defendants

2008 NOV 26 PM 1:59
C C C & G S
f i l e d

I, the undersigned, do hereby certify that I have this date served a copy of Defendant
**Moisture Warranty Corporation d/b/a Moisture Free Warranty's Notice of Motion and Motion
in Support of Defendant Moisture Free's Post-Trial Motions** in connection with the above-
referenced case to all counsel of record by placing a copy of the same in today s mail, via U S
Mail postage paid to the following address

Howard Sheftman, Esquire
Robert 'Sam' Phillips, Esquire
Finkel Law Firm, LLC
Post Office Box 1799
Columbia, South Carolina 29202


Angela D. Navarro, Legal Assistant

Columbia, South Carolina
November 26, 2008

0084

APP_0088

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Faniborz Z. Babace and Malhe Babace) Civil Action No. 2006-CP-40-7215

Plaintiffs,)

vs)

Moisture Warranty Corporation d/b/a)
 Moisture Free Warranty, and Preferred)
 Home Inspections Inc.)

Defendants)

MOISTURE WARRANTY
CORPORATION'S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR
JUDGMENT NOTWITHSTANDING
THE VERDICT FOR A NEW
TRIAL ABSOLUTE, AND NEW
TRIAL NISI REMITTITUR

On November 26, 2008, Defendant Moisture Warranty Corporation d/b/a Moisture Free Warranty ("Moisture Warranty Corporation") moved this Court pursuant to Rules 50-59 and all other applicable rules of the South Carolina Rules of Civil Procedure for judgment notwithstanding the verdict for a new trial absolute, and, failing the above new trial nisi remittitur. Moisture Warranty Corporation now submits this memorandum in support of its previously filed motions.

Factual Background

On November 29, 2004, in connection with the purchase of their home, Plaintiffs were issued a 3 year limited warranty by Moisture Warranty Corporation (Authorization Certificate attached as Exhibit A). The limited warranty was subject to several Terms and Conditions that were detailed in the warranty provided to the Plaintiffs (Terms and Conditions of Warranty attached as Exhibit B). The Plaintiffs were aware of the warranty as early as August 28, 2004 as it was provided to them when they signed the contract for the purchase of their home.

On December 8, 2006, Plaintiffs filed suit alleging various causes of action against Moisture Warranty Corporation, including but not limited to fraud, negligence, negligent misrepresentation, and violations of the South Carolina Unfair Trade Practices Act, related to the allegation that Plaintiffs' home was not moisture free. At the heart of the dispute, Plaintiffs claimed that Moisture Warranty Corporation failed to perform under the terms of the parties' agreement. The trial court granted Moisture Warranty Corporation summary judgment on every claim except for Plaintiffs' breach of warranty claim. The breach of warranty claim proceeded to trial and on November 20, 2008, a jury returned a verdict in the amount of \$140,000 in favor of Plaintiffs. On November 26, 2008, Moisture Warranty Corporation timely filed its post-trial motions, and now submits this memorandum in support of its post-trial motions.

Judgment Notwithstanding the Verdict (JNOV)

As shown herein and argued at trial, Moisture Warranty Corporation is entitled to judgment as a matter of law. The Court should find that Moisture Warranty Corporation is entitled to judgment as a matter of law because Plaintiffs made performance under the warranty impossible. The warranty at issue in this case was a limited warranty. The plain language of the Terms and Conditions of the Moisture Free Limited Warranty provided that

Warrantor reserves the right to make repairs or modifications to the area of failure based on standard industry practices and will have full discretion over the type of repair or modification that is to be made at the specific area that is determined to have high moisture behind the exterior cladding.

(See Terms and Conditions attached at Exhibit B at p. 4.) The Terms and Conditions further stated that "Warrantor [Moisture Warranty Corporation] will make

necessary repairs or modifications based on the Limited Warranty " (Id at p 5)
While the terms of the warranty are plain and unambiguous, Plaintiffs made Moisture
Warranty Corporation s performance of those terms and obligations under the
agreement (repairing the parts of the home, covered under the warranty) impossible by
refusing to allow Moisture Warranty Corporation to actually make repairs Instead
Plaintiffs demanded payment for the alleged cost of repair, which is contrary to the
terms of the parties' agreement Thus Plaintiffs failed to abide by the terms set forth
in the warranty

South Carolina law is clear that, as a matter of law a person that does not
perform his obligations under a contract cannot claim a breach of that same agreement.
See American Nat Bank, etc v Caldwell, 166 S C 194 164 S E 613 (1932)
(holding that if a party to a contract wishes to compel the other party to fulfill the terms
of the contract the party seeking to enforce the terms of the agreement "must make his
part of the agreement precedent and cannot proceed against the other without an actual
performance of the agreement, on his part or a tender and refusal "), See also Swinton
Creek Nursery v Edisto Farm Credit, ACA 334 S C 469 487 514 S E 2d 126 135
(1999) ("A party who seeks to recover damages for breach of a contract must show that,
the contract has been performed on his part, or at least that he was, at the appropriate
time, able, ready and willing to perform it ") Accordingly, because Plaintiffs
prevented Moisture Warranty Corporation from making repairs to the subject property,
Plaintiffs cannot recover any purported breach of the agreement because the Plaintiffs
conduct made performance impossible and Plaintiffs did not live up to their
responsibilities under the agreement

New Trial Absolute

If this Court grants the motion for judgment notwithstanding the verdict, Moisture Warranty Corporation also moves that the Court conditionally grant a new trial absolute pursuant to Rule 50(c), SCRPC. If this Court declines to grant Moisture Warranty Corporation judgment notwithstanding the verdict, then Moisture Warranty Corporation moves for a new trial absolute in this matter.

1 Moisture Warranty Corporation expressly incorporates by reference and repeats each of the grounds set forth above for judgment notwithstanding the verdict.

2 This Court as the "Thirteenth Juror" should grant a new trial because the evidence before the court did not justify the verdict. The thirteenth juror doctrine "entitles the trial judge to sit in essence as the thirteenth juror when he finds the evidence does not justify the verdict and then to grant a new trial based solely upon the facts." Norton v Norfolk S Ry Co, 350 S C 473, 478, 567 S E 2d 851, 854 (2002) (quoting Folkens v Hunt 300 S C 251, 254, 387 S E 2d 265, 267 (1990)). As the thirteenth juror, the trial judge hangs the jury by refusing to agree with the jury's unanimous verdict and casting his or her vote against it, resulting in a verdict which is no longer unanimous. Id. The Court may grant a new trial, sitting as the thirteenth juror when it is convinced that a new trial is necessary on the basis of the facts. Vinson v Hartley, 324 S C 389, 404, 477 S E 2d 715, 722 (Ct App 1996). Under the doctrine, a new trial may be granted where the Court merely finds that "the verdict is unsupported by the evidence" that "the verdict is inconsistent and reflects the jury's confusion," or that "justice has not prevailed." Id at 404, 477 S E 2d at 722-23. See also Trivelas v S C Dep't of Transp, 357 S C 545, 552, 593 S E 2d 504, 508 (Ct

App 2004) (granting new trial where "the evidence does not justify the verdict"), Norton, 350 S C at 480, 567 S E 2d at 855 (granting new trial when court "disapprov[es] of the verdict on factual grounds") McEntire v Mooregard Exterminating Servs, Inc, 353 S C 629, 631 578 S E 2d 746, 747 (Ct App 2003) (characterizing use of doctrine as "granting a new trial upon the facts")

The Court's discretion in granting or denying a new trial under the thirteenth juror doctrine is "founded upon the facts the evidence the witnesses, the trial circumstances the verdict and the judge's view of them." Vinson, 324 S C at 404, 477 S E 2d at 723 (quoting Fallon v Rutks, 217 S C 180, 189, 60 S E 2d 88, 92 (1950)) Consequently, the Court is entitled to "weigh the evidence and rely on his or her view of the circumstances." Sorin Equip Co v The Firm, Inc, 323 S C 359, 364 474 S E 2d 819 822 (Ct App 1996)

In this case the Court, as the thirteenth juror, should "hang" the jury and vacate the jury's verdict in this case for several specific reasons including all those discussed previously in this memorandum. Further the evidence as to liability and damages "does not justify the verdict," Norton, 305 S C at 478 367 S E 2d at 854, as Plaintiffs failed to prove any breach of the warranty by Moisture Warranty Corporation, and to the contrary the evidence demonstrated Moisture Warranty Corporation attempted to comply with the agreement. Further, Plaintiffs failed to demonstrate their willingness to perform pursuant to the terms of the agreement, which is required as a matter of law. Thus, the damages awarded in this case far exceed any amount supported by the evidence and allowed under the terms of the parties' limited warranty agreement.

3 The trial court erred in failing to admit the addendum arising out of the Plaintiff's purchase of their home which demonstrated that Plaintiffs' received a \$110,000 credit toward the purchase of their home (Exhibit C). This failure prejudiced Moisture Warranty Corporation and constitutes an error warranting a new trial.

4 This Court should grant a new trial absolute because the verdict in this case was the result of passion, prejudice, caprice, or other undue influence outside the evidence presented at trial. As shown at trial and addressed herein, the liability of Moisture Warranty Corporation with respect to its agreement with Plaintiff if any was limited to a maximum of \$60,000 pursuant to the express terms of the warranty. Thus, the jury's award on the sole cause of action presented to it—the breach of warranty claim—is contrary and wholly inconsistent to the terms of the parties' agreement and the evidence presented to it.

New Trial Nisi Remittitur

If this Court chooses not to grant JNOV to Moisture Warranty Corporation and not to grant a new trial absolute, then this Court should, at minimum, grant a new trial *nisi remittitur*. As an initial matter, this motion is based on all other grounds previously set forth above that are consistent with the relief requested.

1 In South Carolina, the trial judge "has the power, and with it the responsibility," of reducing a damages award that is "unduly liberal" or "merely excessive." Easley v. Heitz, Temple of Greenville, 329 S.E.2d 753, 758 (1995), see also Becker v. Wal-Mart Stores, Inc., 529 S.E.2d 758, 762 (Ct. App. 2000).

Here, the total verdict awarded is far in excess of any actual damages proven related to repair and replacement costs and over and above the amount provided by the express terms of the warranty. Pursuant to the express terms of the limited warranty "Warrantor's [Moisture Warranty Corporation] total aggregate liability of this Limited Warranty is limited to \$20,000 per year and \$60,000 over the full term of the warranty." (Exhibit A. See also Exhibit B stating "Warrantor's total aggregate liability of this Limited Warranty's is limited to \$60,000 during the full term with a \$20,000 per year, maximum claim limit, unless specified otherwise on the Moisture Free Warranty Authorization Certificate.") Plaintiffs presented no evidence at trial demonstrating that they were entitled to any amount above the \$60,000 limitation or why the limitation in the warranty was not binding upon them. To the contrary, the very agreement under which Plaintiffs sought relief and relied upon for their warranty claim allowed, at a maximum, relief capped at \$60,000.

Thus, the jury verdict in this case was excessive, arbitrary, capricious, based on emotion and sentiment, unsupported by the evidence in the record, contradictory to the evidence in the record, not in accord with the Court's instructions, and was actuated by passion, caprice and prejudice.

Consequently, if the Court declines to grant JNOV and further declines to order a new trial, absolute, it should at minimum order a new trial *nisi reputetur* and reduce the damages to the maximum amount provided by the express terms of the agreement between the parties—\$60,000. (See Exhibits A and B.)

2 Furthermore, and failing the above, Moisture Warranty Corporation is entitled to a reduction in the amount of the judgment by way of a setoff in the amount

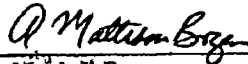
of \$110,000. Prior to the purchase of their home, Plaintiffs negotiated a reduction in the price of their home by \$110,000 "for stucco repairs or replacement at closing" (See Exhibit C). As a result, the Plaintiffs were previously paid for the alleged repairs needed on the home and Moisture Warranty Corporation's liability should be offset by the amounts previously paid to the Plaintiffs for repairs to the stucco exterior on their home.

Conclusion

Based on the foregoing reasons, Moisture Warranty Corporation respectfully requests that the Court grant it relief as outlined above.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, L L P



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Columbia SC 29201

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Charleston, SC 29401-2239

Attorneys for Moisture Warranty Corporation
d/b/a Moisture Free Warranty

January 20, 2009

Exhibit A

0093

APP_0097

01-19-2007 13 27 FROM

717-581-8010

T 101 P 001/002 F-551

MOISTUREFREE WARRANTY

AUTHORIZATION CERTIFICATE

411014 '01

For The Property Located At

133 BEAVER DAM ROAD
COLUMBIA, SC 29223PAID
JAN 04 2005
Accounting Dept.

This MoistureFree Authorization Certificate confirms that a three (3) year Limited Warranty has been issued on the property listed above.

The term of the limited warranty begins on November 29, 2004 and terminates on November 29 2007

Read The Terms and Conditions

The terms and conditions of this Limited Warranty are detailed in the information booklet titled *The Terms And Conditions of the MoistureFree Warranty*. If you do not have a copy of the terms and conditions of this warranty call 1-800-400-8679 and a copy will be mailed to you immediately or you can print a copy from the MoistureFree Warranty web site at www.moisturefreesystems.com. You should thoroughly read and understand the terms and limits of this Limited Warranty. In general, this limited warranty is to provide additional assurance that moisture problems linked to the stucco/TIPS cladding have been resolved.

Interim Inspections

Three year warranties include an interim inspection at no cost to the homeowner at approximately 16 to 20 months into the term of the warranty. Five Year warranties include two interim inspections, at no cost to the homeowner, at approximately 16 to 20 month intervals. One year warranties DO NOT include an interim inspection

Required Normal Maintenance

The homeowner is required to perform normal maintenance on the home during the term of the warranty. This maintenance is limited to normal painting or caulking and cleaning and maintenance of the drainage systems (such as gutters and downspouts) that may be necessary to protect the home from moisture intrusion.

Independent MISC Protocol Inspection

MoistureFree was NOT a party to, or involved with the moisture inspection conducted on the home being warranted. MoistureFree Warranty has used the information provided in the moisture inspection to determine the terms of this specific Limited Warranty. False, misleading, or otherwise inaccurate information contained in the moisture inspection may void all or part of the MoistureFree Warranty.

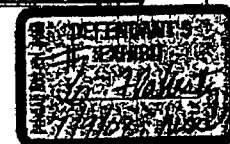
Limited Warranty

This limited warranty does not cover consequential or incidental damages. Warrantor's total aggregate liability of this Limited Warranty is limited to \$20,000 per year and \$60,000 over the full term of the warranty. There are no warranties which extend beyond the terms of this Limited Warranty. There are no implied warranties or any other warranties, express or implied, in connection with this Limited Warranty or the MoistureFree Warranty Authorization Certificate on the warranted home, and all such warranties are unconditionally excluded from this Limited Warranty.

Page 1 of 2 Pages

33207

150



0094

APP_0098

01-19-2007 13 27 FROM-

717-561-0010

T 101 P 002/002 F-551

A thorough moisture inspection of the warranted property was conducted as a condition of the issuance of this Limited Warranty. MoistureFree has issued this Limited Warranty with the understanding that the following areas of the warranted home have been excluded from the warranty protection due to unacceptable observed or measured conditions that existed at the time the home was inspected for moisture. These areas may be included in the Limited Warranty only if they are repaired, modified, inspected and accepted by MoistureFree for coverage under terms and conditions of this Limited Warranty. No area will be included in the Limited Warranty unless an addendum Authorization Certificate is specifically issued for these areas.

Based on the moisture inspection of the above mentioned home, the following areas are **NOT** included in the Limited Warranty. These areas are excluded along with areas that are excluded as mentioned in the Terms and Conditions of the MoistureFree Warranty.

	Photo & Grid No / Location	Item Description
1		Exclusions. The following areas are excluded. The areas can be considered for warranty once additional remediation is completed and reviewed by MWC. Remediation must meet MWC's Standards of Repair. 8L Page 11 Kickout location and area below (30% readings)
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		



THIS CERTIFICATE OF AUTHORIZATION SHOULD
CONSIST OF TWO (2) PAGES ONLY



Warranty Information

MWC-ID 30947

Inactive

SC1 CH SC2 SC3

Purchase Date 11/29/2004 100%

Owner Name(s) Bababe Fred

Warranty Type Non Settlement Warranty # 411014

Warranty Term 3 Year Issue Dat 11/29/2004

Set Term FIRST #

Coverage Amount \$20 000 00 RWC Pd Exp Date 11/29/2007

Sales Price \$4,095 00 RWC Cost \$750 00 Sent Out 12/14/2004

Send to

Ph (803) 786-8646

Address 133 Beaver Dam Road

City Columbia State SC Zip 29223

Interim Inspection

Warranty Int Insp Due 5/29/2006 Completed

2nd Interim Insp Due Completed

Renewal Status

Renewal

Final Appr

Sales Contact Dat

Insp Reviewed Date

Final Appr By

Insp Request Date

Reviewed By

Payment Recd

Insp Rec vd Date

Forwd to Tom

Sent to Proc

Payments

Future Credit Card Use OK

11/29/2004	Payment Date	11/29/2004	Payor	Rogers Townsend & Thomas/BABABE
Payment Via	Check	Exp Date		Print AMT: RWC Paid
CK / CC	20835			\$4 095.00
			Balance	\$0.00

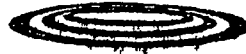
0096

APP_0100

Exhibit B

0097

MoistureFree Warranty



SAMPLE COPY OF
THE TERMS AND LIMITATIONS OF THE

MOISTUREFREE WARRANTY THREE-YEAR LIMITED WARRANTY \$60,000 Full Term Limit and \$20,000 Per Year Maximum Limit

NOTICE

The THREE-Year MoistureFree Limited Warranty includes 1 (one) qualified moisture inspection of the warranted home, which will be performed 16 to 20 months into the term of the warranty. The THREE Year MoistureFree Limited Warranty does require the current homeowner to perform normal maintenance on the home during the term of the warranty or risk voiding all or part of the warranty benefits. These normal maintenance requirements are specifically limited to caulking and/or painting of high risk areas identified in the periodic moisture inspection.

THIS LIMITED WARRANTY IS NOT VALID WITHOUT THE MOISTUREFREE WARRANTY AUTHORIZATION CERTIFICATE.

The following sample copy of the MoistureFree Warranty is provided for review and marketing purposes only. No MoistureFree Warranty is valid without a MoistureFree Warranty Authorization Certificate which describes the specific limits of the warranty. Following the review of a qualified moisture inspection and acceptance of an application for warranty, a MoistureFree Warranty Authorization Certificate will be mailed to the warranty holder within 60 days of approval.

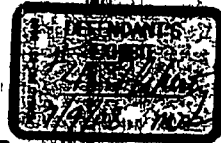
This limited warranty does not cover consequential or incidental damages. Warrantor's total aggregate liability of this Limited Warranty is limited to \$60,000 during the full term with a \$20,000 per year maximum claim limit, unless specified otherwise on the MoistureFree Warranty Authorization Certificate. There are no warranties which extend beyond the face of this Limited Warranty. There are no implied warranties of any other warranties, express or implied, in connection with this Limited Warranty or the MoistureFree Warranty Authorization Certificate on the warranted home, and all such warranties are unconditionally excluded from this Limited Warranty.

To Apply For And Purchase A MoistureFree Warranty

Call 1-800-400-8679

For Claims Qualification Call: 704-896-0339

The MoistureFree Warranty is backed by Western Pacific Mutual Insurance Company, an A+ Best rated company.



MFW 3Yr. Ver. 7.15.03



0098

APP_0102

Dear Homeowner

Moisture problems related to EIFS (synthetic stucco) homes and hardcoat or traditional stucco have created serious concerns for these homeowners. The MoistureFree Warranty was designed to eliminate most of these concerns by providing a cost-effective way to protect homeowners from moisture related damage to their homes exterior. By combining the MoistureFree Warranty with a comprehensive moisture inspection of the home homeowners can be assured of having the information they need to prevent moisture from further damaging their home and a warranty to protect them in the case that moisture is located during the term of the warranty.

This booklet explains the MoistureFree Warranty in its entirety and we encourage you to take the time to **READ THIS INFORMATION CAREFULLY**.

This is not a warranty service contract, but a written Limited Warranty which specifically covers areas of your home directly related to your EIFS (synthetic stucco) or hardcoat stucco system. See "Definitions" section for clarification of these terms.

Please take time now to read this booklet. Familiarize yourself with the Warranty and its limitations. If you have specific questions about your stucco system after reading this information, contact your builder, stucco installer, repair contractor or moisture inspector first. If you have questions specifically about warranty including how to purchase a MoistureFree warranty, please call (704) 896-0339.

Table Of Contents

Section I—Definitions	3
Sections II—The Limited Warranty	4-7
Section III—Warranty Standards	8-12
Section IV—Requesting Warranty Performance	13-15

This Limited Warranty is administered by
Moisture Warranty Corporation
20306 North Main St
Cornelius, North Carolina 28031
704-896-0339



Section I - Definitions

- 1 **Administrator**—RWC Stucco Warranty Corporation (RWCSWC) is the administrator of this warranty. RWCSWC is neither Warrantor nor Insurer.
- 2 **Arbitrator**—A representative of the Academy of Conciliators or other independent arbitration service agreed upon by you, the Purchaser, and the Administrator to determine coverage on an Unresolved Warranty Issue.
- 3 **Consequential Damage**—All consequential damage including, but not limited to, damage to the Home that is caused by a warranted Defect but is not itself a warranted Defect and costs of shelter, transportation, food, moving, storage or other incidental expenses related to relocation during repairs.
- 4 **Defect**—A condition of any item warranted by this Limited Warranty which exceeds the allowable tolerances specified in this warranty. Specifically, any warranted area of the home's exterior cladding system which contains moisture equal to or in excess of 25%.
- 5 **Effective Date of Warranty**—The effective date is indicated on the MoistureFree Warranty Authorization Certificate. The effective date will be on or around the date of the original moisture inspection which qualified the home for a MoistureFree Warranty.
- 6 **EJES** exterior insulating and finishing system or synthetic stucco is a type of exterior cladding system that typically uses a rigid insulating board which is applied directly to the sheathing of the home and is covered with a base and finish coat which looks similar to traditional cement-type stucco.
- 7 **Hardcoat or traditional stucco**—A stucco system which typically uses a metal lath or mesh which is applied to the sheathing of the home and covered with a cement-type coating.
- 8 **Home**—The single family dwelling identified on the MoistureFree Authorization Certificate. The home may be a townhome, condominium or duplex.
- 9 **Limited Warranty**—The terms and conditions in this book including any applicable addenda.
- 10 **Purchaser**—You or perhaps someone else, such as a builder or contractor, who purchased this Limited Warranty on your behalf.
- 11 **MoistureFree Warranty Application Form**—This form is completed by either the inspector who tests the home for moisture, or by a representative of MoistureFree who uses the moisture inspector's information to complete the form.
- 12 **MoistureFree Warranty Authorization Certificate**—This certificate is proof of the home's warranty coverage and contains information about the specific limits of coverage for a particular home, if any.
- 13 **Moisture Inspection**—A moisture inspection of a home performed by a qualified individual using the MoistureFree Inspection Protocol which is used to assess the moisture content of the exterior framing and sheathing of a home.
- 14 **Moisture Location**—A location is any area equal to or less than 36" in diameter which contains a moisture reading which is equal to or in excess of 25%.
- 15 **Normal Maintenance**—Caulking, sealing, or painting which helps to prevent weather damage to exterior elements of the home.
- 16 **Unresolved Warranty Issues**—All requests for warranty performance, demands, disputes, controversies and differences that may arise between the parties to this Limited Warranty that cannot be resolved among the parties.

MoistureFree & Warranty

Section II The Limited Warranty

A Introduction to the Limited Warranty

- 1 This booklet provides specific details, conditions and limitations of the Limited Warranty including procedures for requesting warranty performance and for binding arbitration, in accordance with the procedures of the Federal Arbitration Act. Additional information can be received by calling RWCSWC at (717) 361 4480. Read this document in its entirety to understand the protection it affords, the exclusions applicable to it, the Warranty Standards which determine its interpretation and operation and your responsibilities.
- 2 This is NOT an insurance policy, a maintenance agreement or a service contract. It is an explanation of what you, the Purchaser can expect from this Limited Warranty.
- 3 You are responsible for the maintenance of your Home. General and preventative maintenance are required to prolong the life of your Home.
- 4 This Limited Warranty is AUTOMATICALLY TRANSFERRED to subsequent Owners during the term of this Limited Warranty.
- 5 This Limited Warranty is subject to changes required by various regulating bodies.

B Terms of Warranty

- 1 In the event of the failure of a sealant or flashing on the home's exterior, Warrantor will have a qualified repair contractor make repairs or modifications to the sealant or flashing as necessary to seal or flash the area from future failure.
- 2 Warrantor may also at its sole discretion choose to pay the homeowner to have repairs made to the extent of the warranty coverage. A sealant or flashing failure is defined as the inability of a sealant or flashing to adequately prevent excessive moisture from entering into or behind the exterior cladding of the home.
- 3 Excessive moisture is defined as any moisture reading equal to or above 25%, which is determined by using an electrical resistance-

type moisture meter.

- 4 Warrantor will be responsible only for the improvement of the sealant or flashing component, and is not responsible for any damage that may or may not have been present at or around the specific area of the sealant or flashing failure before the warranty was in effect.
- 5 All claims of failure are limited to \$500 per Moisture Location and up to 40 Moisture Locations per home with a maximum per policy limit of \$20,000 per year, or \$60,000, collectively over the full term of the limited warranty.
- 6 Warrantor reserves the right to make repairs or modifications to the area of failure based on standard industry practices and will have full discretion over the type of repair or modification that is to be made at the specific area that is determined to have high moisture behind the exterior cladding.

C Exclusions and Special Provisions

- 1 Areas of the home that are damaged while under warranty with the damage being caused by naturally occurring weather forces such as tornadoes, hurricanes, floods, winds in excess of 70 miles per hour or damage caused by abuse such as, but not limited to, pressure washing or automatic sprinkler over spray of the exterior cladding will not be repaired under this warranty.
- 2 Warrantor shall not be responsible for any failure that can be shown to be caused by the failure of the Homeowner after the Effective Date of the Warranty to perform normal maintenance.
- 3 This Limited Warranty shall be interpreted and enforced in accordance with the laws of the state in which the home is located.
- 4 If any provision of this Limited Warranty is determined by a court of competent jurisdiction to be unenforceable, that determination will not affect the validity of the remaining provisions.
- 5 If actions by the Warrantor on any obligations under this Limited Warranty are delayed by an event beyond its control, such performance will

Moisture Meter & Warranty

be excused until the delaying effects of the event are remedied. Such events include but are not limited to acts of God, acts of the common enemy, war, riot, civil commotion or sovereign conduct, or acts or omissions by you or any other person not a party of this Limited Warranty.

- 6 Under this Limited Warranty the Warrantor is not responsible for exact color, texture or finish matches in situations where materials are replaced or repaired, or for areas repainted or when original materials are discontinued.
- 7 This warranty specifically covers areas affected by high moisture behind the exterior cladding of the home, but DOES NOT cover damage caused by moisture in these areas, other than the repair or modification of the area to prevent moisture from continuing to damage the affected area.
- 8 This warranty does not provide coverage for structural defects. It does not provide coverage for moisture damage to windows, doors, interior elements of the home or any other area of the home not directly causing the failure of the exterior cladding system. For example, water damage to drywall, wallpaper, carpets, and floors, among other things, are not covered.
- 9 Window systems are commonly damaged by moisture and lack of maintenance, and this warranty DOES NOT cover damage to the window system.
- 10 This warranty DOES NOT cover in any way problems associated with, caused by, contributed to, or aggravated by mold, mildew or fungus and DOES NOT cover, in any way health related problems or conditions associated with, caused by, contributed to or aggravated by mold, mildew or fungus. This warranty specifically excludes bodily injury or property damage which would not have occurred in whole or in part, but for the actual, alleged, or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any fungi or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage. This warranty does not cover any loss, cost or ex-

penses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating, or disposing of or in any way responding to, or assessing the effects of, fungi or bacteria, by any insured or by any other person or entity.

- 11 This Limited Warranty does NOT cover moisture problems that are not related directly to the EIFS or stucco cladding. This includes moisture problems or damage caused by roof leaks, foundation leaks, at or below-grade framing, basement leaks, improper drainage, pest infestation, downspouts, gutters, or the failure of any flashing or sealed joint that is not in direct contact with the cladding system.
- 12 This warranty does NOT provide any coverage for repairs or modifications related to wood-destroying insects, such as termites and ants.

D Methods For Making Repair Claims

- 1 A qualified interim moisture inspection must be performed on the home. Unless an interim moisture inspection is specifically included in your Limited Warranty agreement, this test must be performed at the expense of the homeowner unless specifically stated otherwise.
- 2 If at the time of the moisture test, elevated moisture readings (in excess of 25%) are found at locations covered in the MoistureFree Warranty, Warrantor will make necessary repairs or modifications based on the terms of the Limited Warranty.

E Resolving Warranty Issues

- 1 Your request for warranty performance should be in writing to RWCSWC. Include name, warranty ID number, address, reasonably specific description of the warranty issue and, photo(s), if available.
- 2 Your request for warranty performance must be postmarked no later than 30 days after the expiration of the applicable warranty period.

MoistureFree Warranty

F Arbitration

- 1 If a request for warranty performance to the Warrantor does not result in satisfactory action within a reasonable time, written notice must be given to RWCSWC 5300 Denry Street, Harrisburg, Pennsylvania 17111 3598 Attn Warranty Resolution Department.
- 2 This notice should describe each deficiency in reasonable detail and should be forwarded by certified mail return receipt requested.
- 3 Please note that a written request for warranty performance must be postmarked no later than thirty (30) days after the expiration of the applicable warranty period.
- 4 Your notice to RWCSWC must contain the following information:
 - A. MoistureFree Warranty Authorization Certificate number and effective date of your warranty
 - B. Your name, address and phone number (including home and work numbers)
 - C. Reasonably specific description of the warranty item(s) to be reviewed
 - D. A copy of any previous written notice to RWCSWC
 - E. Photograph(s) may be required

G Conditions of Arbitration

- 1 You have an obligation to cooperate with RWCSWC's investigation of your warranty request.
- 2 From time to time, RWCSWC may request information from you regarding an alleged defect. Failure by you or your appointed representative to respond with the requested information within thirty (30) days of the date of RWCSWC's request can result in the closing of your warranty file.
- 3 When a request for warranty performance is filed and the deficiency cannot be observed under normal conditions, it is your responsibility to substantiate that the need for warranty performance exists, including any cost involved. If properly substantiated, you will be reimbursed by the Warrantor.
- 4 You begin the arbitration process by giving RWCSWC written notice of your request for arbitration of an unresolved warranty issue. Within twenty (20) days after RWCSWC's

receipt of your notice of request for arbitration any unresolved warranty issue that you have with the Warrantor shall be submitted to an independent arbitration service. This binding arbitration is governed by the procedures of the Federal Arbitration Act, 9 U.S.C. 1 et seq. If you submit a request for arbitration, you must pay the arbitration fees before the matter is submitted to the arbitration service.

- 5 After arbitration, the Arbitrator shall have the power to award the cost of this fee to any party or to split it among the parties to the arbitration.
- 6 The arbitration shall be conducted in accordance with this Limited Warranty and the arbitration service's rules and regulations to the extent that they are not in conflict with the Federal Arbitration Act. Within one (1) year after an arbitration award, either party may apply to the U.S. District Court where the Home is situated to confirm the award.
- 7 RWCSWC's receipt of a written request for arbitration in appropriate form shall stop the running of any statute of limitations applicable to the matter to be arbitrated until the Arbitrator renders a decision. The decision of the Arbitrator shall be final and binding upon all parties.
- 8 Since this Limited Warranty provides for mandatory binding arbitration of unresolved warranty issues, if any party commences litigation in violation of this Limited Warranty, such party shall reimburse the other parties to the litigation for their costs and expenses including attorney fees, incurred in seeking dismissal of such litigation.
- 9 The Warrantor shall have sixty (60) days from the date RWCSWC receives the Arbitrator's award to comply with the Arbitrator's decision.
- 10 Warranty compliance will begin as soon as possible and will be completed within the sixty day compliance period, with the exception of any repair that would reasonably take more than sixty (60) days to complete including, but not limited to, repair delayed or prolonged because of inclement weather.



- 11 The Warrantor will complete such repair or replacement as soon as possible without incurring overtime or weekend expenses.
- 12 You may request a compliance arbitration within twenty (20) days after the sixty-day compliance period has expired by giving RWCSWC written notice of your request. You must pay the fees for the compliance arbitration prior to the matter being submitted to the arbitration service.
- 13 You must provide the Warrantor or if applicable RWCSWC with reasonable weekday access during normal business hours in order to perform its obligations. Failure by you to provide such reasonable access to the Warrantor may relieve the Warrantor of its obligations under this Limited Warranty.



Section III Warranty Standards

The following Warranty Standards are applicable to warranted items stated in Section II of this Limited Warranty. Read Section II to determine if the following Warranty Standards apply.

<u>1. Stucco Systems</u>	<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
	1.1 Small cracks appear on the surface of the stucco.	No action required. Most stucco systems have incidental hairline cracks on the surface which rarely allow moisture penetration.	This is only considered a deficiency if the immediate areas around the cracks tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	1.2 Stucco appears wavy or uneven along the plane of a wall or accent.	Uneven application of the stucco system will not typically cause moisture penetration.	Uneven application may need to be repaired for aesthetic reasons, but is not covered under the Limited Warranty.
	1.3 Shirofoam-like insulation layer of the stucco system continues below the soil level.	All insulated stucco systems should terminate at least 4" to 6" above the soil line to prevent termites and other pests from entering into the wall system.	The Limited Warranty does not cover modifications to the home related to pest control.
	1.4 Stucco accents over doors, windows, and other areas are flat and deeper than 1.5" (at a 90 degree angle to the wall) and may collect water.	All flat accents deeper than 1.5" should be caulked to prevent moisture from penetrating the system through faults or cracks.	This is only considered a deficiency if the immediate areas around the accent test positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
<u>2. Caulking</u>	<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
	2.1 Caulking around doors, windows, vents, fixtures, utility breaches, hose bibbs, or any other breaches of stucco system, appears to be failing.	Caulking is a critical element in the upkeep of any home and requires regular maintenance by the homeowner. Any area where caulking appears to be failing should be repaired as soon as possible.	This is only considered a deficiency if the immediate areas around the caulking test positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	2.2 Caulking (glazing) on the glass of windows and doors appears to be failing.	Glazing caulk should be replaced anywhere it appears to be failing. The builder or door/window manufacturer's warranty may be applicable to this type of problem. Contact either the builder or the product manufacturer to check warranty status.	Windows and doors which have glass elements often experience failures with the glazing caulk. This failure is not applicable to this limited warranty. However the window or door manufacturer may have a warranty for such occurrences.
	2.3 No expansion joints (backer rod joints) are installed around doors, windows, or other breaches.	Recessed backer rod joints are now recommended by many stucco manufacturers at the time of original construction. However these types of joints should typically not be retrofitted on existing homes.	The limited warranty may apply to areas affected by the lack of or failure of a backer rod joint. However, installation of recessed backer rod joints is not required for warranty compliance.



2. Caulking (cont.)	Observation	Action Required	Comments
	2.4 Caulk on some areas of the home is fine, while other areas appear to be fading, peeling, cracking, or chipping.	Caulk has a variable service life depending on exposure, expansion, climate, and other factors. Homeowners should take steps to repair any areas of caulk that appear to be failing.	Caulking is a normal maintenance requirement for any home and a caulking deficiency is only warranted if the immediate areas around the failed caulk test positive for moisture equal to or greater than 25%, and no other source of the moisture can be determined.
3. Flashing Systems	Observation	Action Required	Comments
	3.1 Kickout flashings (rake flashings or diverter flashings) appear to be missing or failing.	All kickout flashings should be visually inspected from time to time in order to assure that they are unobstructed and functioning properly.	All stucco homes should have kickout flashings installed at appropriate locations. This limited warranty applies to failing kickout locations that have not been specifically excluded from the limited warranty.
	3.2 Flashing around decks, stairways, porches, chimneys, windows, or other attachments appears to be failing.	Severe weather may cause flashing to momentarily fail under extreme conditions. No action is typically required unless failure occurs more than occasionally or is extreme in nature.	Flashings that cannot be inspected upon visual observation are not applicable to this limited warranty.
	3.3 Head flashing above windows and doors is missing or failing.	If an area above or around a window or door is being damaged by the lack of, or improper function of, a head flashing, modifications should be made to correct the problem.	Areas around windows or doors that experience elevated levels of moisture are applicable to this limited warranty if they have not been specifically excluded and are within the terms of the warranty.
	3.4 The chimney chase is constructed of wood and does not appear to have a chimney cap or proper flashing.	Chimney chases attached to the side of a home commonly are missing kickout flashings which must be installed. Also a chimney cap which covers the entire chimney and continues down the edges 4" should be installed.	Only chimneys that are reasonably accessible to testing are applicable to this Limited Warranty. This is only considered a deficiency if the immediate area of the chimney tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	3.5 Stucco has been used to cover a flat area (wider than 15") over a wall, chimney top, canopy, or other area.	Stucco finishes are not designed to be used as roofing or flashing materials. These areas should be modified so that the stucco is protected from moisture.	Areas of the home that use stucco as a waterproofing system, roofing, or flashing system are not applicable to this Limited Warranty.
	3.6 Gutters are overflowing in some places and the downspouts leak on the stucco surface.	It is VERY important to keep gutters and downspouts clear of debris. Leaking or improperly installed gutters should be fixed to prevent any moisture from contacting the stucco surface.	Gutter systems can significantly contribute to moisture problems related to stucco systems and must be regularly maintained by the homeowner.

Moisture & Warranty

4 Window Systems	Observation	Action Required	Comments
	4.1 Windows appear to have rotted around sill, sash, jamb, or molding.	All windows with wood elements require proper maintenance, which includes periodic caulking and painting. Areas of extreme rot may need to be replaced.	Rotted wood is common in all types of wood windows and is not applicable to this warranty. Failures directly related to excess moisture around the windows are limited to modifications necessary to prevent moisture from penetrating into or behind the stucco system.
	4.2 Water is entering into the interior of the home through a faulty window.	Windows which do not close properly or have warped may need to be replaced in order to stop interior leakage.	This is only considered a deficiency if the immediate area around the exterior of the window tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	4.3 Wooden double or single-hung windows (with or without vinyl or metal cladding) appear to be staining in the corners or are missing caulk.	All double- or single-hung windows need to be caulked at the lower joints of the sill and the jamb. Removal of the sash track may be necessary in order to assure a complete seal of the joint. Further modification may be necessary if the joint cannot be adequately sealed, including window parts or window replacement.	This is considered a deficiency only if the immediate area around the exterior of the window tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined. Areas specifically identified in the MoistureFree Warranty Authorization Certificate will not apply to this Limited Warranty.
	4.4 Windows within doors (piano doors, French doors, sliding doors, etc.) appear to have gaps between the glass and the wood or metal.	Glazing and caulking are common maintenance issues in any window or door. Homeowners should make periodic checks of these areas to assure that the caulking, or glazing is adequate.	Glazing and caulking of the window construction may be warranted by the window or door manufacturer. This is considered a deficiency only if the immediate area around the exterior of the door or window tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	4.5 The glass within the window is cloudy and appears to have moisture trapped between the panes.	Leaks or cracks in the thermal seal of a window allow moisture to get trapped between the glass panes. The window must be replaced to correct the problem.	Broken or leaking window seals are not problems related to the stucco system and are not applicable to this Limited Warranty.

<u>5 Other Areas</u>	<u>Observation</u>	<u>Action Required</u>	<u>Comments</u>
	5.1 The exterior stucco cladding has experienced impact damage.	Most impact damage to the stucco system is superficial and requires aesthetic repair only.	This is considered a deficiency only if the immediate area around the damaged stucco tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
	5.2 Ivy or other vine-type plants have attached to the stucco cladding.	All landscaping should be planted or trimmed back at least 12" from the exterior in order to prevent damage to the stucco and to allow for adequate inspection.	This is not a warranted defect. Areas that can not be effectively tested due to landscaping may be excluded from this Limited Warranty.
	5.3 Moss, mold, or algae have discolored the surface of the stucco.	Northern and southern exposures of homes typically have discoloration due to algae growth. This rarely affects the condition of the stucco, and the algae can be removed using approved cleaners. NEVER USE A HIGH PRESSURE WASHER ON THE SURFACE OF STUCCO.	This is not a warranted defect. Algae growth on walls is common and often mistaken to be associated with interior moisture in the walls.
	5.4 The automatic sprinkler system is overspraying onto the home.	Sprinkler heads should be adjusted or changed to ensure that water does not hit the surface of the home.	This is not a warranted defect and may void this Limited Warranty if found to be the cause of moisture in otherwise warranted areas of the home.
	5.5 Interior leaks are occurring around or directly below the chimney area.	Chimneys should be covered with a chimney cap which covers the entire horizontal exposure of the top of the chimney and extends down each side at least 4". Flashing around the chimney at the roof line should also be checked for proper function.	This is not a warranted defect. Stucco should not be used as a roofing or flashing substitute. If possible, check with the original builder to request repair or modifications, or with the builder's insurance company.
	5.6 Small rust-colored spots and streaks appear on the surface of the stucco.	Typically these rust-colored spots and streaks are caused by iron fragments in the finish coat of the stucco. No action is required, but removal of the iron fragments at the surface will often solve the problem.	Discoloration in the stucco is an aesthetic issue and is not a warranted defect.
	5.7 Loose, chipping paint on the surface of the stucco.	The finish coat of the stucco has most likely been painted. Once the stucco home has been painted, it will need to be maintained and repainted to maintain the appearance.	Aging and failure of paint are typically not related to interior wall moisture and therefore are not applicable to this Limited Warranty.



5 Order Areas (cont.)	Observation	Action Required	Comments
5.8 Where chalky or yellowish deposits or stains are found on the stucco finish.		These areas, referred to as efflorescence, can be cleaned using special cleaners designed for this problem. The source of the stain should be sealed to prevent damage to the finish and base coat of the stucco system.	Efflorescence often occurs under decks, stairs, or other attachments to the home. It is not related to interior wall moisture and is not applicable to this Limited Warranty.
5.9 Shutters are attached through the stucco and do not appear to be sealed.		Shutter attachments that leave a hole should be removed and caulked to reduce the chance of leakage. Snap-on shutter brackets are preferable and reduce the chance of future problems.	This is considered a deficiency only if the immediate area around the shutter tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
5.10 Dead valleys or roof-end-wall intersections where the roof is angled down toward a wall or a corner which does not appear to drain properly.		Roof-end-wall intersections which do not allow proper drainage should be modified in order to create a slope that allows drainage. All flashing should extend 6" to 14" up the wall and run to the end of roof/wall edge and be properly flashed.	Poor roof/wall intersection details can contribute to leaks in the interior of the home, but are not typically related to the stucco cladding and are not applicable to this Limited Warranty.
5.11 Deck, stairs, railings, or other attachments appear to penetrate the stucco and are not sealed.		Seals on attachments to the home can expose openings in the stucco which must be sealed with an appropriate flexible caulk. Attachments to the home can loosen over time and should be secured to prevent movement.	This is considered a deficiency only if the immediate area around the attachment tests positive for moisture equal to or greater than 25% and no other source of the moisture can be determined.
5.12 Below-grade framing has been covered by landscaping or backfill and may be allowing moisture penetration into the wall.		Below-grade framing should be appropriately waterproofed and may require the removal of the exterior soil to allow proper treatment.	Moisture intrusion related to below-grade framing cannot be visually confirmed in most cases and is typically not related to the stucco cladding. Repairs related to below-grade framing are not applicable to this Limited Warranty.
5.13 Patios, stairs, planters, flower boxes, or other attachments may have stucco between the foundation or framing and the attachment.		If the stucco was applied to the home before the exterior attachments, there is a possibility that the stucco is trapped between the home and the attachment. If the stucco system includes an insulation board component, moisture or pest problems may occur in this area. Further destructive inspection of the area may be required.	The inspection protocol required for this Limited Warranty does not include any type of destructive testing and therefore cannot comment on areas that cannot be tested or observed. Unobserved areas or areas that are impossible to inspect are excluded from this Limited Warranty.

Section IV Requesting Warranty Performance

A. Notice To Warrantor

If a warranted defect occurs, you must notify the Administrator to review the item. All such notices must be presented in writing to RWCSWC, Administrator 5300 Derry Street, Harrisburg, Pennsylvania 17111 3598 Attn: MoistureFree Warranty Resolution Department, by certified mail, return receipt requested, within a reasonable time after the situation arises. Requests for warranty performance postmarked more than thirty days after the expiration of the term of this Limited Warranty will not be honored.

B. Purchaser's Obligations

- 1 Your notice to the Administrator must include the following items:
 - a MoistureFree Authorization Certificate number and the Effective Date Of Warranty
 - b Your name, address, and phone number (include home and work numbers)
 - c Reasonably specific description of the warranty item(s) to be reviewed
 - d Photograph(s) may be required
2. You have an obligation to cooperate with the Administrator's mediation, inspection, and investigation of your warranty request. From time to time, the Administrator may request information from you regarding an alleged defect. Failure by you or your appointed representative to respond to the requested information within thirty (30) days of the date of the Administrator's request can result in the closing of your warranty file.

C. Mediation and Inspection

Within thirty (30) days following the Administrator's receipt of proper notice of request for warranty performance, the Administrator may review and mediate your request by communicating with you, and any other individuals or entities who the Administrator believes possesses relevant information. If, after thirty (30) days, the Administrator has not been able to successfully mediate your request, the Administrator will notify you that your request has become an Unresolved Warranty Issue. At any time following the receipt of proper notice of your request for warranty performance, the Administrator may schedule an inspection of the item. You must provide the Administrator reasonable access for any such inspection. When a request for warranty performance is filed and the deficiency cannot be observed under normal conditions, it is your responsibility to substantiate that the need for warranty performance exists including any costs involved. If properly substantiated, you will be reimbursed by the Administrator.

D. Arbitration

- 1 You begin the arbitration process by giving the Administrator written notice of your request for arbitration of an Unresolved Warranty Issue. Within twenty (20) days after the Administrator's receipt of your notice of request for arbitration, any Unresolved Warranty Issue that you have with the Warrantor shall be submitted to the National Academy of Conciliators or another independent arbitration service upon which you and the Administrator agree. The BINDING arbitration is governed by the procedures of the Federal Arbitration Act, 9 U.S.C. 1 et. seq. If you submit a request for arbitration, you must pay the arbitration fees before the matter is submitted to the arbitration service. After arbitration, the Arbitrator shall have the power to award the cost of this fee to any party or split it among the parties to the arbitration. The arbitration

shall be conducted in accordance with this Limited Warranty and the arbitration rules and regulations to the extent that they are not in conflict with any Federal Arbitration Act. Within one (1) year after an arbitration award, either party may apply to the U.S. District Court where the Home is situated to confirm the award. The Administrator's receipt of written request for arbitration in appropriate form shall stop the running of any statute of limitations applicable to the matter to be arbitrated until the Arbitrator renders a decision. The decision of the Arbitrator shall be final and binding on all parties. Since the Limited Warranty provides for mandatory binding arbitration of Unresolved Warranty Issues, if any party commences litigation in violation of this Limited Warranty, such party shall reimburse the other parties to the litigation for their costs and expenses, including attorney fees, incurred in seeking dismissal of such litigation.

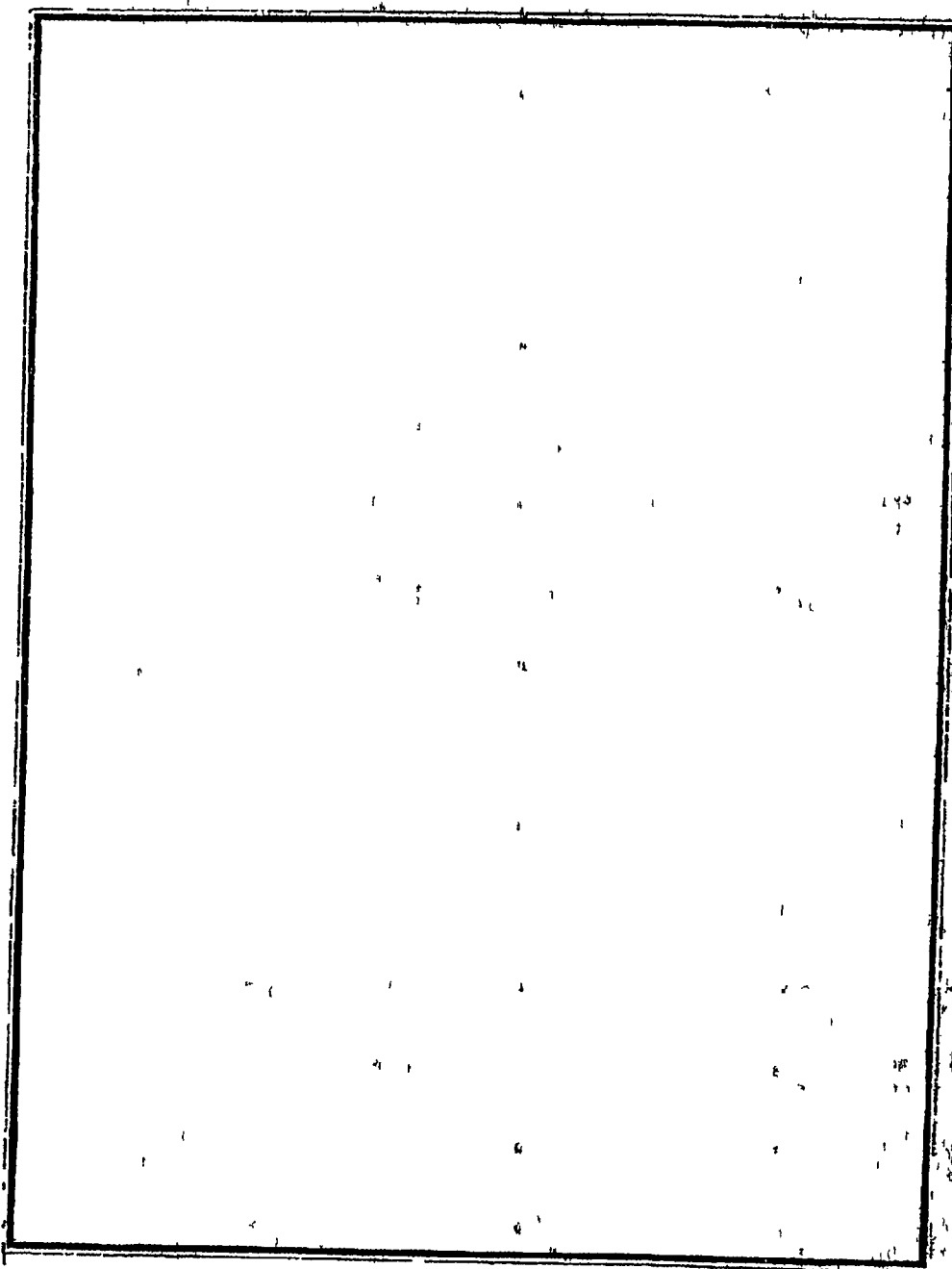
2. The Warrantor shall have sixty (60) days from the date the Administrator receives the arbitrator's award to comply with the Arbitrator's decision. Warranty compliance will begin as soon as possible and will be completed within the sixty-day compliance period with the exception of any repair that would reasonably take more than sixty (60) days to complete, including but not limited to repair delayed or prolonged by inclement weather. The Warrantor will complete such repair or replacement as soon as possible without incurring overtime or weekend expenses. You may request a compliance arbitration within twenty (20) days after the sixty-day compliance period has expired by giving the Administrator written notice of your request. You must pay fees for the compliance arbitration prior to the matter being submitted to the arbitration service.
3. You must provide the Warrantor with reasonable weekday access during normal business hours in order to perform its obligations. Failure by you to provide such access to the Warrantor may relieve the Warrantor of its obligations under the terms of this Limited Warranty.

E. Conditions of Warranty Performance

1. When your request for warranty performance is determined to be a warranted issue, the Warrantor reserves the right to repair or replace the warranted item, or to pay you the reasonable cost of repair or replacement up to the limits of the warranty.
2. If the Warrantor pays the reasonable cost of repairing a warranted item, the payment shall be made to you and to any mortgage or mortgage's successor as each of your interests may appear, provided that the mortgagee has notified the Administrator in writing of its security interest in the Home prior to such payment. Warrantor shall not have any obligation to make payment jointly to the Purchaser and the mortgagee where the mortgagee has not notified the Administrator in writing of its security interest in the Home prior to such payment. Any mortgagee shall be completely bound by any mediation or arbitration relating to a request for warranty performance between you and the Warrantor.
3. Prior to payment for the reasonable cost of repairs or replacement of warranted items, you must sign and deliver to the Administrator a full and unconditional release, in recordable form, of all legal obligations with respect to the warranted Defect and any condition arising from the warranted item.
4. The repaired or replaced warranted item will continue to be warranted by this Limited Warranty for the remainder of the applicable period of coverage.
5. If the Warrantor repairs, replaces or pays you the reasonable cost to repair or replace a warranted item, the Warrantor shall be subrogated to all your rights of recovery against any person or entity. You must execute and deliver any and all instruments and papers and take any and all other actions to secure such rights, including but not limited to assignment of proceeds of any other insurance or other warranties to the Warrantor.
6. Any Warrantor obligation is conditioned upon your proper maintenance of the Home, common elements and grounds to prevent damage.

due to neglect, abnormal use, or improper maintenance.

- 7 If request for performance under this Limited Warranty involves a common element in a condominium, the request must be made by an authorized representative of the condominium association.
- 8 If the request for warranty performance under the Limited Warranty involves a common element affecting multiple units, and all affected units are not warranted by the MoistureFree Warranty the Insurer's liability will be limited to only those units warranted by the MoistureFree Warranty. The limit of liability shall be prorated based upon the number of units warranted by this Limited Warranty.



16



0113

APP_0117

Exhibit C

0114

APP_0118

RUSSELL & JEFFCOAT REALTORS INCORPORATED

ADDENDUM
 CONTRACT DATED 3 OCTOBER 2004
 BETWEEN SELLER GILSEPER + VICTORIA MAOLI
 AND PURCHASER FRED + MALHE BALAE
 IN REFERENCE TO (PROPERTY ADDRESS) 133 BEAVER DAM ROAD

SELLER TO GIVE CREDIT OF
 \$ 110,000 TO PURCHASER
 FOR STUCCO REPAIRS
 OR REPLACEMENT AT
 CLOSING

WITNESS

WITNESS

WITNESS

WITNESS

SELLER

SELLER

PURCHASER

PURCHASER



Russell & Jeffcoat Co.

0115

APP_0119

CERTIFICATE OF SERVICE

I the undersigned Administrative Assistant of the law offices of Nelson Mullins Raley & Scarborough LLP, attorneys for Defendant Moisture Warranty Corporation d/b/a Moisture Free Warranty do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es)

Pleadings:

Moisture Warranty Corporation's Memorandum
Support of its Motion for Judgment Notwithstanding the
Verdict for a New Trial Absolute, and for a New Trial Nisi
Remittitur

Counsel Served

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Lisa Whitehurst
Administrative Assistant

January 20, 2009

0116

APP_0120

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

Fariborz Z. Babae and
Malihe Babae,

Plaintiffs,

vs

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and
Preferred Home Inspections Inc.,

Defendants

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 06-CP-40-7215

Plaintiffs Reply
to Defendant Moisture Warranty Corp.'s
Post-Trial Motions

RICHLAND COUNTY
FILED
2009 JAN 23 PM 3:53
JEANETTE W. McBRIDE
Clerk of Court

Plaintiffs Fariborz Z. Babae and Malihe Babae (hereinafter referred to collectively as the Plaintiffs or the Babaees) ask this Court to deny Defendant Moisture Warranty Corporation d/b/a Moisture Free Warranty (hereinafter 'Defendant' or "Moisture Free Warranty") post-trial motions.

As an initial matter, Plaintiffs would ask that this Court reject the Defendant's erroneous contention that SCRCP Form 4 Order filed on November 21, 2008 setting forth the Jury's verdict in this matter is rendered "premature" because the Court granted the Defendant ten (10) days to file its post-trial motions pursuant to Rule 59, SCRCP. It is axiomatic that a trial court may not 'continue' or postpone the entry of a judgment pending the outcome of a post-trial motion. See Norris v. Heyward, 312 S.C. 67, 439 S.E.2d 264, 265 (1993) (recognizing that an appropriate post-trial motion is the only procedure for amending a judgment as the South Carolina Rules of Civil Procedure do not set for a procedure for "continuing" a judgment.") Additionally, the prompt entry of a judgment after a jury renders its verdict by the appropriate clerk of court is required by Rule 58 of the South Carolina Rules of Civil Procedure and is entirely appropriate under the circumstances.

Page 1 of 7

0117

APP_0121

set forth in this action See Rule 58(a), SCRCP (“upon a general verdict of a jury , the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court ”) The swift entry of a judgment is required as post-judgement interest begins to accrue upon the rendition of a verdict pursuant to S C Code § 34-31-20 (2008) See also, Hunting v Elders, 359 S C 217, 229, 597 S E 2d 803, 809 (Ct App 2004) As for Defendants remaining arguments in support of its post-trial motion, Plaintiffs will address them in the order raised in Defendants supporting memorandum

I) Defendant Moves for a JNOV Because it Offered Evidence it Did Not Breach its Warranty, but the Plaintiffs did

The Defendant s motion should be denied as it failed to raise these grounds at trial in a proper motion for a directed verdict as required by Rule 50, SCRCP Additionally, the Defendants motion should be denied as it asks this Court to second guess the general verdict rendered by the jury

“When ruling on directed verdict or JNOV motions, the evidence must be viewed in the light most favorable to the non moving party ” Jackson v Speed, 326 S C 289, 304, 486 S E 2d 750 757 (1997) The touchstone of the court s review is the existence of evidence to support the jury s verdict,” rather than any analysis of the weight accorded that evidence Connelly v Wometco Enterprises, Inc., 314 S C 188, 442 S E 2d 204, 206 (Ct App 1994), see also Black v Hodge, 306 S C 196, 410 S E 2d 595 (Ct App 1992) (finding that a jury may even disregard uncontradicted testimony in rendering its verdict as it is free to question the inherent credibility of that testimony) The Rule 50 standard of review does not allow a court to ignore the evidence presented at trial that both explicitly and implicitly supports a jury verdict see Hilton Head Island v Skull Creek Club, 287 S C 530, 532, 339 S E 2d 890, 891 (Ct App 1986), yet the Defendant asks the Court to do just

that when it argues it is entitled to a directed verdict because it offered evidence that only the Plaintiffs breached the warranty. To reach such a conclusion, this Court would have to disregard the explicit testimony of Plaintiff Farborz Babae and that of his expert Bill Flaherty regarding the Defendant's breach of its warranty and the inferences that could be drawn from that testimony.

II & III) Defendant Moves for a New Trial *Nisi Remittitur* or Absolute Because the Verdict is Excessive and/or Exceeds the Maximum Amount Payable Under the Warranty

The Defendant's motion should be denied as the verdict is neither excessive nor limited by any agreement of the parties. There must be "compelling evidence" for a trial court to invade the province of the jury and substitute its judgment for that of a jury by granting a new trial *nisi*. Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 724 (Ct. App. 1996). In this case, there is neither compelling evidentiary grounds nor a valid legal rationale for reducing the jury's verdict.

Plaintiffs offered evidence from expert Chris Cooper that the cost of repairing the Babaees' home and making it 'dry' would exceed \$200,000.00. Additionally, Plaintiff Fred Babae offered testimony regarding a similar amount of diminution in the value of the home due to the damage caused by the Defendant's breach of its warranty. The Defendant did not challenge these alternative damage figures by offering evidence of a cost of a similar repair or disputing the diminution of value. Instead, Defendant merely argued what amounts it believed were owed under its warranty. Given the evidence in the record, there can be no argument that the jury's award of \$140,000.00 is excessive."

Additionally, the Defendant's request that the Court reduce the Jury's verdict to \$60,000.00 lacks a valid legal basis for making such a modification. Defendant proposed, and the Court submitted, a general verdict form to the jury. No question was put to the jury regarding the existence

of a contract between the parties, and what terms the contract contained. The jury was merely asked to find whether there was a breach of the parties agreement and what amount of damages the Plaintiffs sustained. During the trial of the matter, the parties contested what documents constituted the parties' "agreement" so it is improper for the Defendant to now ask this Court to impose a limitation on the verdict based on the contested terms of that agreement. It is improper for a court to speculate regarding the make-up of the damages contained within a jury's general verdict. Moore v Moore, 360 S C 241, 599 S E 2d 467 (Ct App 2004). Although the finder of fact must determine damages with reasonable certainty, mathematical certainty is not required. Id., see also Yadkin Brick Co v Materials Recovery Co., 339 S C 640 646 529 S E 2d 764, 767 (Ct App 2000) and Whisenant v James Island Corp., 277 S C 10, 281 S E 2d 794 (1981).

Furthermore, the Defendant failed to ask the jury to decide whether there were any limitations on the damages that could be awarded for breaching its warranty. Although South Carolina law allows for the recovery of consequential damages in breach of warranty cases those damages may be limited under certain circumstances. S C Code §36-2-719 (2008). However, such limitations are not absolute. In Bishop Logging Co v John Deere Industrial Equipment, Co., the Court of Appeals held that the defendant equipment manufacturer's attempt to disclaim consequential damages arising from a breach of the manufacturer's express warranty was ineffective because the equipment at issue failed as its "essential purpose." 317 S C 520, 531, 455 S E 2d 183, 190 (Ct. App 1995). In the instant action, the same argument could be made regarding the failure of the Moisture Free Warranty to address moisture damage through its warranty program that promised a "dry" house.

IV & V) Defendants Moves for a New Trial on the Grounds that Evidence of an Alleged “Set Off” was Excluded at Trial

Defendant’s motion for a new trial should be denied because it is premised on faulty legal presumption that Moisture Free Warranty is entitled to a set off for a reduction in the price the Plaintiffs paid for their home

In the trial of this matter, the Court excluded a document prepared by the seller’s real estate agent that claimed the “seller” would give a \$110,000 ‘ credit’ for ‘stucco repair or replacement’ to the Plaintiffs at closing. Plaintiffs contested the accuracy of that representation, denied that the \$110,000 price reduction was related to stucco, and argued it would be more prejudicial that probative to allow that document into evidence given that the Defendant would, as it is doing with this motion, improperly argue that it was entitled to a reduction in its liability based on the price the Plaintiffs paid for their home. Although the Court excluded the document, it allowed other evidence regarding the negotiations and price reductions between the Plaintiffs and Sellers as well as testimony regarding the reasons for the reduction. In fact, the Defendant’s lawyer raised the contents of the excluded document to the jury during his closing statement.

A set-off is a [c]ounterclaim demand which defendant holds against plaintiff. Black’s Law Dictionary (6th Ed.) at p. 1372. It is a mechanism whereby a party’s liability can be reduced or offset by other extrinsic obligations that exist amongst the parties to a lawsuit. A set-off is not available from a source that is wholly independent of the wrong doer. See Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 604 S.E.2d 385 (2004) (employed the collateral source rule to find that a termite company could not seek a set off of its liability to a homeowner based on a settlement the homeowners reached with another termite company for the same damage because the

homeowners had an "independent unrelated" contract with the other termite company) Assuming *arguendo* that the Plaintiffs' agreement to purchase the subject home was influenced by the presence of defective stucco on its exterior, Moisture Free Warranty was not a party to the purchase agreement and therefore is barred from seeking a set-off by the Collateral Source Rule

VI & VII) Defendant Moves for a New Trial Because of the Exclusion of Evidence Regarding an Arbitration Provision in its Warranty

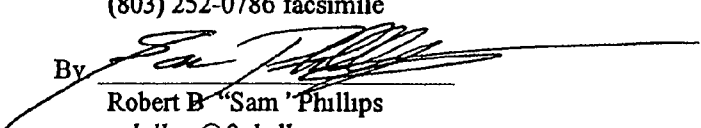
Defendant seeks a new trial because evidence of an arbitration provision was excluded at trial. Shortly after the filing of the instant action, Defendant moved to compel arbitration. Its motion was denied and was not appealed. Thereafter, the parties engaged in extensive discovery that comprised of, *inter alia*, more than 5 inspections of the home, more than eight depositions, several subpoenas, and extensive exchanges of documents. At trial, the Defendant tried to reassert its right to arbitration.

It is axiomatic that a party waives its right to arbitration by engaging in prolonged litigation. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999). In this matter, the Defendant had the right to appeal the denial of his motion to compel arbitration, S.C. Code § 15-48-200 (2008), but failed to do so. Thereafter, the Defendant engaged in approximately two (2) years of extensive and expensive litigation. He can not then assert his right to arbitrate at the trial of the matter.

For the foregoing reasons, Plaintiffs ask that Moisture Free Warranty's Post-Trial Motion be DENIED.

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By


Robert B. "Sam" Phillips
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Columbia, South Carolina
January 21, 2009

Page 7 of 7

0123

APP_0127

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

MAR 05 2009

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

Doyet A Early, III, Circuit Court Judge

Case No 2006-CP-40 7215

Fariborz Z Babae and Malihe Babae,

Appellants,

v

Moisture Warranty Corporation d/b/a Moisture Free Warranty, and
Preferred Home Inspections Inc

Defendants,

Of Whom Moisture Warranty Corporation d/b/a Moisture Free
Warranty is

Respondent

NOTICE OF APPEAL

Fariborz Z Babae and Malihe Babae (hereinafter "Appellants") appeal the Order of the Honorable Doyet A Early III dated February 16 2009 The Judgment appears to have been entered on February 25, 2009 Appellant's counsel received a copy of the Judgment on February 27, 2009



Robert B Phillips
Finkel Law Firm LLC
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, South Carolina 29202
(803) 765 2935
Attorneys for Appellants

Columbia, South Carolina
March 2, 2009

0124

APP_0128

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

Case No. 2006-CP-40 7215

RECEIVED

MAR 05 2009

SC Court of Appeals

Farborz Z. Babae and Malihe Babae

Appellants,

v

Moisture Warranty Corporation d/b/a Moisture Free Warranty, and
Preferred Home Inspections, Inc.,

Defendants

Of Whom Moisture Warranty Corporation d/b/a Moisture Free
Warranty is

Respondent

PROOF OF SERVICE

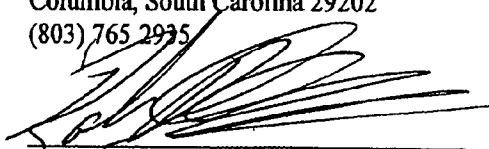
I certify that I have served the Notice of Appeal on the Respondent by depositing a copy of it in the United States Mail, postage prepaid on September 5, 2008, addressed to its attorney of record as follows:

Charles G. Blackburn, Esquire
Anthony W. Livoti, Esquire
Murphy & Grantland P.A.
P.O. Box 6648
Columbia, SC 29260

Charles Mitchell Brown, Esquire
Allen Mattison Bogan
Nelson Mullins Riley & Scarborough
Meridian, 17th Floor
1320 Main Street
Columbia, SC 29201

FINKEL LAW FIRM
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, South Carolina 29202
(803) 765-2935

By


Robert B. Phillips, Esquire
Attorneys for Appellants

Columbia, South Carolina
March 2, 2009

0125

APP_0129

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO 2006CP4007215

Fariborz Z Babae

vs

Moisture Warranty Corporation

Plaintiff

Defendant

CHECK ONE

- ☐ JURY VERDICT This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT This action came to trial or hearing before the court. The issues have been tried and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON) ☐ Rule 12(b) SCRCP, ☐ Rule 41 SCRCP (Vol Nonsuit) ☐ Rule 43(k) SCRCP (Settled) ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON) ☐ Rule 40(j) SCRCP ☐ Bankruptcy
- ☐ Binding arbitration subject to right to restore to confirm, vacate or modify arbitration award
- ☐ Other _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)☐ Affirmed, ☐ Reversed, ☐ Remanded ☐ Other

NOTE ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IT IS ORDERED AND ADJUDGED

☒ See attached order☐ Statement of Judgment by the Court

Dated at Columbia, South Carolina, this _____ day of _____, 2009

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2009 and a copy mailed first class this _____ day of _____, 2009, to attorneys of record or to parties (when appearing pro se) as follows

Charles A. Krawczyk

ATTORNEY(S) FOR THE PLAINTIFF(S)

Charles Grant Blackburn, Anthony W Livoti
Charles Mitchell Brown Allen Mattison Bogan

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W McBride

Clerk of Court

SCRCP APP 24/FORM 4

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Fariborz Z Babae and Malihe Babae,)

Civil Action No 2006-CP-40 7215

Plantiffs,)

vs)

Moisture Warranty Corporation d/b/a)
Moisture Free Warranty, and Preferred)
Home Inspections, Inc ,)

Defendants)

**ORDER GRANTING MOISTURE
WARRANTY CORPORATION'S
MOTION FOR A NEW TRIAL *NI SI*
REMITTITUR**

RICHLAND COUNTY
FILED
2009 FEB 9 39
JEANE C. MCBRIDE

On November 26, 2008, Defendant Moisture Warranty Corporation d/b/a Moisture Free Warranty ('Moisture Warranty Corporation') moved this Court pursuant to Rules 50, 59, and all other applicable rules of the South Carolina Rules of Civil Procedure for judgment notwithstanding the verdict, for a new trial absolute, and failing the above, new trial *ni si remittitur* As outlined below, Moisture Warranty Corporation s motion for a new trial *ni si remittitur* is granted

SUMMARY

A hearing on the motions was held on Wednesday, January 21, 2009 Having considered each and every ground set forth in Moisture Warranty Corporation's motions, memoranda in support thereof, and the arguments submitted in support of the motions at the hearing before this Court, Moisture Warranty Corporation s motion for a new trial *ni si remittitur* is granted and the verdict is reduced as outlined herein However, Moisture Warranty Corporation's motion for judgment notwithstanding the verdict and motion for new trial absolute are denied

BACKGROUND

nAc

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) On November 29, 2004, in connection with the purchase of their home, Plaintiffs were issued a 3 year limited warranty by Moisture Warranty Corporation. The limited warranty was subject to several Terms and Conditions that were detailed in the warranty provided to the Plaintiffs. The Plaintiffs were aware of the warranty as early as August 28, 2004, as it was provided to them when they signed the contract for the purchase of their home.

) On December 8, 2006, Plaintiffs filed suit alleging various causes of action against Moisture Warranty Corporation, including but not limited to fraud, negligence, negligent misrepresentation, and violations of the South Carolina Unfair Trade Practices Act, related to the allegation that Plaintiffs' home was not moisture free. At the heart of the dispute, Plaintiffs claimed that Moisture Warranty Corporation failed to perform under the terms of the parties' agreement. This Court granted Moisture Warranty Corporation judgment on every claim except for Plaintiffs' breach of warranty claim. The breach of warranty claim proceeded to trial and on November 20, 2008, a jury returned a verdict in the amount of \$140,000 in favor of Plaintiffs. On November 26, 2008, Moisture Warranty Corporation timely filed its post-trial

LEGAL DISCUSSION

I Judgment Notwithstanding the Verdict (JNOV)

Moisture Warranty Corporation moved this Court for a judgment notwithstanding the verdict. Having considered each and every ground set forth in support of Moisture Warranty Corporation's JNOV motion, this Court denies that motion.

II New Trial Absolute

DAE
/

Moisture Warranty Corporation moved this Court for a new trial absolute. Having considered each and every ground set forth in support of Moisture Warranty Corporation's motion for a new trial absolute, this Court denies that motion.

III New Trial *Nisi Remittitur*

Moisture Warranty Corporation also moved this Court for a new trial *nisi remittitur*. Having considered each and every ground set forth in support of Moisture Warranty Corporation's motion for new trial *nisi remittitur*, this Court grants that motion and finds that the verdict in this case must be reduced.

In South Carolina, this Court *alone* has the power to grant a new trial *nisi* when it finds the amount of the verdict to be merely excessive. Easler v Hejaz Temple, 285 S C 348, 329 S E 2d 753 (1985) (emphasis original). Further, this Court has wide discretionary power to reduce the amount of a verdict which is excessive. Johnson v Life Insurance Company of Georgia, 227 S C 351, 88 S E 2d 260, 270 (1955).

A verdict is deemed to be excessive when it indicates undue liberality on the part of the jury. " Gray v Davis, 247 S C 536, 148 S E 2d 682 (1966). In considering a motion for new trial *nisi*, this Court must evaluate the adequacy of the verdict in light of the evidence presented. Becker v Wal-Mart Stores, Inc., 339 S C 629, 529 S E 2d 758 (Ct App 2000). Accordingly, when a verdict indicates an undue liberality on the part of the jury in light of the evidence presented, this Court has the power to reduce the verdict to an amount that reflects the evidence presented. See Becker v Wal-Mart Stores, Inc., 339 S C 629, 526 S E 2d 758 (S C Ct App 2000) (affirming the trial court's decision to remit the verdict based on the finding that the verdict was excessive. Orangeburg Sausage

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0129

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Co v Cincinnati Ins Co, 316 S C 331, 450 S E 2d 66 (Ct App 1994) (reducing a jury verdict to actual damages proven)

In this case, after reviewing the evidence, this Court finds that the verdict is "merely excessive" and that the verdict does not bear a reasonable relationship to the injuries sustained by Plaintiffs. First, this Court finds that the total verdict awarded is in excess of any actual damages recoverable under the express terms of the warranty. Pursuant to the express terms of the limited warranty, Warrantor's [Moisture Warranty Corporation] total aggregate liability of this Limited Warranty is limited to \$20,000 per year and \$60,000 over the full term of the warranty. Thus, the \$140,000 awarded is not reasonably related to the evidence presented to the jury regarding the terms of the warranty. Second, Plaintiff's expert, Chris Cooper, testified regarding costs wholly unrelated and not covered by the warranty, including but not limited to replacing the stucco exterior on parts of the home. As a result, this Court finds that Mr. Cooper's numbers were based on speculation and matters that were not consistent with the coverage provided under the express terms of the warranty.

Under these circumstances, a reduction of the verdict is warranted. As was shown at trial, the Plaintiffs made one claim under the warranty in early 2006. No other claims were submitted under the warranty. Hence, Moisture Warranty Corporation's request to reduce is granted and the verdict is hereby reduced to \$20,000, or one year of the maximum coverage under the express terms of the warranty.

CONCLUSION

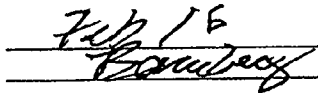
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4

Accordingly, the jury's verdict in this case must be reduced THEREFORE, IT IS
HEREBY ORDERED, ADJUDGED, AND DECREED that the verdict in this action is
reduced from \$140,000 to \$20,000 Should Plaintiffs decline to accept the amount of the
verdict as reduced, a new trial is ordered See Hutson v Cummins Carolina, Inc 280
S C 552, 314 S E 2d 19 (Ct App 1984) (demonstrating that the trial court must offer the
option of a new trial *nisi* when the court remits a verdict) Plaintiffs shall indicate
whether they accept the reduced award within 10 (ten) days of the date of this order

IT IS SO ORDERED


The Honorable Doyet A. Early, III
South Carolina Circuit Judge

 2009
South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A Early III, Circuit Court Judge

Case No 2006-CP-40-7215

Fariborz Z Babae and Malihe Babae, Appellants/Respondents,

v

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and Preferred
Home Inspections, Inc Defendants,

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is Respondent/Appellant

AMENDED NOTICE OF CROSS-APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Moisture Warranty Corporation d/b/a Moisture Free Warranty ("Moisture Warranty") hereby cross-appeals the order of the Honorable Doyet A Early III dated February 16 2009 and entered February 25 2009 and any judgment arising therefrom Judge Early s order is attached as Exhibit A Respondent/Appellant received written notice of entry of the Order on February 27 2009

Respondent/Appellant received Appellant/Respondent s Notice of Appeal March 10 2009, and this notice of cross appeal is timely filed in accordance with Rules 203(c) and 234(a) of the South Carolina Appellate Court Rules

Signature Page Attached

0132

APP_0136

NELSON MULLINS RILEY & SCARBOROUGH LLP

By A. Mattison Bogan

C Mitchell Brown
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A Mattison Bogan
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(803) 799-2000

Mark Phillips
Liberty Center Suite 600
151 Meeting Street
Charleston SC 29401-2239

Attorneys for Respondent/Appellant Moisture
Warranty Corporation d/b/a Moisture Free Warranty

Columbia, South Carolina

March 26 2009

Exhibit A

0134

APP_0138

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO 2006CP4007215

Fariborz Z Babae

vs.

Moisture Warranty Corporation

Plaintiff

Defendant

CHECK ONE.

- ☐ **JURY VERDICT** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT** This action came to trial or hearing before the court. The issues have been tried and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON)** ☐ Rule 12(b) SCRPC ☐ Rule 41(c) SCRPC (Vol Nonsuit) ☐ Rule 43(k) SCRPC (Settled) ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON)** ☐ Rule 40(j) SCRPC ☐ Bankruptcy
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award
- ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**☐ Affirmed ☐ Reversed ☐ Remanded, ☐ Other

NOTE ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL

IT IS ORDERED AND ADJUDGED

☒ See attached order☐ Statement of Judgment by the Court

Dated at Columbia, South Carolina, this ____ day of _____, 2009

PRESIDING JUDGEThis judgment was entered on the ____ day of _____, 2009 and a copy mailed first class this
25th day of Feb 2009 to attorneys of record or to parties (when appearing pro se) as follows

Charles A Krawczyk

ATTORNEY(S) FOR THE PLAINTIFF(S)Charles Grant Blackburn, Anthony W Livoli
Charles Mitchell Brown Allen Mattison Bogan_____
ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP 24/FORM 4

Clerk of Court

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Fariborz Z. Babae and Malihe Babae) Civil Action No. 2006-CP-40 7215

Plaintiffs)

vs)

Moisture Warranty Corporation d/b/a)
Moisture Free Warranty, and Preferred)
Home Inspections, Inc.)

Defendants)

**ORDER GRANTING MOISTURE
WARRANTY CORPORATION'S
MOTION FOR A NEW TRIAL *nisi*
*REMITTITUR***

RICHLAND COUNTY
FILED
2009 FEB 9 39
JEANE C. MCBRIDE

On November 26, 2008, Defendant Moisture Warranty Corporation d/b/a Moisture Free Warranty ("Moisture Warranty Corporation") moved this Court pursuant to Rules 50-59 and all other applicable rules of the South Carolina Rules of Civil Procedure for judgment notwithstanding the verdict, for a new trial absolute and, failing the above, new trial *nisi remittitur*. As outlined below, Moisture Warranty Corporation's motion for a new trial *nisi remittitur* is granted.

SUMMARY

A hearing on the motions was held on Wednesday, January 21, 2009. Having considered each and every ground set forth in Moisture Warranty Corporation's motions memoranda in support thereof and the arguments submitted in support of the motions at the hearing before this Court, Moisture Warranty Corporation's motion for a new trial *nisi remittitur* is granted and the verdict is reduced as outlined herein. However, Moisture Warranty Corporation's motion for judgment notwithstanding the verdict and motion for new trial absolute are denied.

BACKGROUND

OAC
1

On November 29 2004 in connection with the purchase of their home Plaintiffs were issued a 3 year limited warranty by Moisture Warranty Corporation The limited warranty was subject to several terms and conditions that were detailed in the warranty provided to the Plaintiffs The Plaintiffs were aware of the warranty as early as August 28 2004 as it was provided to them when they signed the contract for the purchase of their home

On December 8 2006 Plaintiffs filed suit alleging various causes of action against Moisture Warranty Corporation including but not limited to fraud negligence negligent misrepresentation, and violations of the South Carolina Unfair Trade Practices Act, related to the allegation that Plaintiffs' home was not moisture free At the heart of the dispute Plaintiffs claimed that Moisture Warranty Corporation failed to perform under the terms of the parties agreement This Court granted Moisture Warranty Corporation judgment on every claim except for Plaintiffs' breach of warranty claim. The breach of warranty claim proceeded to trial and on November 20 2008 a jury returned a verdict in the amount of \$140 000 in favor of Plaintiffs On November 26 2008 Moisture Warranty Corporation timely filed its post trial

LEGAL DISCUSSION

I Judgment Notwithstanding the Verdict (JNOV)

Moisture Warranty Corporation moved this Court for a judgment notwithstanding the verdict. Having considered each and every ground set forth in support of Moisture Warranty Corporation's JNOV motion, this Court denies that motion

II New Trial Absolute

DAK
1/2

Moisture Warranty Corporation moved this Court for a new trial absolute. Having considered each and every ground set forth in support of Moisture Warranty Corporation's motion for a new trial absolute, this Court denies that motion.

III New Trial *Nisi Remittitur*

Moisture Warranty Corporation also moved this Court for a new trial *nisi remittitur*. Having considered each and every ground set forth in support of Moisture Warranty Corporation's motion for new trial *nisi remittitur*, this Court grants that motion and finds that the verdict in this case must be reduced.

In South Carolina, this Court *alone* has the power to grant a new trial *nisi* when it finds the amount of the verdict to be merely excessive. Easler v. Hejaz Temple, 285 S.C. 348, 329 S.E.2d 753 (1985) (emphasis original). Further, this Court has wide discretionary power to reduce the amount of a verdict which is excessive. Johnson v. Life Insurance Company of Georgia, 227 S.C. 351, 88 S.E.2d 260, 270 (1955).

A verdict is deemed to be excessive when it indicates "undue liberality on the part of the jury." Gray v. Davis, 247 S.C. 536, 148 S.E.2d 682 (1966). In considering a motion for new trial *nisi*, this Court must evaluate the adequacy of the verdict in light of the evidence presented. Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 529 S.E.2d 758 (Ct. App. 2000). Accordingly, when a verdict indicates an undue liberality on the part of the jury in light of the evidence presented, this Court has the power to reduce the verdict to an amount that reflects the evidence presented. See Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 526 S.E.2d 758 (S.C. Ct. App. 2000) (affirming the trial court's decision to remit the verdict based on the finding that the verdict was excessive). Orangeburg Sausage

OK
/3

Co. v. Cincinnati Ins. Co. 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994) (reducing a jury verdict to actual damages proven)

In this case, after reviewing the evidence this Court finds that the verdict is merely excessive" and that the verdict does not bear a reasonable relationship to the injuries sustained by Plaintiffs. First, this Court finds that the total verdict awarded is in excess of any actual damages recoverable under the express terms of the warranty. Pursuant to the express terms of the limited warranty "Warrantor s [Moisture Warranty Corporation] total aggregate liability of this Limited Warranty is limited to \$20,000 per year and \$60,000 over the full term of the warranty. Thus, the \$140,000 awarded is not reasonably related to the evidence presented to the jury regarding the terms of the warranty. Second, Plaintiff's expert, Chris Cooper, testified regarding costs wholly unrelated and not covered by the warranty, including but not limited to replacing the stucco exterior on parts of the home. As a result, this Court finds that Mr. Cooper's numbers were based on speculation and matters that were not consistent with the coverage provided under the express terms of the warranty.

Under these circumstances, a reduction of the verdict is warranted. As was shown at trial, the Plaintiffs made one claim under the warranty in early 2006. No other claims were submitted under the warranty. Hence, Moisture Warranty Corporation's request to reduce is granted and the verdict is hereby reduced to \$20,000, or one year of the maximum coverage under the express terms of the warranty.

CONCLUSION

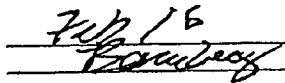
DAK
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Accordingly the jury's verdict in this case must be reduced THEREFORE IT IS
HEREBY ORDERED, ADJUDGED AND DECLARED that the verdict in this action is
reduced from \$140,000 to \$20,000. Should Plaintiffs decline to accept the amount of the
verdict as reduced a new trial is ordered. See Hutson v. Cummins Carolina, Inc., 280
S.C. 552, 314 S.E.2d 19 (Ct. App. 1984) (demonstrating that the trial court must offer the
option of a new trial *must* when the court remits a verdict). Plaintiffs shall indicate
whether they accept the reduced award within 10 (ten) days of the date of this order.

IT IS SO ORDERED



The Honorable Doyet A. Early III
South Carolina Circuit Judge



2009
South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A Early III, Circuit Court Judge

Case No 2006-CP-40-7215

Fariborz Z Babae and Malihe Babae,

Appellants/Respondents

v

Moisture Warranty Corporation d/b/a
Moisture Free Warranty, and Preferred Home
Inspections Inc

Defendants,

Of Whom Moisture Warranty Corporation
d/b/a Moisture Free Warranty is

Respondent/Appellant

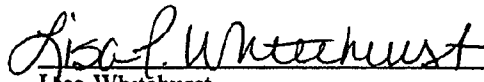
PROOF OF SERVICE

I the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent/Appellant do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es)
Pleadings

Amended Notice of Cross Appeal

Counsel Served

Robert B Phillips Esquire
Finkel Law Firm
Post Office Box 1799
Columbia, SC 29202



Lisa Whitehurst
Administrative Assistant

March 26, 2009

0141

APP_0145

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF RICHLAND) 2006-CP-40-7215

FARIBORZ Z BABAEE AND MALIHE)
BABAEE)
VS) TRANSCRIPT OF RECORD
)
MOISTURE WARRANTY)
CORPORATION, ET AL)
DEFENDANT)

NOVEMBER 17, 2008
COLUMBIA, SOUTH CAROLINA

B E F O R E

HONORABLE DOYET A EARLY, III, JUDGE

A P P E A R A N C E S

ROBERT B PHILLIPS, ESQ
HOWARD SHEFTMAN, ESQ
ATTORNEYS FOR THE PLAINTIFFS

CHARLES BLACKBURN, ESQ
ATTORNEY FOR THE DEFENDANT

JOY E HOLSTON
OFFICIAL COURT REPORTER

1 THE COURT MR PHILLIPS, WHAT DO YOU HAVE IN THE WAY
2 OF PRETRIAL MOTIONS THAT WE NEED TO DO BEFORE WE DRAW THE
3 JURY

4 MR PHILLIPS YOUR HONOR, THE TWO PRETRIAL MOTIONS
5 THAT I HANDED YOU, THE MOTIONS IN LIMINE TO EXCLUDE
6 EVIDENCE REGARDING THE PURCHASE PRICE OF THE SUBJECT
7 PROPERTY IN THIS CASE AND I ALSO HAVE A MOTION IN LIMINE
8 REGARDING THE INTRODUCTION OF EVIDENCE OF INSURANCE, THIRD
9 PARTY CONTRACT THOSE ARE THE TWO MOTIONS IN LIMINE THAT
10 I HAVE

11 THE COURT ARE THESE YOUR CLIENTS?

12 MR PHILLIPS YES, YOUR HONOR, THEY ARE

13 THE COURT WHICH ONE YOU WANT TO HEAR FIRST

14 MR PHILLIPS YOUR HONOR, I WOULD LIKE TO TAKE UP
15 THE MOTION IN LIMINE TO EXCLUDE ANY EVIDENCE OR ANY
16 STATEMENT REGARDING THE APPRAISAL OF THE HOUSE

17 THE COURT I WILL BE GLAD TO HEAR FROM YOU

18 MR PHILLIPS IF IT PLEASES THE COURT, YOUR HONOR,
19 JUST A LITTLE BACKGROUND MY CLIENTS, FARIBORZ AND MALIHE
20 BABAEE PURCHASED A, YOUR HONOR, THIS PARTICULAR HOME THAT
21 THE BABAEE'S WERE LOOKING TO PURCHASE WAS CLAD WITH
22 SYNTHETIC STUCCO ALSO CALLED EIFS

23 THE COURT I AM FAMILIAR WITH STUCCO

24 MR PHILLIPS THE BABAEE'S BECAME AWARE OF THE
25 PROBLEMS WITH MOISTURE INTRUSION AND STUCCO BEFORE THE

1 PURCHASE, YOUR HONOR

2 THE COURT OKAY

3 MR PHILLIPS AND PART OF THE PURCHASE INVOLVED THE
4 SELLERS BUYING MOISTURE FREE WARRANTY, THAT COVERED
5 MOISTURE INTRUSION INTO STUCCO HOUSES, AS PART OF THE SALE
6 WITH THE UNDERSTANDING THAT THAT WARRANTY WOULD TRANSFER
7 TO MY CLIENTS AFTER THE PURCHASE THE AND IN THE PROCESS
8 OF NEGOTIATING THE PRICE OF THIS HOUSE THERE WERE
9 SIGNIFICANT DECREASES IN THE AMOUNT OF THE ACTUAL PRICE
10 BASED ON BOTH MOISTURE INSPECTION WHICH INDICATED THERE
11 COULD BE MOISTURE DAMAGE AND A HOME INSPECTION WHICH
12 INDICATED OTHER THINGS IN BOTH THE INTERIOR OF THE HOUSE
13 AND THE PROPERTY FOR EXAMPLE, CRAWL SPACE WAS WET, THE
14 YARD WASN'T TURNING PROPERLY, THERE WAS HANDICAPPED
15 APPARATUSES IN THE HOUSE THAT HAD TO BE WITHDRAWN SO,
16 THE PRICE OF THE HOUSE WAS NEGOTIATED DOWN TO ACCOUNT FOR
17 ALL OF THESE PROBLEMS

18 THE COURT AND THEY PURCHASED A MOISTURE FREE
19 WARRANTY AND NOW THEY HAVE AN ALLEGED MOISTURE PROBLEM AND
20 THEY ARE SAYING THEY WERE NOT COVERED THAT IS WHY WE ARE
21 HERE

22 MR PHILLIPS THAT IS WHY WE ARE HERE, YOUR HONOR

23 THE COURT YOU DON'T WANT THE REDUCED PURCHASE PRICE
24 TO BE INTRODUCED AS EVIDENCE

25 MR PHILLIPS THAT'S RIGHT, YOUR HONOR, BECAUSE IT

1 MAKES IT SOUND LIKE THE REDUCTION IN THE PRICE ACCOUNTED
2 SOMEHOW FOR THE PROBLEMS CAUSED BY MOISTURE

3 THE COURT I AM SURE THE DEFENDANTS WILL TAKE THAT
4 POSITION

5 MR BLACKBURN YOU ARE RIGHT, YOUR HONOR, YES SIR

6 MR PHILLIPS YOUR HONOR, WE BELIEVE THAT THE
7 MOISTURE WARRANTY WAS ADVERTISED AND WAS DESIGNED TO
8 PROVIDE, I THINK, REGARDLESS OF THE COST--

9 THE COURT IT IS A MOTION IN LIMINE, TODAY I AM
10 GOING TO DO IT YOU GET READY TO START TALKING ABOUT IT,
11 YOU OR ANYBODY, GIVE ME A LITTLE FOREWARNING AND I WILL
12 SEND THE JURY OUT AND WE WILL PROFFER AND YA'LL CAN MAKE
13 YOUR ARGUMENT

14 MR BLACKBURN YOUR HONOR, IF I MAY

15 THE COURT YOU MAY

16 MR BLACKBURN YOUR HONOR, THE FIRST PRICE OF THE
17 HOUSE WAS REDUCED \$110,000 00 DOLLARS TO BE FIXED, THE
18 HOUSE AND THERE IS TESTIMONY IN HERE FROM THE SELLERS,
19 MR MAOLI SOLD THE HOUSE TO THE BABAEE'S THE BABAEE'S
20 NEGOTIATED A PRICE DOWN TO \$110,000 00 DOLLARS THREE
21 DAYS, IN CLOSING, MR BABAEE TOOK THE REPORT TO MAOLI AND
22 SAID, I AM NOT GOING TO BUY YOUR HOUSE BECAUSE I WANT
23 \$110,000 00 TO FIX IT BEFORE I BUY IT AND THAT IS WHY,
24 THAT WAS REDUCED, IT IS ATTACHED TO MY PRETRIAL BRIEF
25 THE COURT IT SOUNDS LIKE IT IS GOING TO BE VERY

1 RELEVANT, THE PROBLEM THAT I HAVE GOT RIGHT NOW IS, I WILL
2 RULE ON THIS AT THE CONCLUSION

3 MR BLACKBURN IF I MAY, YOUR HONOR, THIS CASE IS
4 TWO PRONGS IT IS DAMAGES AND IT IS, THE DAMAGES, WE ARE
5 GOING TO SHOW THEY, NOT ONLY TO MR MAOLI'S SON, DEMETIO,
6 (PHONETIC), WHO WAS DEPOSED MR PHILLIPS KNOWS WHAT MR
7 MAOLI TESTIFIED TO HE SAID FOR INSTANCE, ON PAGE 32,--

8 THE COURT I AM NOT SAYING I AM NOT GOING TO ALLOW
9 IT, LET'S TALK ABOUT HOW WE ARE GOING TO HANDLE IT IF
10 YOU OBJECT TO THE WAY I AM GOING TO HANDLE IT, THE
11 CONCLUSION OF THE ARGUMENT

12 MR BLACKBURN YES, YOUR HONOR, BELIEVE ME, THIS
13 NEGOTIATION THAT THEY COUCH DOWN WAS BASICALLY OVER A
14 MONTH OR MORE PERIOD OF TIME IT IS ALL IN THE DOCUMENTS
15 THAT I HAVE GOT RIGHT HERE AND IT IS ALL OVER AND HE
16 BASICALLY CAME TO AN AGREEMENT FOR \$810,000 00 DOLLARS
17 HE GOT ABOUT \$810 AND RIGHT BEFORE THE CLOSING, THE
18 MAOLI'S WHO WERE GETTING READY TO MOVE BECAUSE OF THEIR
19 HEALTH HE SAID I AM NOT GOING TO BUY IT UNLESS YOU GIVE
20 THE MONEY TO FIX IT AND HE TOLD THE SON, REGARDLESS OF
21 THE WARRANTY, WE ARE GOING TO ASK--

22 THE COURT YOU NEED TO MENTION ALL OF THAT IN YOUR
23 OPENING STATEMENT

24 MR BLACKBURN YES, YOUR HONOR THIS TELLS THE JURY
25 EXACTLY WHERE WE ARE GOING WITH THIS CASE BECAUSE WHERE WE

1 ARE GOING IS, WE WOULD NOT EVEN BE HERE IF MR BABAEE HAD
2 DONE WHAT HE WAS SUPPOSE TO

3 THE COURT I UNDERSTAND THE TWO SIDES OF THE STORY
4 MR PHILLIPS YOUR HONOR, IF I MIGHT, JUST BRIEFLY
5 I AGREE WITH YOUR HONOR'S IDEA TO EXCLUDE IT DURING
6 OPENING I THINK HE GETS, WHAT MR BLACKBURN JUST SAID IS
7 TO GET TO THE HEART OF MY OBJECTION HE IS ARGUING THAT
8 HIS CLIENT IS ENTITLED TO \$110,000 00 SETOFF FOR A
9 TRANSACTION HE WASN'T A PARTY TO, THAT HAD NO BEARING ON
10 THE ISSUANCE OF THIS WARRANTY AND IT GIVES THE JURY THE
11 FALSE IMPRESSION THAT THE BABAEE'S WHO CONTESTED THAT
12 \$110,000 00 WAS FOR THE REPLACEMENT OF STUCCO AND THEIR
13 TESTIMONY IS CLEAR ON THAT REGARD IT GIVES THE JURY THE
14 IMPRESSION THAT THEY SOMEHOW HAD BEEN PAID BY A PARTY WHO
15 IS NOT IN THE COURTROOM AND THAT MOISTURE FREE WARRANTY IS
16 ENTITLED TO \$110,000 00 CREDIT

17 MR BLACKBURN MR BABAEE TESTIFIED ON TWO
18 OCCASIONS, TWO DAYS I ASKED HIM THE QUESTION, HAVE YOU
19 AGREED TO \$700,000 00 BEFORE YOU GOT THE REPORT OR AFTER
20 THE REPORT HE SAID, YES SO, YOU HAD ALREADY AGREED TO
21 \$700,000 00 BEFORE YOU GOT THE REPORT HE SAID, YES
22 THAT IS NOT TRUE, YOUR HONOR, HE HAD THAT REPORT FOR A
23 MONTH AND HE WAITED UNTIL CLOSING AND SAID, I WANT A
24 \$110,000 00 TO FINISH MY STUCCO

25 THE COURT I THINK WE HAVE GOT THE IDEA ALL RIGHT

1 I WILL HANDLE IT IN THIS FASHION WHEN EITHER PARTIES
2 THINKS IT IS RELEVANT, I WILL EXCUSE THE JURY AND DO A
3 PROFFER AND I WILL RULE ON THE ADMISSIBILITY AT THAT TIME
4 UNTIL THEN YOU CAN ARGUE IN YOUR OPENING, GENERAL THINGS
5 BUT DON'T GET SPECIFIC ABOUT THE PRICE UNTIL WE HAVE THE
6 PROFFER

7 MR PHILLIPS YOUR HONOR, MAY IT PLEASE THE COURT
8 MY SECOND MOTION, AS PART OF THE MOISTURE FREE WARRANTY
9 PROGRAM, ALLEGEDLY THE PROGRAM CALLS FOR AN INSPECTION
10 WHICH IDENTIFIES THE PROBLEMS WITH SYNTHETIC STUCCO
11 THOSE DEFICIENCIES ARE SUPPOSE TO BE REPAIRED AND THE
12 MOISTURE FREE WARRANTY THEN UNDERTAKES A SECOND INSPECTION
13 TO MAKE SURE THE REPAIRS HAVE BEEN DONE PROPERLY
14 MOISTURE FREE WARRANTY HAS IDENTIFIED AN EXPERT IN THIS
15 CASE NAMED FRANK GUIDERA WHICH HAS A CONTRACT WITH NORTH
16 CAROLINA

17 THE COURT NOW, WHAT DO YOU WANT TO PUT INTO
18 EVIDENCE REGARDING LIABILITY INSURANCE?

19 MR PHILLIPS YES, OF THESE THIRD PARTY CONTRACTORS,
20 YOUR HONOR ONE OF OUR CONTENTIONS IS THAT--

21 THE COURT I AM GOING TO FEED YOU OUT OF THE SAME
22 SPOON THAT I JUST FED HIM OUT OF WHEN YOU GET READY TO
23 DO THAT LET ME KNOW AND WE WILL SEND THE JURY OUT AND MAKE
24 A PROFFER AND THEN I WILL DETERMINE WHETHER OR NOT IT IS
25 ADMISSIBLE

1 MR PHILLIPS THANK YOU, YOUR HONOR
2 THE COURT GENTLEMEN, WE ARE GOING TO DO THIS
3 PEACEFULLY ONE-HUNDRED TIMES MOTIONS IN LIMINE, THAT IS
4 THE WAY I DO IT LET'S DON'T DO IT AT THE BEGINNING AND
5 LET'S SEE WHAT THE TRIAL IS SHOWING, WHAT IS RELEVANT,
6 WHAT IS NOT RELEVANT WE WILL PROFFER OUTSIDE THE JURY,
7 YOU ARE PROTECTED AND YOU ARE PROTECTED LET'S GO AHEAD
8 AND GET THEM IN AND DO THE VOIR DIRE, LET'S SEE WHERE WE
9 STAND

10 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
11 APPROXIMATELY 11 00 A M)

12 THE COURT DO YOU WANT TO WAIVE ALTERNATES?

13 MR PHILLIPS I WILL WAIVE, YOUR HONOR

14 MR BLACKBURN I WILL WAIVE, YOUR HONOR

15 THE COURT LADIES AND GENTLEMEN OF THE JURY PANEL,
16 WE ARE GOING TO BEGIN THE TRIAL OF THE CASE, IT IS A CIVIL
17 CASE AND IN A CIVIL CASE I AM GOING TO ASK YOU QUESTIONS
18 ABOUT THE PARTIES, THE LAWYERS, A LITTLE BIT ABOUT THE
19 FACTS OF THE CASE THAT WON'T TAKE VERY LONG THERE IS A
20 COMPUTERIZED LIST SELECTED FOR YOU, ONCE WE GET THROUGH
21 THE QUESTIONS ASSUMING NO ONE IS DISQUALIFIED OR PERHAPS
22 KNOW SOMETHING ABOUT THE CASE THEN I WILL TURN THIS LIST
23 OVER TO THE LAWYERS THE PLAINTIFF'S LAWYER, THE PERSON
24 BRINGING THE LAWSUIT, THEY HAVE FOUR STRIKES THE
25 DEFENDANT WHO IS DEFENDING THE LAWSUIT ALSO HAS FOUR

1 BY THE PLAINTIFF?

2 MR PHILLIPS NO, YOUR HONOR

3 THE COURT BY THE DEFENDANT?

4 MR BLACKBURN NONE, YOUR HONOR

5 THE COURT OKAY, MR PHILLIPS, YOU MAY MAKE YOUR
6 OPENING STATEMENT

7 MR PHILLIPS THANK YOU, YOUR HONOR MAY IT PLEASE
8 THE COURT, MR BLACKBURN, GOOD MORNING LADIES AND
9 GENTLEMEN MY NAME IS SAM PHILLIPS WE ARE HERE TODAY
10 FOR KIND OF A COMPLICATED CASE BUT IT REALLY HAS GOT A
11 SITUATION THERE IS A COMPANY THAT MARKETS, SOMETHING
12 THAT THE PUBLIC BUYS TO PROTECT THEIR HOME DO THEY HAVE
13 TO LIVE UP TO THEIR REPRESENTATIONS I WILL TELL YOU THAT
14 THE MOISTURE FREE WARRANTY MARKETS A PROGRAM AND IT SIMPLY
15 DOESN'T WORK MY CLIENTS, FRED AND MALIHE BABAEE
16 PURCHASED A VERY EXPENSIVE HOME AND IT IS CLAD WITH THE
17 TYPE OF STUCCO CALLED SYNTHETIC STUCCO NOW, THERE ARE
18 TWO TYPES OF STUCCO, YOU WILL HEAR TESTIMONY DESCRIBING
19 THE TWO KINDS ONE KIND HAS BEEN AROUND A LONG TIME, IT
20 IS DOWN ON THE HOUSES IN CHARLESTON, EVEN THE TACO BELL
21 HAS A PICTURE OF THE STUCCO ON IT IT IS A HARD COAT
22 STUCCO, IT IS CONCRETE IT HAS BEEN AROUND AND IT WORKS
23 SO, TWENTY YEARS OR SO THEY INVENTED SOMETHING CALLED
24 SYNTHETIC STUCCO AND IT HAS GOT A BUNCH OF NAMES AND YOU
25 WILL HEAR THEM ALL FROM DIFFERENT WITNESSES SYNTHETIC

0150

APP_0154

1 STUCCO, FACE STUCCO, EIFS WHICH STANDS FOR EXTERIOR
2 INSULATION FINISH SYSTEM SOME PEOPLE CALLED IT EVES,
3 SOME PEOPLE CALL IT EIFS IT IS ESSENTIALLY A FOAM WRAP
4 THAT GOES AROUND THE HOUSE AFTER THE WOOD STUDS ARE UP TO
5 HOLD THE WALLS, AFTER THE WOOD SHEATHING IS ON TO GIVE TO
6 THE WALL SOME STABILITY A FOAM IS APPLIED ALL THE WAY
7 AROUND THE HOUSE AND THEN IT IS COVERED WITH A THIN LAYER
8 OF CONCRETE MATERIAL IN A STUCCO FINISH WELL, IT LOOKS
9 LIKE STUCCO BUT IT IS NOT NOW, THIS PRODUCT DOESN'T
10 WORK, IT IS BANNED IN STATES, IT LETS WATER IN AND THAT
11 WATER CAUSES DAMAGE AND PEOPLE KNOW IT IT IS THE ONLY
12 PRODUCT IN SOUTH CAROLINA THE LEGISLATURE AS SPECIFICALLY
13 DESIGNATED ON A PROPERTY DISCLOSURE FORM AS A TYPE OF
14 STUCCO THAT YOU HAVE TO DISCLOSE TO A BUYER NOW, FRED
15 AND MALIHE BABAEE, FRED BABAEE CAME HERE 30 YEARS AGO,
16 CAME TO USC TO STUDY MATHEMATICS AND COMPUTERS HE DID
17 WELL, HE LIKED IT HERE, HE LIKED IT SO WELL HE GOT A JOB
18 AT USC TEACHING OR INSTALLING THEIR COMPUTER SYSTEM
19 WHILE HE WAS WORKING AT USC HE STARTED A BUSINESS IN HIS
20 GARAGE TO HELP SMALL BUSINESSES HAVE COMPUTER NETWORKS
21 WHICH IS ESSENTIALLY THE JOB HE WAS DOING AT USC WELL,
22 HIS BUSINESS IN HIS GARAGE GOT SO SUCCESSFUL THAT HE MOVED
23 OUT OF HIS GARAGE, BUILT HIMSELF A BUILDING AND NOW HE HAS
24 A COMPUTER COMPANY THAT HAS LOCATIONS BOTH HERE IN
25 COLUMBIA AND IN CALIFORNIA SO, HIS PART-TIME JOB BECAME

0151

APP_0155

1 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT
2 APPROXIMATELY 2 00 P M)

3 THE COURT I HOPE YOU HAD A PLEASANT LUNCH MR
4 MOORE, CONGRATULATIONS, YOU ARE THE FOREPERSON YOU MAY
5 CALL YOUR FIRST WITNESS

6 MR PHILLIPS THE PLAINTIFF'S CALL BILL FLAHERTY TO
7 THE STAND

8 BILL FLAHERTY, AFTER BEING DULY SWORN, TESTIFIED
9 AS FOLLOWS

10 DIRECT EXAMINATION

11 BY MR PHILLIPS

12 Q PLEASE STATE YOUR NAME

13 A MY NAME IS WILLIAM P FLAHERTY, JR , LAST NAME IS
14 F-L-A-H-E-R-T-Y

15 Q MR FLAHERTY, WHERE ARE YOU CURRENTLY EMPLOYED?

16 A I AM THE OWNER AND PRESIDENT OF ALL AMERICAN HOME
17 SERVICES LOCATED IN LILBURN, GEORGIA WHICH IS A SUBURB OF
18 ATLANTA

19 Q AND HOW LONG HAVE YOU BEEN OPERATING THAT BUSINESS

20 A APPROXIMATELY 12 YEARS

21 Q AND WHAT DOES THAT BUSINESS DO?

22 A ESSENTIALLY I DO RESIDENTIAL HOME INSPECTIONS FOR
23 BUYERS AND SELLERS OF HOMES I DO NEW CONSTRUCTION IN
24 INSPECTIONS FOR FOLKS THAT ARE HAVING A HOUSE BUILT, TO
25 EXAMINE IT IN THE PROCESS OF BEING BUILT AND BE SURE THAT

1 THINGS ARE DONE PROPERLY I DO EFIS, AS YOU HEARD ABOUT
2 BEFORE AND HARD COAT STUCCO INSPECTIONS FOR HOMEOWNERS AND
3 HOMEBUYERS AND SELLERS AND I ALSO DO MOLD INSPECTIONS
4 FOR THE SAME PEOPLE, HOMEBUYERS, HOME SELLERS OR
5 HOMEOWNERS I ALSO DO THE ABOVE INSPECTIONS ON BEHALF OF
6 CORPORATE RELOCATION COMPANIES ALL OVER THE STATE OF
7 GEORGIA I DO SOME LITIGATION WORK FOR MY CLIENTS THAT
8 REQUIRE IT AND I ALSO HAVE, TESTIFIED IN DEPOSITION
9 ARBITRATION OR TRIAL OVER 40 TIMES IN GEORGIA, SOUTH
10 CAROLINA AND ALABAMA ON BEHALF OF MY CLIENTS THAT NEEDED
11 THAT

12 Q DO YOU HAVE CERTAIN CREDENTIALS TO DO THOSE TYPE OF
13 INSPECTIONS?

14 A YES, SIR I AM A REGISTERED SPECIALITY CONTRACTOR
15 WITH THE STATE OF SOUTH CAROLINA I AM ALSO A CERTIFIED
16 THIRD PARTY EFIS INSPECTOR AND MOISTURE ANALYSIS FOR THE
17 EXTERIOR DESIGN INSTITUTE TO GET THAT CERTIFICATION I
18 HAD TO TAKE A FOUR DAY CLASSROOM STUDY WITH A
19 CERTIFICATION EXAM AT THE END THAT CERTIFICATION IS
20 REQUIRED BY CERTAIN STATES IN ORDER TO DO A STUCCO WORK
21 INSPECTION IN THAT STATE I AM A CABLE CERTIFIED ONE AND
22 TWO FAMILY DWELLING INSPECTOR BY THE SOUTHERN BUILDING
23 CODE CONGRESS INTERNATIONAL THEY NO LONGER EXIST, THEY
24 HAVE BEEN MERGED INTO THE INTERNATIONAL CODE WHO
25 ESTABLISHES NOW THE BUILDING CODES FOR THE UNITED STATES

0153

APP_0157

1 FOR RESIDENTIAL STRUCTURES TO GET THAT I TOOK A SIX TO
2 EIGHT WEEK COURSE OF STUDY TO PASS A CERTIFICATION EXAM
3 ADMINISTERED BY THE SOUTHERN BUILDING CODE CONGRESS AT
4 THAT TIME ONLY ABOUT 23 PERCENT OF THE PEOPLE THAT TOOK
5 THE EXAM PASSED IT ON THE FIRST TRY I AM CURRENTLY A
6 CERTIFIED RESIDENTIAL SPECIALTY, RESIDENTIAL COMBINATION
7 INSPECTOR THROUGH THE INTERNATIONAL CODE COUNSEL, THAT WAS
8 GRANDFATHERED IN WHERE THEY ABSORBED THE CABLE
9 CERTIFICATION WHEN ALL OF THE BUILDING CODE BODIES MERGED
10 I HAVE TO TAKE EXAMS AND/OR COMMUNITY CONTINUING EDUCATION
11 CREDITS IN ORDER TO RENEW THAT CERTIFICATION EVERY THREE
12 YEARS I AM A CERTIFIED INDOOR ENVIRONMENTALIST WITH THE
13 AMERICAN INDOOR AIR QUALITY COUNSEL AGAIN, A FOUR DAY
14 COURSE OF STUDY WITH A CERTIFICATION EXAM AT THE END, I
15 HAVE TO TAKE CONTINUING EDUCATION CREDITS EVERY TWO YEARS
16 TO RECERTIFY FOR THAT AND I AM A CERTIFIED MOLD
17 INSPECTOR AND ALLERGEN INSPECTOR THROUGH THE ENVIRONMENTAL
18 SOLUTIONS ASSOCIATION, AGAIN EVERY TWO YEARS I HAVE TO
19 HAVE CONTINUING EDUCATION CREDITS IN ORDER TO CONTINUE TO
20 RENEW THAT CERTIFICATION
21 Q HAVE YOU EVER BEEN ASSOCIATED WITH MOISTURE FREE
22 WARRANTY?
23 A FROM 2003 TO 2005 I PARTICIPATED IN THE MOISTURE FREE
24 WARRANTY PROGRAM THE DRYVIT CLASS SETTLEMENT YOU HAD TO
25 BE A CERTIFIED MOISTURE FREE WARRANTY INSPECTOR I HAD TO

0154

APP_0158

1 TAKE A VIDEO COURSE THROUGH THEM AND PASS THEIR EXAM IN
2 ORDER TO QUALIFY TO DO THOSE IN ORDER TO QUALITY TO EVEN
3 TAKE THE EXAM YOU HAD TO BE A CERTIFIED THIRD PARTY EIFS
4 INSPECTOR THROUGH THE EXTERIOR DESIGN I HOPE THAT
5 ANSWERED YOUR QUESTION

6 Q YOU TALKED ABOUT THE DRYVIT CLASS ACTIONS, EXPLAIN TO
7 THE JURY

8 A DRYVIT IS THE SINGLE LARGEST MANUFACTURER OF THE
9 PRODUCTS THAT WE ARE GOING TO TALK ABOUT, WHICH MAKES UP A
10 HUGE CLADDING SYSTEM, ESSENTIALLY THE SIDING THAT IS ON
11 THE BABAEE'S HOUSE THEY ARE THE SINGLE LARGEST ONE AND
12 THERE WAS A CLASS ACTION LAWSUIT BROUGHT AGAINST THEM
13 RELATIVE TO WHAT WAS HAPPENING TO HOMES AS A RESULT OF
14 THEIR PRODUCT

15 Q WHAT WAS THE ASSOCIATION, MOISTURE FREE WARRANTY?

16 A MOISTURE FREE WARRANTY WAS ESSENTIALLY THE
17 ADMINISTRATIVE ARM TO MANAGE THE INSPECTIONS THAT WOULD BE
18 DONE FOR PEOPLE INVOLVED IN THE CLASS SUIT AND
19 INSPECTORS LIKE MYSELF WOULD GO OUT, DO AN INITIAL
20 INSPECTION, PROVIDE A REPORT TO MOISTURE FREE WARRANTY,
21 THEY WOULD DEVELOP A LIST OF REPAIRS THAT WERE TO BE MADE
22 TO THE HOMES THEY WOULD PICK FROM CONTRACTORS THAT WERE
23 CERTIFIED BY THEM AS WELL TO DO THE REPAIRS I WOULD GO
24 BACK OUT ASSUMING THOSE REPAIRS WERE DONE TO INSURE THEY
25 WERE DONE PROPERLY TO THEIR SPECIFICATIONS AND GIVEN

0155

APP_0159

1 THAT ALL HAS HAPPENED, YOU WOULD GET A MOISTURE FREE
2 WARRANTY, A THREE YEAR MOISTURE FREE WARRANTY ON THE HOME

3 Q HOW MANY EIFS STUCCO INSPECTIONS HAVE YOU PERFORMED?

4 A I PERSONALLY DO ALL OF MY OWN INSPECTIONS, I DON'T
5 HAVE EMPLOYEES OR SUBCONTRACTORS I PERSONALLY INSPECTED
6 2,500 TO 3,000 IN GEORGIA, SOUTH CAROLINA, ALABAMA,
7 MISSISSIPPI, APPROXIMATELY 1,500 OF WHICH HAD THE EIFS
8 PLANNING SYSTEM ON IT

9 Q AND OF THOSE YOU SAID YOU DID THESE FOR YOUR CLIENTS,
10 ABOUT HOW MANY CLIENTS WITH LITIGATION?

11 A APPROXIMATELY 250 OVERALL, ROUGHLY 20 PERCENT OF MY
12 BUSINESS HAD TO DO WITH LITIGATION WORK, IF YOU WILL

13 Q AND HOW MANY OF THOSE 1,500 INSPECTIONS THAT YOU DID
14 WERE MOISTURE FREE WARRANTY?

15 A ROUGHLY TWO DOZEN I WOULD SAY THAT WERE FOR, MOST OF
16 WHICH WOULD OF BEEN FOR THE DRYVIT SETTLEMENT INITIAL
17 INSPECTION, A FEW OF THOSE HAD A SECOND INSPECTION DONE
18 WHERE THE HOMEOWNER MADE THE REPAIRS TO THE HOUSE AND I
19 THINK THERE WERE A HANDFUL THAT WERE PURE MOISTURE FREE
20 WARRANTY INSPECTIONS THAT WERE NOT RELATED TO DRYVIT

21 Q HAVE YOU TESTIFIED IN COURT BEFORE?

22 A YES, SIR

23 Q WERE YOU QUALIFIED AS AN EXPERT?

24 A YES, SIR

25 Q HOW MANY TIMES?

1 A AT LEAST THREE TIMES THAT I CAN REMEMBER

2 Q WHAT STATE IS THAT?

3 A PRIMARILY GEORGIA

4 Q HAVE YOU EVER BEEN QUALIFIED AS AN EXPERT IN SOUTH
5 CAROLINA?

6 A NO, SIR

7 Q HAVE YOU EVER BEEN PUT FORTH AS AN EXPERT AND NOT
8 BEEN QUALIFIED BY SOUTH CAROLINA COURTS?

9 A I SUPPOSE TO BE TESTIFYING IN A TRIAL IN, I CAN'T
10 REMEMBER THE NAME OF THE TOWN, NEAR THE GEORGIA BORDER,
11 AND I WASN'T ALLOWED TO TESTIFY

12 Q AND WHY WAS THAT?

13 A IN MY OPINION THE JUDGE MADE AN IMPROPER RULING THAT
14 I WASN'T LICENSED TO DO BUSINESS IN SOUTH CAROLINA I HAD
15 TO GO TO THE AGENCY THAT I NOW HAVE THE REGISTRATION WITH,
16 THE LABOR AND LICENSING REGULATION BORDER AT THAT TIME
17 THEY TOLD ME THAT BECAUSE I WAS ONLY INSPECTING A PART OF
18 A HOUSE THAT I DID NOT HAVE TO HAVE ANY SPECIAL
19 CERTIFICATION, REGISTRATION, I WASN'T A HOME BUILDER OR A,
20 "HOME INSPECTOR", I WASN'T INSPECTING THE ENTIRE HOME
21 SO, THE JUDGE FELT THAT SHOULD OF HAD SOMETHING BUT THEY,
22 THAT IS WHAT THEY TOLD ME WHEN I WENT THERE TO GET THE
23 PROPER PAPERWORK TO DO THE INSPECTIONS

24 Q DID THE LLR CREATE A LICENSE FOR YOU TO DO WHAT YOU
25 DO IN SOUTH CAROLINA?

1 A YES, AS SOON AS I FOUND OUT ABOUT IT, THAT IS THE
2 SPECIALITY CONTRACT OF REGISTRATION THAT THEY HAVE TODAY
3 THAT I HAVE HAD SINCE 2005

4 Q AND DID, WHEN YOU FIRST APPROACHED THEM DID THEY
5 SUGGEST THAT YOU GET CREDENTIALS?

6 A THEY DIDN'T HAVE IT AT THAT TIME

7 MR PHILLIPS YOUR HONOR, I WOULD LIKE TO OFFER MR
8 FLAHERTY AS AN EXPERT IN SYNTHETIC STUCCO EIFS AND THE
9 MOISTURE FREE WARRANTY PROGRAM

10 THE COURT MR BLACKBURN, ANY CROSS-EXAMINATION ON
11 HIS QUALIFICATIONS?

12 MR BLACKBURN NOT AT THIS TIME, YOUR HONOR, NO
13 OBJECTION TO HIS QUALIFICATION

14 THE COURT ALL RIGHT MR FOREMAN AND LADIES AND
15 GENTLEMEN, I AM GOING TO ALLOW MR FLAHERTY TO TESTIFY AS
16 AN EXPERT AND WHAT THAT SIMPLY MEANS IS THAT MOST
17 WITNESSES CAN ONLY TESTIFY ABOUT THINGS THAT THEY SEE,
18 SMELL, HEAR, TASTE, YOU KNOW, CAN'T GIVE OPINIONS BUT
19 OUR RULES OF EVIDENCE ALLOW SOMEONE THAT HAS BEEN
20 QUALIFIED AS AN EXPERT TO GIVE OPINIONS IN THOSE POTENTIAL
21 AREAS SO, HE WILL BE ALLOWED TO GIVE OPINION TESTIMONY
22 IN THE TRIAL

23 MR PHILLIPS THANK YOU, YOUR HONOR MAY I APPROACH
24 THE WITNESS

25 THE COURT YOU MAY

1 Q MR FLAHERTY, THIS HAS BEEN PREMARKED EXHIBIT 1,
2 COULD YOU HOLD THAT OUT AND EXPLAIN TO THE JURY WHAT THIS
3 IS?

4 A EIFS AND AS MR PHILLIPS HAS INDICATED, THIS GOES BY
5 SEVERAL NICKNAMES IF YOU WILL BUT SYNTHETIC STUCCO IS A
6 TYPE OF SIDING THAT IS ATTACHED TO THE WOOD PANELING ON
7 YOUR HOME THAT IS ATTACHED TO THE STUDS WHEN THE HOUSE IS
8 FIRST BEING BUILT IT IS COMPRISED OF AN INSULATED BOARD
9 AND IN THIS CASE IT IS WHAT IS CALLED AN EXPANDED
10 POLYSTYRENE BUT THERE ARE TWO OR THREE DIFFERENT TYPES
11 THAT ARE USED AND THAT IS EITHER GLUED OR SCREWED TO THE
12 SUB-STRAIGHT OF THE HOUSE WHICH IS THE WOOD PART THAT YOU
13 SEE HERE ON TO THAT IS A VERY THIN COATING THAT IS
14 APPLIED AND FIBERGLASS IS EMBEDDED IN IT TO SPAN ALL THE
15 CREASES OF THE VARIOUS INSULATED BOARDS SO YOU DON'T SEE
16 THE OUTLINE WHEN THE HOUSE IS FINISHED YOU HAVE A SMOOTH
17 SURFACE WHEN IT IS DONE AND THE FINAL COAT IS ANOTHER
18 VERY THIN REALLY WHAT IS CALLED SYNTHETIC STUCCO,
19 FINISHED, THAT GIVES IT A ESTHETICALLY PLEASING LOOK
20 AND, AGAIN, IT COVERS ALL OF THIS THAT IS GOING ON SO YOU
21 DON'T SEE ANYTHING

22 Q WHAT ARE THE PROBLEMS THAT IS ASSOCIATED WITH THIS
23 PRODUCT?

24 A WELL, THE SINGLE BIGGEST PROBLEM IS, THAT UNLIKE ALL
25 OF YOUR SIDINGS THAT ARE TYPICALLY FOUND ON HOUSES SUCH AS

1 BRICK, LAP-SIDING, EVEN HARD COAT STUCCO, SHOULD MOISTURE
2 GET BEHIND THAT PRODUCT THERE IS NO FACILITY IN IT TO
3 ALLOW THE MOISTURE TO GET OUT SO, ONCE IT GETS IN IT IS
4 TRAPPED AGAINST THE STRUCTURAL MATERIALS OF THE HOME
5 THERE IS A FELT PAPER, IF YOU ARE FAMILIAR WITH
6 CONSTRUCTION, THAT WOULD NORMALLY BE BEHIND A SIDING TO
7 ISOLATE IT FROM THE STRUCTURAL MATERIALS OF THE HOUSE
8 THAT IS NOT PART OF THE SYSTEM SO, THEREFORE WHEN
9 MOISTURE GAINS ENTRY IT IS A MUCH MORE SERIOUS ISSUE THAN
10 IT IS ON ANOTHER PRODUCT BECAUSE IT NOW HAS ACCESS TO THE
11 STRUCTURAL MATERIALS IN THE HOME

12 Q DESCRIBE WHAT YOU DO, IN GENERAL TERMS, WHEN YOU DO
13 AN EIFS INSPECTION

14 A WELL AN EIFS INSPECTION IS REALLY TWO PARTS ONE IS
15 A VISUAL, WAS IT INSTALLED TO THE WAY IT WAS SUPPOSE TO
16 HAVE BEEN AND AS PART OF THAT IS MOISTURE TESTING IN ALL
17 THE PENETRATIONS WHICH IS REALLY WHERE MOISTURE HAS THE
18 OPPORTUNITY TO GET BEHIND THE SYSTEM, WINDOWS AND DOORS,
19 ROOF TERMINATIONS, LIGHT FIXTURES, ELECTRICAL OUTLETS,
20 THAT SORT OF THING ARE OPPORTUNITIES FOR MOISTURE TO GET
21 BEHIND THE SYSTEM SO, YOU MAP THAT AND IN CERTAIN CASES
22 PROBE WHERE IT IS INDICATED THERE MAY BE ELEVATED MOISTURE
23 BEHIND THE SYSTEM AT THAT POINT

24 Q WHAT IS ELEVATED MOISTURE?

25 A ELEVATED MOISTURE BY A DEFINITION OF A NUMBER OF

1 INDUSTRIES IS 19 PERCENT IS THE HIGHEST ACCEPTABLE LIMIT
2 THAT IS CALLED DRY ON RESIDENTIAL STRUCTURES AND ONCE
3 YOU GET PAST THAT, OBVIOUSLY THE PROBLEM GETS WORSE, THE
4 HIGHER THAT PERCENTAGE WOULD GO

5 Q AND HOW DO YOU DETERMINE THAT MOISTURE PERCENTAGE?

6 A THE ONLY WAY TO GET THE ACTUAL PERCENTAGE OF MOISTURE
7 IS TO PUNCH TWO VERY SMALL HOLES THROUGH THE STUCCO WHICH
8 IS VERY SIMPLE TO DO AND YOU GET WHAT IS CALLED AN
9 ELECTRONIC IMPEDANCE METER WITH PROBES THAT ACTUALLY TOUCH
10 THE WOOD PART THAT YOU SEE TO GET AN ACTUAL READING OF THE
11 PERCENTAGE OF MOISTURE CONTENT AT THAT LOCATION

12 Q LET ME SHOW YOU EXHIBIT 2, CAN YOU IDENTIFY THAT?

13 A YES, SIR THAT IS THE CLEMSON EXTENSION DOCUMENT
14 REGARDING WOOD MOISTURE CONTENT

15 Q IS THIS A DOCUMENT THAT YOU USE ROUTINELY IN YOUR
16 JOB?

17 A I CARRY IT ON ME EVERY DAY BUT I HAVE READ IT AMONG
18 OTHER DOCUMENTS OF VARIOUS INDUSTRIES THAT HAVE THE SAME
19 PREMISE

20 Q WHAT OTHER ORGANIZATIONS HAVE THE SAME STANDARD AS
21 CLEMSON DOES?

22 A THE NATIONAL ASSOCIATION OF HOME BUILDERS, DRYVIT
23 THEMSELVES WHICH WE HAVE ALREADY TALKED ABOUT IS THE
24 LARGEST MANUFACTURER OF THESE OF CLADDINGS AND THAT WAS
25 THE LIMIT THAT WAS USED FOR THE DRYVIT CLASS SETTLEMENT AS

1 WHAT WAS CONSIDERED ACCEPTABLE, 19 PERCENT AMERICAN
2 FORESTRY SERVICE FINDS THAT 19 PERCENT IS THE MAXIMUM THAT
3 IS CONSIDERED DRY IN RESIDENTIAL LUMBER THAT IS GOING TO
4 BE USED FOR CONSTRUCTION AND OBVIOUSLY THE CLEMSON
5 DOCUMENT THAT WE ARE LOOKING AT NOW

6 Q WHAT LEVEL DOES WOOD ROT OCCUR?

7 A WOOD ROT OCCURS AT APPROXIMATELY 28 TO 31 PERCENT

8 Q WHAT DOES CLEMSON RECOMMEND A HOMEOWNER DO WHEN A
9 MOISTURE LEVEL EXCEEDS 19 PERCENT?

10 A WELL, AS YOU WILL SEE, FROM 20 TO 24 PERCENT, THEY
11 CONSIDER THAT INDICATIVE OF A SIGNIFICANT PROBLEM AND IT
12 REALLY, IT INDICATES THAT THAT MOISTURE IS GAINING ACCESS
13 TO THE WOOD FROM SOME OTHER PLACE POTENTIALLY AND IT
14 SUGGEST THAT YOU SOLVE THAT PROBLEM TO STOP THE CONTINUED
15 INTRUSION OF MOISTURE OVER TIME

16 Q AND WHERE DOES THE MOISTURE FREE WARRANTY AND THE
17 DRYVIT CLASS ACTION SETTLEMENT CALL TO BE DONE FOR THE
18 READINGS ABOVE 19 PERCENT?

19 A AGAIN, YOU HAVE TO DOCUMENT AS CONSIDERED ELEVATED,
20 SO 20 PERCENT AND ABOVE IS IN THE DRYVIT CLASS SETTLEMENT
21 INSPECTIONS

22 Q WHAT ABOUT THE VERSION OF THE MOISTURE FREE WARRANTY
23 THAT THE BABAEE'S PURCHASED?

24 A WELL, IN YOUR INITIAL INSPECTION THEY WANT ANYTHING
25 ABOVE 19 PERCENT NOTED ON THE REPORT BUT IN THEIR INTERIM,

1 WHAT THEY CALL INTERIM INSPECTIONS WHICH IS ONCE THE
2 HOMEOWNER HAS THE WARRANTY ON THEIR HOME AND THEY HAVE A
3 PERSON THAT COMES OUT PERIODICALLY TO EXAMINE AND SEE HOW
4 IT IS DOING, THEY WILL ACCEPT 25 PERCENT

5 Q ARE YOU FAMILIAR WITH THE MARKETING MATERIALS THAT
6 MOISTURE FREE WARRANTY HAS USED TO GAIN CUSTOMERS?

7 A I AM, YES SIR

8 Q COULD YOU TELL ME WHAT THIS IS, IT IS MARKED
9 PLAINTIFF'S EXHIBIT 3?

10 A YES SIR, THAT IS A BLOWUP OF A BROCHURE AND WHEN I
11 FIRST, ONE OF THE REASONS THAT I SIGNED ON FOR THE
12 MOISTURE FREE WARRANTY INSPECTIONS IS THE WAY I UNDERSTOOD
13 THE MARKETING IT INDICATED TO ME THAT IT WAS AN
14 OPPORTUNITY TO DO SOMETHING FOR MY CLIENTS THAT HAD STUCCO
15 HOMES AND REALLY HAD NOTHING ELSE AVAILABLE TO THEM, THAT
16 WAS GOING TO PROVIDE THEM SOME PROTECTION AGAINST PROBLEMS
17 WITH THE HOUSE ONGOING AND OBVIOUSLY THE DRYVIT CLASS
18 SETTLEMENT REPRESENTING A POTENTIAL, OTHER INCOMES FOR ME
19 TOO WHICH WAS OKAY

20 Q THIS MISSION STATEMENT TALKS ABOUT PROTECTING STUCCO
21 HOMES FROM MOISTURE INTRUSION CAN YOU TELL ME WHAT THE
22 MOISTURE FREE WARRANTY DOES TO PROTECT OUR HOME FROM
23 MOISTURE INTRUSION?

24 A WELL, THEIR REPAIR STANDARDS, SHOULD YOU HAVE TO DO
25 ANY CALLS FOR SEALANTS TO BE APPLIED IN A PARTICULAR WAY

0163

APP_0167

1 AROUND THE PERIMETER OF WINDOWS OR DOORS, IT CALLS FOR THE
2 JOINTS OF WINDOWS SUCH AS WHERE THE SILL MEETS THE JAM OR
3 SIDE OF THE WINDOW, THOSE ARE OPPORTUNITIES WITH THE
4 MOISTURE CREEPING IN AT THOSE LOCATIONS FLASHING SHOULD
5 BE INSTALLED OR PRESENT AT WINDOWS AND DOORS TO STOP WATER
6 FROM GETTING ACCESS TO THE TOP OF THEM AND PARTICULARLY,
7 WHAT ARE CALLED ROOF TERMINATIONS, WHERE THE ROOF MAY MEET
8 A VERTICAL WALL AND THAT IS AN OPPORTUNITY FOR FAIRLY
9 HIGH VOLUMES OF WATER TO GAIN ACCESS AND OBVIOUSLY DO
10 DAMAGE

11 Q AND LET ME, I WANT TO ASK YOU ABOUT EACH ONE OF
12 THESE WHEN IT COMES TO THE WINDOWS, ARE THE WINDOWS AT
13 THE BABAEE HOUSE SEALED ACCORDING TO MOISTURE FREE
14 WARRANTY STANDARDS?

15 A NO, THEY ARE NOT

16 Q IS THERE ANY EVIDENCE THAT THEY EVER HAVE?

17 A NO, SIR

18 Q WHAT ABOUT THE JOINTS AROUND THE WINDOWS, HAVE THEY
19 BEEN PROPERLY SEALED?

20 A WHEN I WAS OUT THERE I FOUND THAT THEY HAD NOT BEEN
21 SEALED

22 Q WHAT ABOUT, YOU MENTIONED KICKOUT FLASHING, WE WILL
23 DISCUSS IT, WHAT THAT IS AND A PICTURE A LITTLE LATER
24 BUT WERE THE KICKOUTS INSTALLED ACCORDING TO THE MOISTURE
25 FREE WARRANTY STANDARD?

1 A WELL, THERE WERE THREE KICKOUT FLASHINGS ON THE
2 BABAEE HOUSE, ONE ON THE FRONT AND TWO ON THE REAR TWO
3 OF THEM WERE NOT FUNCTIONING PROPERLY AND THAT THERE WAS
4 HIGH MOISTURE GETTING UNDER ONE AND THE WALL WAS
5 DETERIORATING

6 Q AND ON THOSE THREE AREAS THAT AREN'T PREPARED
7 PROPERLY, WAS MOISTURE INTRUDING INTO THE SYSTEM?

8 A TWO OF THEM I FOUND OUT OF THE THREE

9 Q TWO OF THE KICKOUTS?

10 A YES

11 Q CAN YOU IDENTIFY THIS, THIS IS PLAINTIFF'S EXHIBIT 4?

12 A AGAIN, THAT IS ANOTHER PAGE OF THEIR BROCHURE OF THE
13 MOISTURE FREE WARRANTY

14 Q ON THIS PAGE IT MAKES A REPRESENTATION ABOUT WHAT
15 HOME SELLERS SHOULD KNOW IN YOUR EXPERIENCE IS THE
16 MOISTURE FREE WARRANTY USED TO SELL PEOPLE SYNTHETIC
17 STUCCO?

18 A YES, I WOULD THINK PRIMARILY HOW IT IS ACQUIRED AT
19 THE TIME OF THE SALE

20 Q I ASK YOU IF YOU RECOGNIZE PLAINTIFF'S EXHIBIT 5?

21 A AGAIN, ANOTHER PAGE FROM THE WARRANTY BROCHURE

22 Q IN THIS IT HAS A STATEMENT THAT MOISTURE FREE
23 WARRANTY IS, "TRUSTED BY COURTS, CONTRACTS AND HOMEOWNERS
24 NATIONWIDE " WHAT COURT ARE THEY REFERRING TO?

25 A IT IS AN INSPECTOR TALKING ABOUT THE COURT THAT

1 AUTHORIZED THE DRYVIT CLASS SETTLEMENT

2 Q BUT THE BABAE'S VERSION OF MOISTURE FREE WARRANTY IS
3 DIFFERENT THAN THE COURT'S SANCTION VERSION?

4 A THAT IS CORRECT, YES

5 Q ON THIS, IT MAKES REPRESENTATION ABOUT INHERENT
6 PROBLEMS, WOULD YOU, IN YOUR OPINION DOES SYNTHETIC STUCCO
7 HAVE INHERENT PROBLEMS?

8 A SURE AND FOR WHAT WE HAVE TALKED ABOUT IS THAT ALL
9 CLADDING SYSTEMS AT SOME POINT IN THEIR LIFE ARE GOING TO
10 ALLOW MOISTURE TO GET BEHIND THEM WHERE SEALANTS BREAK
11 DOWN, THAT SORT OF THING AS WE TALKED ABOUT OTHER
12 SYSTEMS ARE MORE FORGIVING AND THAT THAT MOISTURE HAS AN
13 OPPORTUNITY TO GET OUT THE INHERENT PROBLEMS IS THAT
14 SHOULD MOISTURE GET IN IT HAS NO WAY TO GET OUT THEREFORE
15 IT IS CAPABLE OF STAYING THERE AND CAUSING DAMAGE TO THE
16 HOME THAT MAY NOT HAPPEN WITH A DIFFERENT CLADDING SYSTEM

17 Q I WILL SHOW YOU EXHIBIT NUMBER 6 AND ASK YOU TO
18 IDENTIFY THAT?

19 A ANOTHER PAGE FROM THE SAME

20 Q AND THE LAST PAGE, I PROMISE COULD YOU EXPLAIN THE
21 PROCESS THAT IS SET FORTH ON THAT EXHIBIT

22 A WELL, IT IS REALLY WHAT WE TALKED ABOUT AS A BRIEF
23 STEP PLAN WHICH IS AN INITIAL INSPECTION, IT INCLUDES
24 MOISTURE TESTING THAT MAY BE A LIST OF THINGS THAT HAVE
25 TO BE REPAIRED, THE CONTRACTOR IS BROUGHT OUT THE REPAIRS

1 DONE, A SECOND INSPECTION IS GENERALLY DONE BY THE SAME
2 INSPECTOR, COMES OUT TO SAY, YES, THE THINGS THAT I FOUND
3 TO BE DEFICIENT INITIALLY HAVE BEEN CORRECTED TO MOISTURE
4 FREE WARRANTY STANDARDS AND THEN THE WARRANTY GETS
5 ISSUED AND THEN IF YOU GET A THREE TO FIVE YEAR WARRANTY,
6 PART OF THAT ARRANGEMENT IS THAT ANOTHER INSPECTOR WILL
7 COME OUT, SOMEWHERE IN THE MIDDLE OF 16 TO 18 MONTHS TO
8 REINSPECT THE HOUSE TO SEE HOW IT IS DOING AND THEN
9 AGAIN IF ANYTHING NEEDS TO BE CORRECTED THAT WOULD BE
10 IDENTIFIED AT THAT TIME

11 Q YOU HAVE REVIEWED THE PROTOCOL INSPECTIONS IN THIS
12 CASE?

13 A YES, SIR

14 Q WERE THEY DONE TO MOISTURE FREE WARRANTY'S INSPECTION
15 PROTOCOL STANDARD?

16 A NOT IN MY OPINION, NO

17 Q AND A SECTION THAT YOU WOULD REVIEW, DID YOU REVIEW
18 SECTION ONE INSPECTION?

19 A YES, SIR

20 Q DID IT NOTE ANY DEFICIENCY ON THE HOUSE?

21 A IT INDICATED THAT EVERYTHING WAS BASICALLY FINE BUT
22 THERE WAS ONE PROBLEM ON THE REAR, THE REPORT WAS ISSUED
23 TWICE IN MY MEMORY THERE WAS AN INITIAL ISSUANCE IN
24 THAT, ABOUT TWO OR THREE MONTHS LATER THERE WAS AN
25 AMENDMENT MADE TO IT REGARDING A KICKOUT FLASHING BUT NO

1 WHERE IN THE REPORT DID IT NOTE THAT THE CONSTRUCTION
2 JOINTS OF THE WINDOWS WERE NOT SEALED, THAT THE SEALANT
3 THAT WAS PRESENT AROUND THE WINDOWS DID NOT COMPLY WITH
4 MOISTURE FREE WARRANTY STANDARDS AND THAT THERE WAS HIGH
5 MOISTURE--

6 MR BLACKBURN YOUR HONOR, I AM GOING TO OBJECT,
7 THIS HAS NOT BEEN MARKED AS AN EXHIBIT AND WHAT HE IS
8 TALKING ABOUT IS HEARSAY I OBJECT TO THIS TESTIMONY HE
9 IS TALKING ABOUT A REPORT THAT HAS NOT BEEN MARKED INTO
10 EVIDENCE

11 THE COURT WHOSE REPORT IS IT?

12 MR PHILLIPS A REPORT DONE BY CHARLES STRICKLAND,
13 YOUR HONOR, HE HAS REVIEWED FOR HIS TESTIMONY

14 THE COURT OVERRULED, EXPERTS CAN RELY ON TYPES OF
15 DOCUMENTS, OVERRULED

16 Q THE KICKOUT THAT WAS IDENTIFIED IN THE SECOND REPORT,
17 IT WASN'T INSTALLED PROPERLY, WAS IT?

18 A RIGHT, WHAT YOU ARE CALLING AS A SECOND REPORT I AM
19 UNDERSTANDING TO BE THE AMENDMENT TO THE FIRST REPORT

20 Q CORRECT, THE AMENDED REPORT IT DID IDENTIFY A
21 PROBLEM, CORRECT?

22 A THAT IS CORRECT

23 Q WAS THAT PROBLEM THERE WAS THE START?

24 A IN ALL LIKELIHOOD, YES

25 Q DO YOU UNDERSTAND WHY IT WOULDN'T BE PICKED UP ON THE

1 FIRST REPORT?

2 A NO, I DON'T

3 Q NOW, MOISTURE FREE WARRANTY TAKES THESE REPORTS AND

4 THEY EXAMINE THEM, DON'T THEY?

5 A THAT IS THE PROCESS, YES

6 Q TO MAKE SURE THAT THE INSPECTION IS NOT A PROBLEM?

7 A THAT IS CORRECT

8 Q AND YOU LOOKED AT THAT REPORT?

9 A YES

10 Q WITHOUT EVEN LOOKING AT THE HOUSE COULD YOU TELL WHAT

11 THAT REPORT WAS GOING TO HAVE A PROBLEM WITH?

12 A YES, BECAUSE THERE WERE NOT PICTURES OF EACH DETAIL

13 MR BLACKBURN YOUR HONOR, I OBJECT

14 THE COURT I THINK YOU SHOULD ASK THE QUESTION LIKE

15 IT IS SUPPOSE TO BE ASKED DO YOU HAVE AN OPINION WITH A

16 REASONABLE DEGREE OF CERTAINTY, IF YOU ARE GOING TO ASK

17 HIM OPINIONS ASK IT RIGHT

18 MR PHILLIPS I APOLOGIZE, YOUR HONOR

19 THE COURT YOU DON'T HAVE TO APOLOGIZE, JUST FOLLOW

20 THE RULES

21 Q MR FLAHERTY, DO YOU HAVE AN OPINION ABOUT WHETHER

22 THE FIRST, THE AMENDED REPORT WAS DONE ACCORDING TO

23 MOISTURE FREE WARRANTY'S PROTOCOLS

24 THE COURT I AM NOT GOING TO ALLOW THAT QUESTION TO

25 BE ANSWERED

1 Q MR FLAHERTY, CAN I ASK YOU IF YOU, HAVE YOU FORMED
2 AN OPINION ABOUT THE ACCURACY OF THE AMENDED MOISTURE FREE
3 WARRANTY REPORT

4 THE COURT I AM NOT GOING TO ALLOW THAT QUESTION TO
5 BE ANSWERED DO YOU HAVE AN OPINION WITH A REASONABLE
6 DEGREE OF PROFESSIONAL CERTAINTY WITH AN AREA OF EXPERTISE
7 THAT MORE LIKELY THAN NOT AND THEN ASK YOUR QUESTION I
8 AM SORRY, I DON'T MAKE THOSE RULES

9 Q MR FLAHERTY, LET'S TALK ABOUT THE HOUSE FOR A LITTLE
10 BIT DO YOU RECOGNIZE EXHIBIT NUMBER 7?

11 A SURE

12 Q TELL ME WHAT THAT IS?

13 A THAT IS THE FRONT ELEVATION OF THE BABAE HOME

14 Q YOU TALKED ABOUT A KICKOUT LOCATION?

15 A YES, SIR

16 Q CAN YOU IDENTIFY WHERE THE KICKOUT LOCATION IS?

17 A YOU WILL SEE THE FRONT PART OF THE GARAGE WHICH IS ON
18 THE RIGHT PORTION OF THE FRONT OF THE HOUSE, THERE IS A
19 ROOF THAT COMES DOWN AND TERMINATES JUST UNDER THE SECOND
20 STORY WINDOW UP FROM MR PHILLIPS, UP ABOVE THERE, RIGHT
21 THERE IS A ROOF TERMINATION AS IT RELATES TO THE EIFS
22 CLADDING AND THAT IS WHAT IS CALLED A KICKOUT FLASHING
23 TO BE INSTALLED AND ESSENTIALLY WHAT IT DOES, AS THE WATER
24 COMES DOWN THE ROOF DIVERTS IT INTO A GUTTER SO THAT IT
25 CAN'T GAIN ACCESS BEHIND THE STUCCO AT THAT JUNCTION

0170

APP_0174

1 Q DO YOU RECOGNIZE EXHIBIT NUMBER 9?

2 A YES SIR, THAT IS A BLOWUP OF JUST THAT AREA IN THE

3 FRONT OF THE HOUSE

4 Q AM I POINTING TO THE KICKOUT?

5 A THAT'S CORRECT

6 Q LET ME SHOW YOU EXHIBIT NUMBER 10

7 A AGAIN, THAT IS A FURTHER BLOWUP OF THAT KICKOUT AREA

8 AT THAT ROOF TERMINATION

9 Q WHAT IS THAT PIECE OF MATERIAL MADE OF?

10 A THAT IS A METAL FLASHING

11 Q AND HOW IS THAT MALFUNCTIONING?

12 A WELL, IT COULD BE ANYWHERE ABOVE THERE BECAUSE IT IS

13 REALLY BEING CONCEALED BY THAT WHITE BAND THAT YOU SEE

14 THERE WHICH IS DECORATIVE IN NATURE BUT IT IS HARD TO SEE

15 WHAT IS GOING ON BEHIND THAT DECORATIVE BAND AT THE END OF

16 THAT ROOF THAT IS ALLOWING WATER TO ENTER BELOW THERE INTO

17 THE WALL AREA

18 Q HAVE YOU INSPECTED THAT AREA?

19 A YES, I HAVE

20 Q WHAT DID YOU FIND?

21 A I FOUND EXTREMELY HIGH MOISTER IN THE AREA, 40

22 PERCENT WHICH FRANKLY THE METER I WAS USING AT THE TIME

23 ONLY GOES TO THAT AND WOULD INDICATE TO ME THAT IT WOULD

24 LIKELY GO HIGHER IF THE METER WOULD ALLOW IT TO AND AS

25 PART OF MY EVALUATION ON THAT DAY, AT THE BASE OF THAT

1 WALL I CUT A HOLE ROUGHLY FOUR INCHES IN DIAMETER THROUGH
 2 THE SYSTEM TO REVEAL WHAT IS GOING ON BEHIND IT AND THE
 3 STRUCTURAL MATERIALS WERE SOAKING WET AND WERE
 4 DETERIORATED
 5 Q IN YOUR OPINION TO A REASONABLE DEGREE OF CERTAINTY,
 6 HOW LONG HAS THAT CONDITION EXISTED?
 7 A THAT IS HARD TO SAY, IT IS HARD TO TELL HOW LONG THAT
 8 HAS BEEN GOING ON
 9 Q CAN YOU IDENTIFY PLAINTIFF'S 8, WHAT IS THAT?
 10 A THAT IS THE REAR ELEVATION OF THE BABAEE HOUSE
 11 Q AND IS THERE A KICKOUT LOCATION THERE?
 12 A YES SIR, THERE IS ACTUALLY TWO YOU WILL SEE A SMALL
 13 ENTRY DOOR ON THE LEFT PORTION AND YOU WILL SEE THE WHITE
 14 ACCENT ABOVE THAT ROOF OF THAT, THERE ARE KICKOUTS ON
 15 EITHER SIDE AND THEN THERE IS A KICKOUT ON THE ROOF
 16 TERMINATION ABOVE THAT AREA JUST UNDER THE SECOND STORY
 17 TRIPLE WINDOW
 18 Q DO YOU RECOGNIZE EXHIBIT 11?
 19 A YES SIR, THAT IS A BLOWUP OF THAT AREA
 20 Q AND EXHIBIT 12?
 21 A A FURTHER BLOWUP OF THAT AREA, YES
 22 Q IS THAT KICKOUT THE ONE YOU WERE REFERRING EARLIER?
 23 A I BELIEVE IT IS, YES
 24 Q DO YOU SEE ANY EVIDENCE THAT THERE HAD BEEN ANY
 25 REMEDIAL WORK ON THAT KICKOUT BEING MALFUNCTIONED?

1 A NO, SIR

2 Q DID THAT CAUSE DAMAGE TO THE HOME?

3 A IT HAS, YES

4 Q I WILL SHOW YOU EXHIBIT 13, TELL THE JURY WHAT THAT

5 IS?

6 A THAT IS THE BLOWUP OF A CORNER OF A WINDOW IN THE

7 HOUSE AND REALLY ILLUSTRATES TWO OF THE PROBLEMS THAT I

8 DESCRIBED EARLIER ONE IS, YOU CAN SEE THE JUNCTION WHERE

9 THE SILL AND THE SIDE OF THE WINDOW COME TOGETHER IS OPEN

10 WHICH PROVIDES AN OPPORTUNITY OR UNSEALED WHICH PROVIDES

11 AN OPPORTUNITY FOR WATER TO GAIN ENTRY AT THAT POINT AND

12 THAT IS A PRETTY COMMON OCCURRENCE IN WINDOWS OF THAT

13 NATURE THE OTHER ISSUE IS THE SEALANT THAT YOU SEE

14 AROUND THE OUTSIDE PERIMETER OF THE WINDOW UP THE SIDE AND

15 ACROSS THE BOTTOM IS FAILING IF YOU WERE LOOKING AT IT

16 CLOSE ENOUGH, YOU MAY NOT BE ABLE TO SEE WHERE YOU ARE

17 SITTING UP ON TOP BUT IT IS ALL CRACKING AND THAT IS AN

18 INDICATOR THAT THE SEALANT WAS EXPERIENCING TWO TYPES OF

19 FAILURE AND THE RISK OF, THERE ARE TWO TYPES, ONE IS

20 ADHESIVE FAILURE AND ONE IS COHESIVE FAILURE ADHESIVE

21 FAILURE IS WHEN IT IS PULLING AWAY FROM THE MATERIAL THAT

22 IT IS SUPPOSE TO ADHERE TO COHESIVE FAILURE WHICH YOU

23 SEE GOING ON IS ALL THE CRACKING IN THE MIDDLE WHERE THE

24 SEALANT IS COMING APART FROM WITHIN AND IT TYPICALLY

25 HAPPENS WHEN THE SEALANT IS NOT INSTALLED PROPERLY, IT

1 DOESN'T HAVE THE ABILITY TO EXPAND AND CONTRACT WITH THE
2 SIDING WITHOUT PULLING APART

3 Q IS THIS TYPICAL OF THE WINDOWS ON THE BABAEE HOUSE?

4 A AT THE TIME I WAS THERE, YES

5 Q DO YOU RECOGNIZE EXHIBIT 14?

6 A YES, SIR

7 Q IS THAT YOUR HAND IN THE PICTURE?

8 A YES, IT IS

9 Q WHAT ARE YOU MAKING OF THAT?

10 A THAT THE SEALANT, I HAD CUT THE SEALANT TO DETERMINE
11 HOW IT HAD BEEN APPLIED, IF IT HAD BEEN APPLIED PROPERLY
12 TO ALLOW IT TO PERFORM IN THIS APPLICATION AND IT HAD NOT
13 AND BY THAT I MEAN THAT THERE WAS NOT A BOND BREAKER
14 MATERIAL BEHIND THE SEALANT THAT THE SEALANT WOULD NOT
15 STICK TO WHICH WOULD ALLOW IT, LIKE A RUBBER BAND, TO
16 EXPAND AND CONTRACT AND COME BACK TO IT'S ORIGINAL SHAPE
17 WHEN YOU DON'T DO THAT THE WIDTH OF THE JOINT IS REALLY
18 NOTHING MORE THAN THE POINT WHERE THE STUCCO AND THE
19 WINDOW COME TOGETHER SO IN ESSENCE IT IS A VERY THIN
20 PART OF THE SEALANT THAT IS TRYING TO EXPAND AND CONTRACT
21 AND THAT IS WHAT IS CAUSING THE FAILURE THAT IS GOING ON
22 ON THE HOUSE AT THIS TIME

23 Q DOES MOISTURE FREE WARRANTY SPECIFY HOW JOINTS LIKE
24 THAT ARE SUPPOSE TO BE MADE?

25 A THEY DO, YES

1 Q HOW IS THAT, CAN YOU EXPLAIN THAT?

2 A WELL, THEY CALL FOR A BOND BREAKER, AS WE JUST
3 DISCUSSED TO BE UNDERNEATH THE SEALANT WHEN IT IS APPLIED
4 FOR THAT EXACT REASON, TO ALLOW IT TO EXPAND AND CONTRACT
5 LIKE A RUBBER BAND, TO HELP TO PROTECT THAT AREA AGAINST
6 FAILURE WHICH LETS MOISTURE GET BEHIND THE SYSTEM WHICH IS
7 OBVIOUSLY WHAT YOU CAN'T HAVE, THE WHOLE PREMISES CANNOT
8 LET MOISTURE GET BEHIND THE SYSTEM

9 Q HAVE YOU SEEN ANY EVIDENCE OF A BOND BREAKER MATERIAL
10 ON ANY OF THE WINDOWS ON THE BABAEE HOUSE?

11 A NO, SIR

12 Q IN YOUR OPINION TO A REASONABLE DEGREE OF CERTAINTY,
13 WHEN THE MOISTURE FREE WARRANTY INSPECTORS LOOKED AT THAT
14 HOUSE WAS THE BOND BREAKER MATERIAL PRESENT?

15 A I CAN ONLY ASSUME THAT THE SEALANT THAT I SAW WAS
16 THERE WHEN THEY DID THEIR FIRST INSPECTION

17 Q MR FLAHERTY, YOU HAVE DONE SOME EVASIVE TEST AT THE
18 BABAEE HOME?

19 A THAT IS CORRECT

20 Q EXPLAIN TO THE JURY WHAT AN EVASIVE TEST IS?

21 A WELL, AFTER I HAVE DONE THE VISUAL INSPECTION OF HOW
22 THE SYSTEM WAS INSTALLED AND I HAVE DONE THE MAPPING, IS
23 THERE ELEVATED MOISTURE OR NOT IN THE SYSTEM IN A CASE
24 LIKE THE BABAEE'S, WHERE THEY ARE HAVING A SITUATION THAT
25 MAY OR MAY NOT LEND ITSELF TO LITIGATION, I WILL CUT AS I

1 INDICATED A FOUR INCH CIRCULAR CUT THROUGH THE VARIOUS
2 LAYERS OF THE EIFS SYSTEM AND THE STRUCTURAL MATERIALS ON
3 THE HOUSE TO EXAMINE WHAT IS THERE AND WHAT IS HAPPENING
4 AS A RESULT OF THE ISSUES THAT I FOUND IN THAT AREA

5 Q DO YOU RECOGNIZE PLAINTIFF'S 15?

6 A YES, SIR

7 Q EXPLAIN TO THE JURY WHAT THAT IS?

8 A WELL, IT IS A COMBINATION OF MATERIALS THAT I GATHER
9 AS PART OF MY CUT, ONE OF WHICH IS THE INSULATOR BOARD
10 WITH THE VERY THIN LAMINATE THAT IS APPLIED TO IT THERE
11 IS ALSO PERORATED WOOD IN THAT AREA THAT IS A RESULT OF
12 THE MOISTURE HAVING BEEN AFFECTING IT AND MORE
13 IMPORTANTLY FROM MY STANDPOINT ALMOST, IS THE FACT THAT
14 THERE ARE WHAT IS CALLED VAPOR RETARDERS IN THE WALL, YOU
15 WILL SEE AN EXAMPLE HERE, THE PAPER THAT IS PART OF THE
16 INSTALLATION AND THERE IS ALSO PLASTIC IN HERE WHICH IS
17 COMMON IN SOUTH CAROLINA FOR ENERGY EFFICIENCY REASONS
18 WHERE THEY INSTALL IT UNDERNEATH THE INTERIOR SHEETROCK TO
19 HELP WITH THE ENERGY EFFICIENCY OF THE HOME WHEN THAT IS
20 THERE THOSE VAPOR RETARDERS, IT CREATES A SITUATION UNLIKE
21 WITH OTHER SIDING MATERIALS, WHEN IN EFFECT IT CREATES A
22 TERRARIUM IN THE WALL WHERE THE NORMAL FLOW OF MOISTURE
23 THAT MIGHT GET INTO A SYSTEM OR IN THE HOT HUMID WEATHER
24 THAT WE HAVE IN SOUTH CAROLINA MOST OF THE YEAR, THE
25 NORMAL FLOW OF THE AIR IS FROM THE OUTSIDE TO THE INSIDE,

0176

APP_0180

1 WARM SIDE TO COLD SIDE IT INTERFERES WITH THE NORMAL
2 FLOW OF THAT AND CAUSES NOT ONLY MOISTURE THAT HAS GOTTEN
3 INTO THE WALL DUE TO LEAKS TO STAY THERE LONGER THEREFORE
4 THE WALL NOT DRYING OUT AS QUICKLY AS IT WOULD NORMALLY BE
5 EXPECTED TO BUT IT ALSO CAUSES CONDENSATION TO FORM IN THE
6 WALL CAVITIES MOST OF THE YEAR HERE BECAUSE OF THE HOT
7 HUMID CONDITIONS THAT ARE PREVALENT AND ESSENTIALLY THE
8 MANUFACTURERS OF THE EIFS PRODUCTS HAVE PUT OUT DOCUMENTS
9 THAT THOSE SHOULD BE AVOIDED OR IN THEIR CASE VAPOR
10 RETARDERS WOULD BE AVOIDED WHEN THESE CLADDINGS IS BEING
11 PUT ON THE HOUSE REALLY THE REVERSE IS TRUE BECAUSE THE
12 ENERGY IS CALLING FOR THESE VAPOR RETARDERS TO BE
13 INSTALLED, REALLY AT LEAST CLADDING SHOULD NOT BE
14 INSTALLED ON A HOUSE THAT HAS A VAPOR RETARDER
15 INCORPORATED INTO THE WALL TO PREVENT THOSE PROBLEMS FROM
16 HAPPENING

17 Q AND MR BLACKBURN POINTED OUT IN HIS OPENING THAT HIS
18 MATERIAL IS DRY?

19 A THAT IS CORRECT

20 Q WHAT IS THAT MATERIAL TELL YOU ABOUT PAST MOISTURE
21 PROOF?

22 A WELL, IT HAS BEEN MY EXPERIENCE, AGAIN, IN THE 1500
23 INSPECTIONS THAT I HAVE DONE BUT OBVIOUSLY MOST HOMEOWNERS
24 AREN'T GOING TO CUT HOLES IN THEIR HOUSE IF THEY ARE
25 TRYING TO SELL IT BUT IN THE ROUGHLY 250 LITIGATION

1 ORIENTED INSPECTIONS THAT I HAVE DONE, WHAT I HAVE FOUND
2 IS THAT WHEN WOOD MATERIALS HAVE DETERIORATED TO A CERTAIN
3 POINT THEY NO LONGER HOLD WATER, THE WATER WILL PASS
4 THROUGH IT BECAUSE THERE ISN'T ENOUGH OF IT TO HOLD ONTO
5 IT ANY LONGER AND THAT IS WHAT I FIND AND ONE OF THE
6 ITEMS I FOUND IN MY INTIAL INSPECTION OF THE REAR OF THE
7 HOME WAS AN AREA THAT WAS ROTTED OUT BUT WAS NOT WET
8 WHEREAS IN ANOTHER AREA NEAR BY HAD SOME ELEVATED MOISTURE
9 BECAUSE IT HAD BEEN AFFECTED SO MUCH BY PREVIOUS MOISTURE
10 INTRUSION THAT IT WAS DETERIORATED TO THE POINT WHERE IT
11 COULDN'T EVEN HOLD ONTO THE WATER ANYMORE

12 Q WHEN YOU REMOVED THE WOOD MATERIAL IN THIS BAG WAS IT
13 INTACT?

14 A NO, IT WAS LIKE COMPOST IN THE WALL WHERE YOU JUST
15 TAKE IT AND PULL IT OUT WITH YOUR HANDS

16 Q WHEN IT WAS INSTALLED IT WAS A SOLID BOARD, WASN'T
17 IT?

18 A THAT IS CORRECT, YES

19 Q MR FLAHERTY, I WOULD LIKE YOU TO LOOK AT EXHIBIT 16

20 MR BLACKBURN YOUR HONOR, WE OBJECT TO THIS
21 EXHIBIT

22 THE COURT LADIES AND GENTLEMEN, ALL OF THE EXHIBITS
23 THAT YOU HAVE SEEN SO FAR HAVE BEEN AGREED UPON BY THE
24 PARTIES BUT THERE WILL BE AN OBJECTION TO THIS EXHIBIT
25

1 Q THIS HAS BEEN MARKED AS IDENTIFICATION PURPOSES AS
2 PLAINTIFF'S 16, COULD YOU DESCRIBED THAT MATERIAL, DO YOU
3 RECOGNIZE THAT MATERIAL?

4 A YES

5 Q TELL ME WHAT IT IS?

6 A WELL, AGAIN, THESE ARE MATERIALS I REMOVED FROM A CUT
7 I DID AT THE HOME

8 Q DO YOU RECOGNIZE THAT?

9 A YES, SIR

10 Q DO YOU RECALL WHERE YOU COLLECTED THAT SAMPLE?

11 A YES SIR, I WOULD OF COLLECTED IT ON THE REAR OF THE
12 BABAE HOME IN MY FIRST INSPECTION

13 MR PHILLIPS YOUR HONOR, I BELIEVE THE WITNESS HAS
14 IDENTIFIED THE EXHIBIT, 16

15 THE COURT DO YOU WANT TO OFFER IT INTO EVIDENCE?

16 MR PHILLIPS I WOULD LIKE TO OFFER IT AS EVIDENCE

17 THE COURT ANY OBJECTION?

18 MR BLACKBURN NO OBJECTION, YOUR HONOR

19 THE COURT IT IS ADMITTED

20 (WHEREUPON, PLAINTIFF'S EXHIBIT NO 16 WAS ADMITTED
21 INTO EVIDENCE)

22 Q MR FLAHERTY, EXHIBIT 16, IS THAT EVIDENCE OF WOOD
23 ROT?

24 A YES, SIR

25 Q WHERE DID YOU TAKE THAT CUT?

1 A THAT CUT, IF YOU CAN PUT THE PICTURE BACK UP ON THE
2 EASEL, YES

3 Q EXHIBIT 11

4 A AT THE BASE OF THAT WALL UNDER THAT KICKOUT FLASHING
5 THAT YOU SEE WITH THE WHITE TRIM, DOWN AT THE BOTTOM OF
6 THE WALL, I DID ANOTHER FOUR INCH CIRCULAR CUT BECAUSE
7 WHEN I PROBED IT TO GET MOISTURE READINGS I WAS GETTING NO
8 ELEVATED MOISTURE BUT MY PROBE WAS GOING TO PUT ME THROUGH
9 THE WALL TELLING ME THAT THERE WAS VIRTUALLY NOTHING LEFT
10 THERE SO, AS I INDICATED, WHEN I AM IN A SITUATION LIKE
11 THIS FOR THE BABAE'S, I DID A CUT AT THE BASE OF THE WALL
12 THERE TO SEE WHAT WAS GOING ON AND WHAT WAS IN THE WALL AS
13 A RESULT OF THAT AND THESE, AS YOU CAN SEE, ARE THE
14 REMNANTS OF THE WALL IN THAT AREA AND THAT WAS IN JUNE OF
15 2006

16 Q MR FLAHERTY, LET'S GO BACK TO THE VAPOR RETARDERS,
17 THIS IS THE SIGNIFICANCE OF A VAPOR RETARDER WALL, IN YOUR
18 OPINION?

19 A WELL, UNDER NORMAL CIRCUMSTANCES THERE IS REALLY NOT
20 A SIGNIFICANCE, THE SIGNIFICANCE IS WHEN THERE IS A EIFS
21 CLADDING ON THE OUTSIDE AND IT WAS WHAT I WAS ELUDING TO A
22 FEW MINUTES AGO IN THAT IT CHANGES THE WAY THE WALL
23 OPERATES AS FAR AS MOISTURE THAT WOULD NORMALLY,
24 INCIDENTAL MOISTURE THAT MIGHT GET INTO THE WALL WOULD
25 NORMALLY BE PULLED THROUGH THE WALL AND THE MOISTURE WOULD

1 BE DISSIPATED BY THE HVAC SYSTEM ONCE IT GETS INSIDE THE
2 AIR OF THE HOME WHEN YOU PUT THE VAPOR RETARDERS
3 UNDERNEATH THE INTERIOR SHEETROCK IT DOESN'T GET THERE
4 THE MOISTURE THAT GETS INTO THE WALL NOW IS HELD IN THE
5 WALL CAVITY AND THERE WERE STUDIES DONE, AS A QUICK
6 HISTORY, WHERE ALL OF THIS CAME TO LIGHT WAS IN
7 WILMINGTON, NORTH CAROLINA IN THE MID-1990'S THERE WAS A
8 STUDY DONE BY THE NATIONAL RESEARCH CENTER IN CANADA WHERE
9 THEY EVALUATED WHAT WAS HAPPENING AS A RESULT OF THESE
10 VAPOR RETARDERS BEING PRESENT IN THE WALLS IN THAT
11 LOCATION WHICH CAME, WHICH BECAME THE VOCAL POINT OF THE
12 EIFS PROBLEMS, IF YOU WILL, WHERE IT CAME TO LIGHT AND
13 THEY FOUND IN THEIR MODELS, AS A RESULT OF THEIR
14 EVALUATION TWO THINGS ONE IS, WHEN EXCESSIVE MOISTURE
15 GOT INTO A WALL CAVITY OF A HOME WITH THE VAPOR RETARDERS
16 THEIR MODEL INDICATED THAT THE WALL WOULD NEVER COMPLETELY
17 DRY OUT OVER A THREE YEAR PERIOD THE OTHER PART IS THEY
18 FOUND THAT THE AREAS THAT THEY WERE FINDING THE EXCESSIVE
19 MOISTURE WAS UNDER WINDOWS THAT HAD SEALANT APPLIED JUST
20 LIKE UPON THE BABAE'S HOUSE WHERE THERE WAS NO BOND
21 BREAKER INVOLVED OVER TIME THAT SEALANT WOULD NOT
22 PERFORM AS EXPECTED, WATER WOULD GAIN ACCESS UNDER THE
23 WINDOWS AND ONCE THERE THE VAPOR RETARDERS WOULD THEN KEEP
24 THAT WATER IN THE WALLS AND OBVIOUSLY DO MORE DAMAGE THAN
25 MAY NORMALLY BE EXPECTED TO HAPPEN IN OTHER CIRCUMSTANCES

0181

APP_0185

1 Q MR FLAHERTY, LET ME SHOW YOU PLAINTIFF'S EXHIBIT 17
2 AND ASK YOU IF YOU CAN IDENTIFY THAT ONE?

3 A YES, SIR THAT IS A COPY OF THE DOCUMENT THAT I WAS
4 JUST REFERRING TO

5 Q GIVEN THE PRESENCE OF VAPOR RETARDERS CAN A EIFS
6 SYSTEM EVER WORK IN A BABAE HOUSE?

7 A IN MY OPINION IN AREAS AS SUCH AS SOUTH CAROLINA
8 WHERE THEY EMPLOY VAPOR RETARDERS, EIFS CLADDING SHOULD
9 NOT BE ON THE EXTERIOR OF THE HOME BECAUSE OF THE PROBLEMS
10 THAT WE JUST TALKED ABOUT THAT EVEN IF YOU COULD NOT
11 HAVE LEAKS AT THE PENETRATIONS, WHICH IS VERY DIFFICULT TO
12 DO, YOU STILL HAVE THE PROBLEM BECAUSE OF THE WARM MOIST
13 CLIMATE OF CONDENSATION FORMING IN THE WALLS, MOST MONTHS
14 OF THE YEAR, FROM SPRING THROUGH FALL SO, A PERFECTLY
15 REMEDIATED HOUSE IS LIKELY GOING TO HAVE A LONGTERM
16 DETRIMENTAL EFFECT DUE TO THE RESULT OF MOISTURE FORMING
17 AS CONDENSATION IN THE WALLS

18 Q AND IN HIS OPENING MR BLACKBURN SAID YOU RECOMMENDED
19 WARRANTY ON STUCCO HOUSES IN SOUTH CAROLINA, IS THAT TRUE?

20 A THAT IS NOT TRUE IN THE END OF 2005 WHICH IS
21 COINCIDENTALLY WHEN I STOPPED DOING INSPECTIONS OR
22 REFERRING MY CLIENTS TO MOISTURE FREE WARRANTY, A GIRL IN
23 THEIR OFFICE ASKED ME IF I WOULD MIND DOING A COUPLE OF
24 INTERIM INSPECTIONS, AS WE TALKED ABOUT 18 MONTHS IN ON
25 TWO HOUSES IN SOUTH CAROLINA THEY WERE NOT MY CLIENTS, I

1 WAS NOT THE INITIAL INSPECTOR BUT I AGREED TO GO DO THAT
2 FOR THEM THAT WAS PURELY THE FOLLOW-UP INSPECTION FOR
3 SOMEONE WHO ALREADY HAD THE MOISTURE FREE WARRANTY ON
4 THEIR HOUSE BUT I NEVER DID AN INITIAL INSPECTION ON A
5 HOME IN SOUTH CAROLINA FOR THE PURPOSE OF ACQUIRING A
6 MOISTURE FREE WARRANTY

7 Q DID YOU EVER INFORM ANYBODY OF MOISTURE FREE
8 WARRANTY, ABOUT YOUR OPINION REGARDING VAPOR AREAS IN
9 SOUTH CAROLINA?

10 A ACTUALLY ANOTHER CLIENT OF MINE, ALANDE JACKSON WHO
11 LIVES NORTH OF GREENVILLE WAS IN A SITUATION SIMILAR TO
12 THE BABAEE'S, A LOT OF DAMAGE ON THE HOME AND THE ONLY
13 TIME I HAVE MET MR BURTON HE AND ANOTHER FELLOW CAME OUT
14 TO THE HOUSE AND MET ME AND I TALKED TO THEM ABOUT,
15 OBVIOUSLY SHOWED THEM THE ELEVATED MOISTURE THAT WAS
16 GETTING IN, UNDER WINDOWS THAT HAD BEEN REMEDIATED BY A
17 PREVIOUS INSPECTOR, A MOISTURE FREE WARRANTY CONTRACTOR
18 AND TALKED TO THEM ABOUT THE VAPOR RETARDER PROBLEM HE
19 JUST BASICALLY DISMISSED IT, NOT AN ISSUE AND I DISAGREE
20 BASED ON MY EXPERIENCE

21 Q DO YOU RECOMMEND THAT YOUR CLIENTS USE A MOISTURE
22 FREE WARRANTY IN SOUTH CAROLINA?

23 A NO, SIR

24 Q WHY NOT?

25 A WELL, BECAUSE MY EXPERIENCE BEING THE VAST MAJORITY

1 AND I HAVE FOUND A COUPLE OF HOMES THAT HAVEN'T HAD VAPOR
2 RETARDERS IN THE WALLS FOR WHATEVER REASON, BUT THE
3 PREVALENCE OF VAPOR RETARDERS USED IN SOUTH CAROLINA AND
4 COASTAL AREAS SUCH AS THE GULF COAST OF ALABAMA AND
5 MISSISSIPPI WHERE THEY EMPLOY THEM, AN EIFS CLADDING
6 SHOULD NOT BE INSTALLED ON A HOME THAT HAS THAT AS PART OF
7 ITS CONSTRUCTION FOR ALL THE REASONS THAT WE JUST TALKED
8 ABOUT

9 Q IN YOUR OPINION, TOO A REASONABLE DEGREE CERTAINTY,
10 DOES MOISTURE FREE WARRANTY KEEP A HOME DRY?

11 A WELL, I SUPPOSE THERE IS TWO ANSWERS TO THAT ONE
12 IS, IF THE REPAIRS OR REMEDIATION WERE DONE TO THEIR
13 SPECIFICATIONS IN AN AREA OTHER THAN SOUTH CAROLINA OR THE
14 AREAS THAT I JUST TALKED ABOUT, THEN I THINK THERE IS A
15 CHANCE WITH DILIGENT INSPECTION AND MAINTENANCE TO PROTECT
16 THE HOUSE TO A REASONABLE DEGREE HOWEVER, MY EXPERIENCE
17 HAS BEEN THAT REPAIRS ARE NOT DONE TO THEIR SPECIFICATIONS
18 THEREFORE CAUSING OPPORTUNITY FOR FAILURE WHICH IS WHAT IS
19 HAPPENING TO THE BABAEE'S AND THEREFORE PROBLEMS THAT
20 WOULD NOT NORMALLY EXPECT TO HAVE IF YOU HAVE A WARRANTY
21 ON YOUR HOUSE AND GENERALLY INSPECTED AND REPAIRED

22 Q I ASK YOU IF YOU RECOGNIZE PLAINTIFF'S 18?

23 A THIS WAS A, IN THE INITIAL INSPECTION WHEN THEY
24 AMENDED IT THEY PUT IN THE ITEM ABOUT THE KICKOUT FLASHING
25 IN THE REAR APPARENTLY MOISTURE FREE WARRANTY HAD ISSUED

1 THEIR WARRANTY ANYWAY WITH AN EXCLUSION FOR THAT THEN
2 ROUGHLY SEVEN MONTHS LATER IT APPEARS, ANOTHER MOISTURE
3 FREE WARRANTY INSPECTOR CAME OUT AND DID SOME MOISTURE
4 TESTING AND SAID IT IS DRY AND THEY TOOK THE EXCLUSION OFF
5 ALTHOUGH NOTHING HAD EVER BEEN DONE TO CHANGE THE
6 CONDITION THERE BECAUSE THE DAY HE CAME OUT AND IT IS
7 DRY THEY TOOK THE EXCLUSION OFF IN THE MEANWHILE THE
8 HOUSE WAS ALLOWED TO STAY THERE WITH SOMETHING FAILING
9 CAUSING DAMAGE TO THE HOUSE THAT THEY WEREN'T DEALING
10 WITH

11 Q WHAT ROLE DID EXHIBIT 18 PLAY IN THAT PROCESS?

12 A FOR THE ROLE THAT I SEE IS THAT IT CAUSED THEM TO
13 TAKE THE EXCLUSION OFF THE WARRANTY FOR THAT AREA AND THAT
14 IS INCLUDING IT IN THE WARRANTY OF THE REST OF THE HOUSE

15 Q I WILL DIRECT YOUR ATTENTION BACK TO PLAINTIFF'S
16 EXHIBIT 6, WAS THERE ANY STEP TWO IN THIS PROCESS OR WAS
17 IT A REVIEW AND RECOMMENDATIONS OF REPAIR MADE?

18 MR BLACKBURN OBJECTION, YOUR HONOR, HOW DOES HE
19 KNOW--

20 THE COURT WELL, ASK HIM

21 Q HAVE YOU SEE ANY EVIDENCE THAT THERE WAS A REVIEW
22 MADE?

23 A I HAVE NOT SEEN ANYTHING THAT INDICATES THAT
24 INSTRUCTIONS HAVE BEEN PROVIDED TO MAKE A CORRECTION TO
25 THAT AREA

1 Q DOES EXHIBIT 18 COMPORT WITH OR FOLLOW THE GUIDELINES
2 THAT MOISTURE FREE WARRANTY HAS ESTABLISHED FOR REPAIRING
3 MOISTURE AREAS?

4 A WELL, IT DOESN'T SAY ANYTHING ABOUT A REPAIR HAVING
5 BEEN MADE, IT JUST SAYS IT IS DRY TODAY

6 Q THE AREA THAT HE IS DISCUSSING IS DRY IS EXHIBIT 16
7 THAT YOU HAVE IN FRONT OF YOU, ISN'T IT?

8 A YES, THAT IS THE KICKOUT ABOVE THIS AREA

9 Q DID MOISTURE FREE WARRANTY FOLLOW, IN REMOVING THAT
10 EXCLUSION, DID THEY FOLLOW THE THREE STEP PROCESS THAT
11 THEY ADVERTISED TO THE BABAEE'S?

12 MR BLACKBURN OBJECTION, YOUR HONOR

13 THE COURT WHAT IS THE OBJECTION?

14 MR BLACKBURN HE IS LEADING INTO, HOW DOES HE KNOW
15 ABOUT STEPS THAT WERE TAKEN TO THAT EXCLUSION?

16 THE COURT HE IS LEADING, SUSTAINED ASK IN A
17 NON-LEADING FASHION

18 MR PHILLIPS YES, YOUR HONOR

19 THE COURT IN FACT YOU HAVE BEEN LEADING THE WHOLE
20 TIME

21 Q MR FLAHERTY, HAVE YOU SEEN ANY EVIDENCE REGARDING
22 THE THREE STEP PROCESS AT THE BABAEE'S?

23 MR BLACKBURN OBJECTION, THE SAME QUESTION

24 THE COURT ASK HIM A NON-LEADING QUESTION

25 Q MR FLAHERTY, YOU ARE FAMILIAR WITH--

1 THE COURT LET ME JUST TELL THE JURY WHAT IS GOING
2 ON I AM GOING TO HAVE TO TELL THE FOREPERSON THIS IS
3 THE PLAINTIFF'S WITNESS, HE IS ON DIRECT EXAMINATION THE
4 RULES OF EVIDENCE WHEN YOU ARE EXAMINING YOUR WITNESS YOU
5 CAN ONLY ASK DIRECT QUESTIONS WHAT DAY IS IT, MONDAY
6 WHAT DID YOU DO YESTERDAY AND SO FORTH ON
7 CROSS-EXAMINATION YOU CAN ASK LEADING QUESTIONS, ISN'T
8 TODAY MONDAY AND DIDN'T YOU DO SO AND SO YESTERDAY SO,
9 THEY CAN'T ASK LEADING QUESTIONS ON DIRECT AND THAT IS
10 WHAT THEY ARE OBJECTING TO

11 Q MR FLAHERTY, DO YOU HAVE AN OPINION AS TO WHETHER
12 THE THREE STEP PROCESS SET FORTH IN EXHIBIT 6 WAS
13 FOLLOWED?

14 MR BLACKBURN I AM GOING TO OBJECT, ASKING THE SAME
15 THING

16 THE COURT NO, HE CAN ASK IN THAT FASHION, AN
17 OPINION HE IS DOING IT RIGHT

18 A IN MY OPINION IT DOES NOT APPEAR THAT IT WAS FOLLOWED
19 AND THAT THERE WERE NO COMMUNICATED REPAIRS THAT WERE
20 GOING TO BE NECESSARY AND ANY DOCUMENTATION THAT THEY HAD
21 BEEN COMPLETED TO JUSTIFY REMOVING THE EXCLUSION FOR THAT
22 AREA SIX OR SEVEN MONTHS LATER

23 Q DO YOU HAVE AN OPINION AS TO WHY THE THREE STEP
24 PROCESS WASN'T FOLLOWED?

25 A WELL, MY OPINION IS THAT MOISTURE FREE WARRANTY AS

1 YOU FIND OUT OR I FOUND OUT AFTER AROUND 2005 DOES NOT
2 REPAIR ANY DAMAGE DONE TO THE HOME AS A RESULT OF A
3 FAILURE OF THEIR REPAIRS THAT THEY CALLED FOR SO, TO ME,
4 AND IN YOUR SHOES, IF YOU HAD TO FIX THE PROBLEM THAT WAS
5 CAUSED BY WHAT YOU SAID TO BE DONE YOU WOULD BE MORE
6 DILIGENT AND MOTIVATED TO SEE THAT THINGS WERE DONE
7 PROPERLY THEN IF YOU DON'T HAVE ANY LIABILITY SO, TO
8 TAKE THE EXCLUSION OFF WITHOUT KNOWING THAT ANYTHING IS
9 CHANGED AND HAVING ALLOWED THE HOUSE TO SIT THERE AT THAT
10 POINT FOR SIX OR SEVEN MONTHS WITH A DEFECTIVE ITEM STILL
11 IN PLACE, BY THEIR UNDERSTANDING THAT WAS GOING TO
12 CONTRIBUTE TO DAMAGE TO THE HOME, THEY WEREN'T REAL
13 CONCERNED ABOUT IT BECAUSE THEY ARE NOT GOING TO FIX IT
14 SO, THAT IS MY OPINION THAT THE REPAIRS AREN'T DONE
15 PROPERLY TO THEIR SPECIFICATIONS AND I DON'T THINK THERE
16 IS AS MUCH CONCERN ABOUT IT BECAUSE THEY DON'T HAVE TO FIX
17 THE RESULT IN DAMAGE

18 Q THANK YOU, MR FLAHERTY, PLEASE ANSWER ANY QUESTIONS
19 THAT MR BLACKBURN HAS

20 THE COURT NOW HE IS ON CROSS-EXAMINATION IT IS
21 PROPER FOR HIM TO LEAD

22 CROSS-EXAMINATION

23 BY MR BLACKBURN

24 Q MR FLAHERTY, GOOD TO SEE YOU AGAIN

25 A YES, SIR

1 Q DO YOU REMEMBER WHEN I TOOK YOUR DEPOSITION?

2 A YES, SIR

3 Q I TOOK YOUR DEPOSITION IN JULY OF 2008, DIDN'T I?

4 A YES, SIR

5 Q YOU FIRST INSPECTED THE BABAEE HOUSE ON JUNE OF 2006,
6 DIDN'T YOU?

7 A THAT'S CORRECT

8 Q AND MR BABAEE GOT YOUR NAME FROM HIS ATTORNEY,
9 RIGHT?

10 A THAT IS CORRECT

11 Q YOU WORKED FOR MR BABAEE'S ATTORNEY FOR OVER FIVE
12 YEARS, HAVEN'T YOU?

13 A I DON'T WORK FOR ATTORNEYS

14 Q YOU DON'T?

15 A I WORK FOR THE HOMEOWNERS

16 Q I WILL PULL OUT YOUR DEPOSITION AND TO CLARIFY WHAT
17 YOU JUST SAID

18 THE COURT DON'T BE MAKING COMMENTS LIKE THAT, IF
19 YOU ARE GOING TO IMPEACH HIM, IMPEACH HIM

20 MR BLACKBURN OKAY

21 THE COURT LADIES AND GENTLEMEN, OTHER THAN MY
22 FOREPERSON, A DEPOSITION, IN CIVIL CASES WHEN I SUE YOU
23 FOR SOMETHING OR YOU SUE ME FOR SOMETHING YOU FILE A
24 LAWSUIT, THE OTHER PARTY FILES A RESPONSE AFTER THAT
25 THEY ENGAGE IN WHAT WE CALL DISCOVERY, EACH SIDE NEEDS TO

1 TELL THE OTHER SIDE WHO THEIR WITNESSES ARE, THE DOCUMENTS
2 THEY ARE GOING TO RELY ON, THOSE SORTS OF THINGS WHEN
3 THEY GIVE THEM THE NAME OF THE WITNESSES THEN THE LAWYERS
4 HAVE THE OPPORTUNITY IF THEY WANT TO TO TAKE A DEPOSITION
5 WHICH MEANS MEET FACE TO FACE BY TELEPHONE AND THE LAWYER
6 IS ABLE TO ASK THAT WITNESS EVERYTHING HE IS GOING TO
7 TESTIFY TO IN THE TRIAL SO THERE WON'T BE ANY AMBUSH OR
8 ANY SURPRISES AT TRIAL WHEN THEY TAKE THAT DEPOSITION,
9 WITH A COURT REPORTER PRESENT, THE WITNESS IS UNDER OATH
10 AND ALL QUESTIONS ARE TYPED UP AND ALL RESPONSES ARE TYPED
11 UP INTO A DEPOSITION TRANSCRIPT A DEPOSITION PROCESS CAN
12 BE USED IN A NUMBER OF WAYS IN THE TRIAL OF THE CASE ONE
13 OF THEM IS WHAT WE CALL IMPEACHMENT, SOMETIMES A WITNESS
14 MAY ANSWER A QUESTION DIFFERENT THAN THEY DID IN THE
15 DEPOSITION AND THE LAWYER GETS TO ASK HIM ABOUT THAT I
16 ASSUME THAT IS WHAT WE ARE GETTING READY TO DO

17 MR BLACKBURN WE ARE, YOUR HONOR
18 THE COURT I SUSPECTED THAT THE ORIGINAL
19 TRANSCRIPT IS ALWAYS SEALED BY THE COURT REPORTER WE
20 WILL OPEN THE ORIGINAL NOW AND THE LAWYER WILL ASK TO
21 REFER TO A CERTAIN PAGE, CERTAIN LINES ALLEGEDLY TESTIFIED
22 DIFFERENT THAN HE DID IN THE DEPOSITION
23 Q I AM GOING TO HAND YOU THE ORIGINAL DEPOSITION DATED
24 JULY 9TH OF 2008 AND I WANT YOU TO READ A COUPLE OF
25 THINGS FOR ME WHEN I TOOK YOUR DEPOSITION ON JULY THE

1 9TH OF 2008, CAN YOU REFER TO PAGE, THE BOTTOM OF PAGE 15,

2 GOING INTO THE TOP OF PAGE 60

3 A YES, SIR

4 Q AND I ASK YOU ON LINE 17, MR FLAHERTY, WHO CALLED

5 YOU TO INSPECT THE BABAEE'S HOUSE YOU SAID MR BABAEE,

6 RIGHT THAT IS ON LINE 20

7 A YES, SIR

8 Q AND THEN ON 21 IT SAYS, WHEN DID HE CALL YOU AND

9 YOU SAID, WELL, IT WOULD OF BEEN SOMETIME SHORTLY PRIOR TO

10 JUNE OF '06, A WEEK OR TWO AT THE MOST OF THAT DATE IS

11 THAT RIGHT?

12 A THAT IS CORRECT

13 Q AND THE NEXT QUESTION THAT I ASKED YOU IS, HOW DID

14 THEY GET YOUR NAME AND YOU SAID HE GOT IT FROM MR

15 KRAWAZYK AT THE FIRM AND I AM ASSUMING THAT MR

16 KRAWAZYK'S FIRM IS THE SAME FIRM AS THE FINKEL FIRM,

17 RIGHT?

18 A THAT'S CORRECT

19 Q MR PHILLIPS AND SHEFTMAN, THAT IS THEIR FIRM, RIGHT?

20 A THAT IS CORRECT

21 Q OKAY AND THEN I SAID, OKAY, AND HOW MANY OF MR

22 KRAWAZYK'S CLIENTS DO YOU WORK FOR AND YOU SAID, WHAT

23 A PROBABLY WE HAVE DONE 100, 100 OR SO OVER THE YEARS

24 Q OKAY AND THEN IT, I SAID, OVER THE YEARS AND I

25 SAID, WHAT, TWO, THREE, FOUR YEARS AND YOU SAID WHAT

1 A WELL, IT HAS PROBABLY BEEN SINCE THE EARLY 2000'S
2 THAT I HAVE BEEN DOING SOME WORK OVER HERE FOR THEM SO,
3 PROBABLY A GOOD FIVE YEARS, I WOULD THINK

4 Q AND YOU NEVER TOLD ME THAT THEY WEREN'T YOUR CLIENT,
5 DID YOU?

6 A THE ATTORNEYS ARE NOT MY CLIENTS THE PEOPLE THAT
7 HIRE ME AND PAY ME ARE THE HOMEOWNERS WHO MAY OR MAY NOT
8 CHOOSE TO RETAIN THE LAW FIRM FOR LITIGATION

9 Q THEY PAY YOU BECAUSE THEY ARE REFERRED TO YOU BY
10 THEIR ATTORNEYS, RIGHT?

11 A AND THAT THEY CALL AND I ASSUME THE WAY IT HAPPENS IS
12 THAT THEY CALL THE ATTORNEYS THAT THEY HAVE A PROBLEM THAT
13 THEY NEED HELP WITH

14 Q AND YOU ANSWERED, WELL SINCE, WELL IT HAS PROBABLY
15 BEEN SINCE THE EARLY 2000'S, I HAVE BEEN DOING SOME WORK
16 OVER HERE FOR THEM PROBABLY A GOOD FIVE YEARS, I WOULD
17 THINK, RIGHT?

18 A THAT IS CORRECT

19 Q SO, WHEN I ASKED YOU, HAVE YOU WORKED FOR MR
20 BABAE'S ATTORNEY FOR FIVE YEARS AND YOU SAID NOT YOUR
21 CLIENTS YOU HAVE WORKED FOR THEM--

22 A I DIDN'T SAY I WORKED FOR THE FIRM, I SAID I WORKED
23 FOR THEIR CLIENTS AND I REFER TO THEM IS, IN THE FOLLOWING
24 STATEMENTS

25 Q AND THEN I SAID HOW MUCH, WHAT IS THE PERCENTAGE OF

1 THE WORK YOU DO FOR MR KRAWEZYK'S CLIENTS, TOTAL AMOUNT
2 OF WORK WHAT IS YOUR ANSWER TO THAT

3 THE COURT WHY DON'T YOU ASK HIM NOW IF HE DISAGREES
4 WITH IT AND THEN YOU CAN IMPEACH HIM BUT YOU CAN'T
5 IMPEACH HIM BEFORE YOU ASK A QUESTION /DON'T MAKE ME LOSE
6 MY PATIENCE, COME ON

7 Q LET'S MOVE ON YOU WOULD AGREE, MR FLAHERTY, THAT
8 ABOUT FORTY PERCENT OF YOUR WORK CAME FROM MR BABAEE'S
9 ATTORNEYS AT ONE TIME OR THE OTHER, DIDN'T IT?

10 A YEARS AGO

11 Q AND IT HAS DRIED UP SINCE THEN, HASN'T IT?

12 A IT HAS GOTTEN LESS OVER THE YEARS, YES

13 Q YOU ONLY SPOKE TO MR BABAEE ONE TIME AT THE JUNE
14 13TH OF 2006 INSPECTION, RIGHT?

15 A THAT I CAN REMEMBER, YES CAN YOU REPEAT THAT

16 Q YOU ONLY SPOKE TO MR BABAEE ONE TIME BEFORE YOUR
17 JUNE 13TH 2006 INSPECTION, RIGHT?

18 A THAT I CAN RECALL, YES

19 Q MR BABAEE AND MS BABAEE TOLD YOU HE HAD CONCERNS
20 ABOUT THE STUCCO AND WANTED YOU TO DO A FULL INSPECTION
21 STUCCO, RIGHT?

22 A THAT IS CORRECT

23 Q DID HE SHOW YOU THE REPORT BY CK SERVICES?

24 A NO

25 Q HE DIDN'T AND HE WASN'T THERE THE FIRST TIME YOU

1 INSPECTED THE HOUSE, WAS HE?

2 A HIS WIFE WAS THERE AND I BELIEVE HE CAME AT THE
3 LATTER PART OF THE INSPECTION

4 Q YOU DO NOT RECALL IF MR BABAEI ARTICULATED ANY
5 SPECIFIC CONCERNS HE HAD WITH THE STUCCO WHEN HE SPOKE
6 WITH YOU, DID HE?

7 A NOT THAT I CAN RECALL, NO

8 Q AND HE DID NOT SHOW YOU THE REPORT BY CK SERVICES
9 WHEN HE MET WITH YOU, DID HE?

10 A NOT THAT I RECALL, NO

11 Q YOU GENERATE THE FIRST REPORT AND, YOUR HONOR, I
12 DON'T BELIEVE THE FIRST REPORT IS INTO EVIDENCE MR
13 FLAHERTY, YOUR JUNE 16TH 2006 REPORT YOU GENERATED AFTER
14 YOUR FIRST VISIT, RIGHT?

15 A THAT IS CORRECT

16 Q YOUR JUNE 16TH, 2006 REPORT IS YOUR BASIC FORMAT YOU
17 CHOSE TO PORTRAY WHAT YOU THINK IS GOING ON IN THE HOUSE,
18 RIGHT?

19 A THAT IS CORRECT, ON THAT PARTICULAR DAY

20 Q ON THAT PARTICULAR DAY, RIGHT AND DURING MY OPENING
21 ARGUMENT, LET ME SHOW YOU THESE PICTURES AND YOU AGREE
22 THAT--

23 THE COURT REFER TO THE EXHIBITS, PLEASE

24 Q THIS IS DEFENDANT'S EXHIBIT NUMBER 1, IT IS A BLOWUP
25 OF YOUR REPORT, RIGHT?

1 A YES, SIR

2 Q OKAY DEFENDANT'S EXHIBIT NUMBER 1, PAGE 22 AND PAGE

3 23 AS OF JUNE OF 2006 THERE WERE NO ISSUES ON THE LEFT

4 SIDE OF THE HOUSE, RIGHT?

5 A AS FAR AS ELEVATED MOISTURE ON THE DAY THAT I WAS

6 THERE

7 Q AND ON THE RIGHT SIDE OF THE HOUSE THERE WAS ONLY ONE

8 AREA THAT ELEVATED MOISTURE WAS IN TO, RIGHT?

9 A THAT IS CORRECT

10 Q AND YOU ATTRIBUTED THAT ELEVATED MOISTURE AT 23

11 PERCENT TO A MISSING KICKOUT THAT YOU TALKED ABOUT?

12 A I BELIEVE IT IS 40 PERCENT IF I AM NOT MISTAKEN

13 Q 23 AND 40?

14 A YES

15 Q AND YOU ATTRIBUTED THAT TO A MISSING KICKOUT?

16 A OR A FAILING KICKOUT NOT MISSING BECAUSE IT IS

17 OBVIOUSLY THERE

18 Q PLAINTIFF'S EXHIBIT NUMBER 10, IS THAT THE KICKOUT

19 YOU ARE TALKING ABOUT?

20 A YES, SIR

21 Q OAKY AND YOU BELIEVE THAT KICKOUT IS CAUSING THE

22 DAMAGE RIGHT THERE, RIGHT?

23 A YES, SIR

24 Q AND DEFENDANT'S EXHIBIT NUMBER 2, THIS IS THE LEFT

25 ELEVATION OF THE HOUSE, RIGHT?

1 A I BELIEVE SO, YES

2 Q AND THAT IS YOUR JUNE OF 2006 REPORT, RIGHT?

3 A THAT IS CORRECT

4 Q IT DOESN'T HAVE ANY EVIDENCE OF ELEVATED MOISTURE
5 CONTENT, DOES IT?

6 A ON THAT DAY, YES

7 Q ON THAT DAY AND YOU WENT OUT TWO YEARS LATER AND IT
8 DIDN'T EITHER, DID IT?

9 A NO, RIGHT BEFORE THE DEPOSITION, THAT IS CORRECT

10 Q YOU DIDN'T FIND ELEVATED MOISTURE TWO YEARS LATER,
11 RIGHT?

12 A THAT'S CORRECT

13 Q AND ON YOUR FIRST VISIT, ON THIS BACK SIDE OF THE
14 HOUSE WE HAVE THE KICKOUT AREA YOU ARE TALKING ABOUT?

15 A YES, SIR

16 Q AND YOU BROUGHT A BAG WITH YOU RIGHT HERE AND
17 PLAINTIFF'S EXHIBIT NUMBER 16 IS THE TEST THAT YOU TOOK
18 OUT RIGHT WHERE THAT SQUARE IS?

19 A THE BASE OF THAT WALL, YES SIR

20 Q AND THIS IS THE EVIDENCE THAT YOU HAVE MAINTAINED
21 SINCE THEN, RIGHT?

22 A ACTUALLY I SENT IT TO MR KRAWEZYK WITH A COPY OF THE
23 REPORT

24 Q AND IT IS RIGHT WHERE THAT SQUARE IS, RIGHT?

25 A YES SIR, AT THE BOTTOM

1 Q AND NO OTHER AREAS OF THAT SIDE OF THE HOUSE WERE
2 ELEVATED AT THAT TIME?

3 A THAT IS CORRECT

4 Q THE RIGHT SIDE OF THE HOUSE ON 2006, NO EVIDENCE OF
5 ELEVATED MOISTURE CONTENT AT THAT TIME EITHER, RIGHT?

6 A THAT IS CORRECT

7 Q THE RIGHT SIDE OF THE HOUSE WITH THE CARPORTS, NO
8 ELEVATED MOISTURE ON THAT DAY EITHER, RIGHT?

9 A THAT IS CORRECT

10 Q NO AREAS THAT YOU PROBED, RIGHT?

11 A THAT IS CORRECT

12 Q NO AREAS WHERE YOU FOUND SHEATHING LIKE THIS, RIGHT?

13 A THAT IS CORRECT

14 THE COURT WHAT EXHIBIT IS THAT?

15 MR BLACKBURN PLAINTIFF'S EXHIBIT NUMBER 16

16 THE COURT NO SIR, WHAT YOU WERE LOOKING AT ON THE
17 BOARD

18 MR BLACKBURN DEFENDANT'S 3, PAGE 26, 27

19 Q AND WHEN YOU WENT OUT IN 2006 AND YOU NOTICED THAT
20 THERE WAS A 40 PERCENT CONCENTRATION ELEVATED MOISTURE AND
21 23, DID YOU TELL THE BABAEE'S THEY NEEDED TO DO ANY TYPE
22 OF MAINTENANCE ON THAT ISSUE?

23 A NO SIR, THAT IS WHY I UNDERSTAND THEY HAD A MOISTURE
24 FREE WARRANTY

25 Q BUT AT THIS TIME THEY WERE INVOLVED IN A LAWSUIT,

1 RIGHT?

2 A I DON'T KNOW IF THEY WERE YET

3 Q 2006?

4 A I DON'T KNOW AND AGAIN I DON'T KNOW WHEN THEY WOULD
5 OF FILED IT, WHETHER THEY FILED IT AFTER THE INSPECTION

6 Q BUT AT THAT TIME, YOU AS AN INSPECTOR DIDN'T OFFER
7 THEM ANY SUGGESTIONS ON HOW TO KEEP THAT MOISTURE CONTENT?

8 A I WILL TELL YOU WHAT I BELIEVE WHAT I TOLD THEM WHICH
9 WAS AFTER I DID THE SECOND INSPECTION, THE TWO OF THEM AND
10 I FOUND THE VAPOR RETARDERS IN THE WALL WHICH ARE NOT

11 VISIBLE UNTIL YOU DO THE CUT, THAT AT THAT POINT MY
12 FEELING IS THAT THE SYSTEM WOULD HAVE TO COME OFF THE
13 HOUSE BECAUSE OF THAT PROBLEM IT IS FUNDAMENTAL TO THE
14 EIFS CLADDING ON THE HOME

15 Q AND IN YOUR OPINION, RIGHT?

16 A THAT IS CORRECT

17 Q AND YOU BASE THAT OPINION ON STUDIES BY, PLAINTIFF'S
18 EXHIBIT NUMBER 17, RIGHT?

19 A THAT IS NOT THE ONLY DOCUMENT, NO SIR

20 Q WHICH OTHER DOCUMENTS DO YOU RELY ON COMING TO THAT
21 CONCLUSION?

22 A THAT DOCUMENT PRODUCED BY DRYVIT CORPORATION RELATIVE
23 TO MOISTURE VAPOR TRANSFER, A DOCUMENT FROM FINESTONE
24 CORPORATION ON THE SAME TOPIC, ON A BOOK THAT I HAVE BY
25 ROBERT THOMAS WHICH WAS THE DIRECTOR OF TECHNICAL SERVICES

1 FOR DRYVIT CORPORATION, ALSO TALKED ABOUT THE FACT THAT AN
2 EFIS CLADDING AND A VAPOR RETARDER SHOULD NOT BE
3 COEXISTING ON A HOME

4 Q DID YOU PRODUCE THOSE REFERENCE DOCUMENTS TO ME WHEN
5 I ASKED YOU TO PRODUCE THEM TO ME?

6 A I BELIEVE I DID, YES

7 Q THE ONLY ONES THAT I HAVE GOT, MR FLAHERTY, IS, I
8 HAVEN'T SEEN THOSE?

9 A I AM SURE BECAUSE WE MADE A LOT OF COPIES, IF I AM
10 NOT MISTAKEN, WITH THE DEPOSITION, OF THOSE DOCUMENTS

11 Q YOU DID REFERENCE THE STUDY BY THE NATIONAL
12 ASSOCIATION RESEARCH CENTER, RIGHT?

13 A YES

14 Q AND I WILL HAND YOU A COPY OF THIS AND ASK YOU TO
15 TURN TO PAGE 6

16 A YES, SIR

17 Q AND ON PAGE 6

18 THE COURT LET ME ASK A QUESTION FIRST IS THIS A
19 DOCUMENT THAT YOU RELIED ON IN RENDERING THE OPINIONS THAT
20 YOU ARE GIVING HERE TODAY?

21 A THIS DOCUMENT, NO SIR

22 THE COURT IT IS NOT?

23 A NO, SIR I AM SORRY, THIS HAS TO DO, WHAT IS
24 ACCEPTABLE OF MOISTURE, IT DOESN'T NECESSARILY DEAL WITH
25 THE VAPOR RETARDER ISSUE THAT WE HAVE BEEN DISCUSSING

1 THE COURT DO YOU RELY ON THAT DOCUMENT?

2 A AS ONE OF THEM, YES SIR

3 Q AND THIS DOCUMENT ON PAGE 6 TALKS ABOUT MOISTURE
4 LEVELS, THIS DOCUMENT YOU RELIED UPON DO YOU SEE, WHAT
5 IS AN ACCEPTABLE LEVEL OF MOISTURE?

6 A YES, SIR

7 Q AND IT SAYS SERIOUS DECAYING OCCURS WHEN THE MOISTURE
8 CONTENT OF WOOD IS ABOVE THE SATURATION POINT,
9 APPROXIMATELY 30 PERCENT

10 A THAT IS CORRECT

11 Q IS THAT RIGHT?

12 A YES

13 Q AND THE FINAL SATURATION POINT WILL BE REACHED ONLY
14 WHEN IN CONTACT WITH WATER, SUCH AS PROVIDED BY RAIN,
15 CONDENSATION?

16 A YES, SIR

17 Q AND THEN IT GOES ON TO SAY, IF THE MOISTURE CONTENT
18 IS FOUND TO BE ABOVE 30 PERCENT AT ANY TIME THE FRAMING
19 SHOULD BE INVESTIGATED FOR DECAY, RIGHT?

20 A THAT IS CORRECT ARE WE GOING TO READ THE SENTENCES
21 IN BETWEEN THOSE?

22 THE COURT NO, I AM GOING TO LET HIM ASK THE
23 QUESTIONS AND YOU ARE GOING TO ANSWER, FOLLOWUP

24 Q AND IF YOU LOOK ON PAGE 8 OF THIS DOCUMENT, THE THIRD
25 FULL PARAGRAPH AT THE TOP, THE LAST SENTENCE SAYS THE

1 REQUIREMENT FOR AN INTERIOR VAPOR RETARDER SHOULD BE
2 REVALUATED FOR EFIS ON A NATIONWIDE BASE BUT THIS IS A
3 COMPLEX ISSUE, RIGHT?

4 A THAT IS CORRECT

5 Q AND THE DATE OF THIS DOCUMENT IS DATED JANUARY OF
6 1996, RIGHT?

7 A I BELIEVE SO, YES

8 Q AND THEN THE NEXT PARAGRAPH SAYS, ALTHOUGH THE
9 PRESENCE OF AN INTERIOR VAPOR RETARDER MAY BE A
10 CONTRIBUTED FACTOR TO MOISTURE BUILDUP, ITS ELIMINATION
11 WILL NOT SOLVE ALL OF THESE PROBLEMS OBSERVED IN
12 WILMINGTON, RIGHT?

13 A THAT'S CORRECT

14 Q OKAY SO, IT SAYS IT MAY BE A CONTRIBUTED FACTOR,
15 RIGHT?

16 A IT DEPENDS ON THE AREA OF THE COUNTRY WHERE THE VAPOR
17 RETARDER IS PRESENT

18 Q NO, THE QUESTION WAS, IT SAYS MAY BE, RIGHT?

19 A YES

20 MR BLACKBURN YOUR HONOR, I WOULD LIKE TO MARK THIS
21 AS DEFENDANT'S EXHIBIT 38

22 THE COURT ANY OBJECTION?

23 MR PHILLIPS NO OBJECTION, YOUR HONOR

24 (WHEREUPON, DEFENDANT'S EXHIBIT NO 38 WAS ADMITTED
25 INTO EVIDENCE)

1 THE COURT MOVE ALONG

2 Q MR FLAHERTY, DO YOU HAVE A COPY OF YOUR 2006 REPORT?

3 A I DON'T KNOW IF I HAVE THAT WITH ME, NO

4 Q I AM GOING TO HAND YOU THIS DOCUMENT AND ASK YOU IF

5 YOU CAN IDENTIFY IT?

6 A YES, SIR, THIS WOULD BE THE REPORT THAT I DID FROM THE

7 JUNE 13TH, '06 INSPECTION OF THE BABAEE'S HOUSE

8 Q YOU PREPARED THIS DOCUMENT, RIGHT?

9 A YES, SIR

10 Q AND THIS DOCUMENT IS THE CONDITION OF THE BABAEE'S

11 HOUSE AS YOU INSPECTED IT ON JUNE OF 2006, RIGHT?

12 A THAT IS CORRECT

13 MR BLACKBURN YOUR HONOR, WE WOULD LIKE TO MARK

14 THIS AS DEFENDANT'S EXHIBIT NUMBER 39

15 THE COURT ANY OBJECTION

16 MR PHILLIPS WITHOUT OBJECTION, YOUR HONOR

17 (WHEREUPON, DEFENDANT'S EXHIBIT NO 39 WAS ADMITTED

18 INTO EVIDENCE)

19 Q LOOK ON PAGE 3 OF THIS REPORT AND ON PAGE 3 ON THE

20 REPORT IT SAYS, THE PURPOSE OF THIS IS A VISUAL INSPECTION

21 OF THE PROPERTY, RIGHT?

22 A YES, SIR

23 Q THE EXTERIOR INSULATION OF THE SYSTEM WAS EXAMINED

24 WITH THE INTENTION OF FINDING AND DISCLOSING CONDITIONS

25 THAT DEVIATE THE MANUFACTURER SPECIFICATIONS, RIGHT?

1 A YES, SIR

2 Q THE BUILDING CODES, THE STANDARD BUILDING PRACTICES

3 AND THE ADEQUACY OF WORKMANSHIP AND MATERIALS, RIGHT?

4 A THAT IS CORRECT

5 Q AND ON PAGE 3 CABO CODES, IS WHAT YOU CITE AS THE

6 APPLICABLE CODE OF THE CONSTRUCTION OF THIS HOME, RIGHT?

7 A NOT AS FAR AS THE EIFS SYSTEM IS IMPLIED BUT OTHER

8 THINGS THAT IT MAY INTERACT WITH

9 Q AND CABO, ONE AND TWO FAMILY DWELLING IS THE

10 APPLICABLE CODE?

11 A YES, THAT IS WHAT I USE FOR ANY CODE ISSUES THAT I

12 REFER TO

13 Q AND THAT IS CODE FOR CONSTRUCTION, RIGHT?

14 A THAT IS CORRECT

15 Q YOU ARE AN ICC AND CABO CERTIFIED INSPECTOR WITH

16 BUILDING CODES, RIGHT?

17 A THAT'S CORRECT

18 Q AND IN PRIMARILY THE SOUTHEAST, RIGHT?

19 A YES, SIR

20 Q THAT INCLUDES SOUTH CAROLINA, GEORGIA, ALABAMA,

21 RIGHT?

22 A YES, SIR

23 Q CABO CODE REQUIRED A VAPOR RETARDER BE INSTALLED

24 DURING THE CONSTRUCTION OF HOMES WHEN THE BABAE'S HOUSE

25 WAS BUILT, DIDN'T IT?

1 A LIKE WE DID

2 Q THAT IS RIGHT SO, THE CABO CODE REQUIRED THE VAPOR
3 RETARDER THAT YOU ARE SO CRITICAL, RIGHT?

4 A I AM NOT CRITICAL OF THE VAPOR RETARDER

5 Q YOU ARE NOT?

6 A I AM CRITICAL OF PUTTING A EFIS CLADDING ON A HOUSE
7 THAT HAS A VAPOR RETARDER

8 Q SO, YOU THINK THAT THE VAPOR RETARDERS CAN BE USED ON
9 OTHER HOMES EXCEPT SYNTHETIC STUCCO, RIGHT?

10 A YES

11 Q AND THE VAPOR RETARDER, AND THERE ARE SOME SYNTHETIC
12 STUCCO HOMES IN GEORGIA, RIGHT?

13 A YES, SIR

14 Q AND THE CABO CODES IS APPLICABLE FOR CONSTRUCTION
15 HOMES IN GEORGIA, WASN'T IT?

16 A THAT IS CORRECT

17 Q IS THERE VAPOR RETARDERS ON HOMES BUILT ABOUT THE
18 TIME THE BABAEE'S HOME WAS BUILT, IN GEORGIA TOO, RIGHT?

19 A NOT THAT I HAVE COME ACROSS OR WHERE I HAVE HAD THE
20 OPPORTUNITY TO CUT INTO THE WALLS AS I DID IN THE BABAEE'S
21 RESIDENCE AND FIND WHETHER THEY WERE THERE OR NOT WHEN I
22 HAVE DONE LITIGATION WORK IN GEORGIA I TYPICALLY DID NOT
23 FIND THAT

24 Q BUT THE HOMES IN GEORGIA ARE BUILT PURSUANT TO THE
25 CABO CODE, RIGHT?

0204

1 A THAT IS CORRECT

2 Q IF THE HOMES ARE BUILT WITH THE CABO CODE IT SHOULD
3 HAVE VAPOR RETARDER IN THE WALL CAVITY, SHOULDN'T IT?

4 A THE CODES AS THEY ARE ADOPTED BY VARIOUS
5 MUNICIPALITIES ARE NOT IDENTICAL EVEN WITHIN A STATE OR
6 FROM STATE TO STATE THE CABO IS A MINIMUM STANDARD,
7 STATES CAN ACCEPT OR NOT ACCEPT THE CABO CODE IN ITS
8 ENTIRETY AT THE TIME THAT THEY CHOOSE TO ADMINISTER IT

9 Q SO, IT IS A MINIMUM STANDARD, RIGHT?

10 A THAT IS CORRECT

11 Q SO, YOU WOULD HOPE THAT SOMEONE BUILT THEIR HOMES
12 WITH A MINIMUM STANDARD, WOULDN'T YOU?

13 A SURE

14 Q SO, IT SHOULD INCLUDE VAPOR RETARDERS, SHOULDN'T IT?

15 A IN THE CASE OF SOUTH CAROLINA, YES

16 Q ABOUT GEORGIA?

17 A I DON'T BELIEVE THAT IS USED IN GEORGIA

18 Q YOU DON'T BELIEVE, RIGHT?

19 A I HAVE NOT FOUND IT IN GEORGIA

20 Q YOU HAVE DONE INSPECTIONS ON HOMES IN GEORGIA,
21 HAVEN'T YOU?

22 A ABSOLUTELY

23 THE COURT MR BLACKBURN, I DON'T THINK GEORGIA IS
24 RELEVANT IN THIS LITIGATION

25 MR BLACKBURN I WILL MOVE ON

1 THE COURT THANK YOU

2 Q STANDARD BUILDING PRACTICES FOLLOW THE CODE, DON'T
3 THEY?

4 A THAT IS CORRECT STANDARD BUILDING PRACTICES IS
5 WHERE A CODE MAY NOT BE IN PLACE, THEN THE STANDARD
6 BUILDING PRACTICES WOULD BE WHAT PEOPLE WOULD EXPECT TO BE
7 USED

8 Q STANDARD BUILDING PRACTICES WOULD INCLUDE INSTALLING
9 VAPOR RETARDERS AT THE TIME THAT THE BABAEH HOUSE WAS
10 BUILT, WOULDN'T IT?

11 A I WOULD IMAGINE, YES

12 Q OKAY ON PAGE 3 OF YOUR REPORT, YOU REFER TO
13 DETRIMENTAL/MISSING MATERIALS INCLUDING SECONDARY VAPOR
14 RETARDERS MISSING MOISTURE BARRIER, DON'T YOU?

15 A YES, SIR

16 Q AND ON PAGE 4 OF YOUR REPORT YOU PUT MISSING MOISTURE
17 BARRIER BETWEEN A POLYISOCYANURATE INSULATED BOARD, HIDDEN
18 DEFECT, DON'T YOU?

19 A YES, SIR

20 Q YOU CALL IT A HIDDEN DEFECT, RIGHT?

21 A THAT IS CORRECT

22 Q MISSING MOISTURE BARRIER DOESN'T HAVE ANYTHING TO DO
23 WITH YOUR OPINION ABOUT THE MOISTURE FREE WARRANTY
24 APPLICATION, DOES IT?

25 A NO, I WASN'T INSPECTING IT TO MOISTURE FREE WARRANTY

1 STANDARDS AT THAT TIME

2 Q RIGHT AND THEN CALLING THE MISSING MOISTURE BARRIER

3 A HIDDEN DEFECT DOESN'T APPLY TO THE WARRANTY, DOES IT?

4 A THAT IS CORRECT, I WASN'T INSPECTING IT FOR THE

5 WARRANTY I WAS INSPECTING IT TO HOW IT WAS INSTALLED

6 ORIGINALLY

7 Q AND YOU WOULD AGREE WITH ME THAT MOISTURE INTRUSION

8 ENTERS THE HOME'S CLADDING THROUGH WINDOWS, RIGHT?

9 A PRIMARILY AT PENETRATIONS, SURE

10 Q AND PENETRATIONS THROUGH WINDOWS, RIGHT?

11 A THAT IS CORRECT

12 Q AND PENETRATIONS AT KICKOUTS, THEY TOTAL ABOUT WHAT,

13 70 PERCENT OF MOISTURE INTRUSION IN HOMES?

14 A WHICH, KICKOUTS OR THE WINDOWS?

15 Q TOTAL YOU ARE GOING TO TAKE, WHERE YOU TALKED ABOUT

16 IN YOUR DEPOSITION ABOUT THE TOTAL OF WATER, SOURCES OF

17 WATER INTRUSION INTO A HOUSE I THINK YOU ATTRIBUTED

18 ABOUT 70 PERCENT OF TOTAL MOISTURE INTRUSION INTO A HOME

19 THROUGH KICKOUTS AND WINDOWS, DIDN'T YOU?

20 A SURE, THAT WOULD BE MOST OF YOUR PENETRATIONS, YES

21 Q SO, WHEN A HOUSE LIKE THE BABAEE'S WITH ALL OF THESE

22 WINDOWS AND YOUR REPORT SAYS THERE ARE 22 WINDOWS, RIGHT?

23 A I BELIEVE, I WOULD HAVE TO LOOK

24 Q GO AHEAD AND LOOK YOUR REPORT SAYS 22 WINDOWS,

25 DOESN'T IT?

0207

1 A IF I CAN LOOK AT IT

2 Q PAGE 3

3 A YES

4 Q SO, ON THE FRONT OF THE HOUSE WE HAVE GOT, ONE, TWO,
5 THREE, FOUR, FIVE, SIX, SEVEN, EIGHT, NINE, TEN, ELEVEN
6 ELEVEN ON THE FRONT, RIGHT?

7 A YES, SIR

8 Q AND ON THE LEFT SIDE WE HAVE GOT TWELVE, THIRTEEN,
9 FOURTEEN, FIFTEEN, SIXTEEN, SEVENTEEN, EIGHTEEN?

10 A A FLANGED WINDOW COUNTS AS ONE

11 Q SO, YOU ARE COUNTING THAT BIG WINDOW ON THE LEFT SIDE
12 OF THE HOUSE ON THE SECOND FLOOR AS A ONE WINDOW, CORRECT?

13 A THAT IS CORRECT, IT IS FLANGED IN ONE FRAME

14 Q OKAY SO, OUT OF ALL OF THESE WINDOWS THAT YOU
15 LOOKED AT ON THE BABAEE HOUSE, YOU FOUND WHAT YOU CONSIDER
16 ONE WINDOW AS A SOURCE OF MOISTURE TREATMENT, DIDN'T YOU?

17 A NOT AS A SOURCE OF IT, AS A POINT WHERE THERE WAS
18 ELEVATED MOISTURE THAT DAY

19 Q BUT YOU DO, IN YOUR REPORT, AND WHEN YOU TESTIFIED IN
20 YOUR DEPOSITION, YOU SAID THAT YOU BELIEVED THAT THE
21 MOISTURE INTRUSION THAT YOU FOUND ON THE RIGHT REAR
22 ELEVATION, ON THIS WINDOW RIGHT BESIDE THE DOOR, THAT
23 MOISTURE INTRUSION WAS COMING FROM THE WINDOW, DIDN'T YOU?

24 A YES, SIR

25 Q SO, THAT WINDOW YOU CONSIDER IS A SOURCE OF MOISTURE

1 INTRUSION, RIGHT?

2 A I CONSIDER THEM ALL RESOURCES, THAT ONE HAPPENED TO
3 HAVE ELEVATED MOISTURE

4 Q BUT OUT OF ALL THE WINDOWS OF THE BABAEE'S HOUSE YOU
5 ONLY FOUND THAT ONE TO HAVE POTENTIAL SOURCE OF MOISTURE,
6 RIGHT?

7 A ON THAT DAY THAT IS THE ONLY ONE I FOUND THAT HAD
8 ELEVATED MOISTURE AT THAT POINT AND TIME

9 Q AND YOU WENT BACK OUT TWO YEARS LATER AND YOU STILL
10 ONLY FOUND ONE WINDOW, RIGHT?

11 A WELL, NO AT THAT POINT THAT LOCATION WHERE THERE
12 WAS 23 PERCENT AND IT WAS STILL FIRM TWO YEARS LATER,
13 NOW I HAD 30 PERCENT AND WAS TOTALLY DETERIORATED UNDER
14 IT

15 Q AND YOU NEVER DID TELL THE BABAEE'S THEY COULD OF
16 CAUGHT THAT WINDOW OR MAINTAINED THAT WINDOW TO KEEP
17 DAMAGE FROM GETTING IN, DID YOU?

18 A AGAIN, AS I INDICATED BEFORE, ONCE I KNEW THAT THERE
19 WAS SECONDARY VAPOR RETARDERS IN THE WALL, AT THAT POINT I
20 DON'T BELIEVE REMEDIATION IS APPROPRIATE

21 Q WELL, IF REMEDIATION ISN'T APPROPRIATE WHY WOULDN'T
22 YOU OF FOUND DAMAGE IN ALL THE OTHER WINDOWS OR KICKOUTS?

23 A WELL, AGAIN, WHEN I WAS THERE IN JUNE OF 2006 WE WERE
24 IN THE MIDDLE OF A DROUGHT SO, OBVIOUSLY MOISTURE IN A
25 HOUSE IS RELATIVE TO WHEN IT RAINS BUT I, SINCE OUR

1 DEPOSITION I HAVE AN OPPORTUNITY TO REVIEW MR CLARK'S
2 REPORT WHICH WAS DONE ABOUT, I THINK IT WAS ABOUT 12 OR 14
3 MONTHS BEFORE I CAME OUT AND HE HAD MANY MORE, NOT ONLY
4 AREAS OF ELEVATED MOISTURE BUT TO MY POINT MORE
5 IMPORTANTLY MANY AREAS OF MODERATE OR SOFT STRUCTURAL
6 MATERIALS OR SUB-STRAIGHT EVEN WITHOUT ELEVATED MOISTURE

7 Q BUT MR BABAEE OR HIS WIFE NEVER SHOWED YOU THAT
8 REPORT, DID THEY?

9 A IT WASN'T APPROPRIATE I DON'T USUALLY LOOK AT
10 SOMEONE ELSE'S REPORT WHEN I GO OUT BECAUSE IT DOESN'T
11 AFFECT WHAT I AM GOING TO DO

12 Q BUT IF SOMEONE WANTED TO TELL YOU WHAT THEY THOUGHT
13 WHEN THEY BOUGHT THE HOUSE, WAS THE CONDITION OF THE
14 HOUSE, THEIR OPINION, DON'T YOU THINK THEY WOULD OF SHARED
15 THEIR INFORMATION WITH YOU TO SAY, HERE BILL, HERE IS THE
16 REPORT THAT WE HAVE GOT THAT SAYS WE THINK THE DAMAGE IS
17 IN THIS AREA BASED ON THIS REPORT

18 MR PHILLIPS YOUR HONOR

19 THE COURT JUST ONE SECOND

20 MR PHILLIPS YOUR HONOR, I OBJECT, THIS IS PURE
21 SPECULATION

22 THE COURT I AM GOING TO ALLOW HIM TO ANSWER IT

23 A I HAVE MY OWN WAY OF GOING ABOUT LOOKING AT THE HOUSE
24 AND I DO IT IN MY PROTOCOL SO, I WILL USUALLY EVEN ASK
25 THE PEOPLE NOT TO GIVE ME INFORMATION THEY HAVE SO THAT I

1 AM DOING MY WAY

2 Q AND WHEN YOU DID YOUR PROTOCOL YOU DIDN'T FIND NEAR

3 TO WHAT MR CLARK DID, DID YOU?

4 A THAT IS CORRECT IT WAS A WHOLE DIFFERENT POINT AND

5 TIME AND THE CLIMATIC CONDITIONS WERE LIKELY ENTIRELY

6 DIFFERENT

7 Q AND THAT WAS ABOUT TWO YEARS AFTER CLARK, WASN'T IT?

8 A I THINK IT WAS ABOUT 16 MONTHS IF I AM NOT MISTAKEN

9 Q CLARK'S REPORT WAS IN NOVEMBER OF 2004, RIGHT?

10 A RIGHT AND I WAS IN JUNE OF 2006, 16 OR 17 MONTHS, I

11 THINK I HAVE BEEN THERE THREE TIMES, YES

12 Q AND THE SECOND INSPECTION YOU DID--

13 THE COURT I TELL YOU WHAT, MR BLACKBURN, ARE YOU

14 GETTING READY TO GO INTO THE SECOND INSPECTION?

15 MR BLACKBURN YES, SIR

16 THE COURT LET'S TAKE A BREAK LET'S TAKE A BREAK,

17 LADIES AND GENTLEMEN, YOU ARE EXCUSED TO YOUR JURY ROOM

18 AND DON'T TALK ABOUT THE CASE

19 (WHEREUPON, THE JURY WAS EXCUSED FROM OPEN COURT FOR

20 A BREAK)

21 THE COURT WE WILL TAKE A SHORT BREAK YOU ARE IN

22 THE MIDDLE OF YOUR EXAMINATION AND IT IS NOT PROPER TO

23 DISCUSS YOUR TESTIMONY WITH EITHER SIDE THANK YOU

24 (WHEREUPON, A SHORT BREAK WAS TAKEN)

25 THE COURT ANYTHING FROM THE PLAINTIFF BEFORE WE GET

0211

APP_0215

1 THE JURY IN?

2 MR PHILLIPS NO, SIR

3 THE COURT ANYTHING FROM THE DEFENDANT?

4 MR BLACKBURN NO, YOUR HONOR

5 THE COURT BRING THE JURY IN, PLEASE

6 (WHEREUPON, THE JURY CAME INTO OPEN COURT AT

7 APPROXIMATELY 3 50 P M)

8 THE COURT MR BLACKBURN, YOU MAY CONTINUE

9 CONTINUE CROSS-EXAMINATION

10 BY MR BLACKBURN

11 Q MR FLAHERTY, I WANT TO BACK UP A MINUTE I WANT TO

12 ASK YOU ABOUT THE CABO CODE AGAIN

13 A YES, SIR

14 Q I AM GOING TO HAND YOU A DOCUMENT AND I WANT TO ASK

15 YOU IF YOU CAN IDENTIFY THE DOCUMENT I AM HANDING YOU?

16 A WELL, IT IS A SECTION OF A CABO CODE, I DON'T KNOW

17 WHAT YEAR IT WOULD OF BEEN FROM I KNOW WRITTEN ON THERE

18 IS CABO 1993 BUT I HAVE NO WAY OF KNOWING THAT

19 Q AND IT DOES HAVE A PAGE NUMBER AT THE BOTTOM, PAGE

20 25, RIGHT?

21 A THAT IS CORRECT

22 Q AND YOU AGREE WITH THAT SECTION, R220 MOISTURE VAPOR

23 RETARDER, IS THAT RIGHT?

24 A THAT IS THE TITLE OF IT, YES SIR

25 MR BLACKBURN YOUR HONOR, I WOULD LIKE TO MARK THAT

0212

1 AS DEFENDANT'S 41

2 MR PHILLIPS I HAVE AN OBJECTION, YOUR HONOR, MR
3 FLAHERTY IS JUST READING THIS OFF THE DOCUMENT

4 Q MR FLAHERTY, IF YOU COULD FOR THE JURY--

5 THE COURT I AM NOT LETTING IT IN ALONG THAT BASIS
6 THERE IS A WAY TO GET IT IN BUT THAT IS NOT HOW YOU DO IT

7 Q I HAND YOU ANOTHER DOCUMENT, MR FLAHERTY AND ASK
8 YOU, YOU MENTIONED THE SOUTH CAROLINA ENERGY?

9 A THE ENERGY CODE

10 Q DO YOU RECOGNIZE THIS DOCUMENT I AM HANDING YOU?

11 A NO SIR, I HAVE NOT SEEN THIS BEFORE

12 Q OKAY WE WILL TALK ABOUT YOUR SECOND REPORT BEFORE
13 WE GET TO THAT LET'S LOOK AT PAGE 30 OF YOUR JUNE 2006
14 FIRST REPORT MARKED AS DEFENDANT'S EXHIBIT NUMBER 40, I AM
15 SORRY, 39 YOU TESTIFIED EARLIER THAT YOU BELIEVE THAT
16 EIFS SYSTEM IS UNFORGIVING, RIGHT?

17 A THAT IS CORRECT

18 Q AND YOU BELIEVE THAT THE EIFS SYSTEM TRAPS WATER,
19 RIGHT?

20 A THAT IS CORRECT

21 Q SO, IF WATER GETS INTO A HOUSE AND GETS THINGS WET
22 LIKE THIS AREA AT THE BACK DOOR, YOU BELIEVE IT IS NEVER
23 GOING TO GET OUT, RIGHT?

24 A NO, NOT NEVER

25 Q NOT NEVER BUT, UNLESS SOME OTHER MEANS GETS IT OUT IT

1 IS GOING TO STAY THERE, RIGHT?

2 A WELL, AGAIN, IT DEPENDS ON THE AMOUNT, IT IS
3 INCIDENTAL, IT WOULD LIKELY TO BE PULLED THROUGH, ASSUMING
4 THERE ARE NO VAPOR RETARDERS INVOLVED IT WOULD BE PULLED
5 TO THE INTERIOR OF THE HOME AND DISSIPATED BY THE HVAC
6 SYSTEM HEAVY AMOUNTS OF WATER WILL OBVIOUSLY TAKE
7 LONGER

8 Q ON PAGE 30 OF YOUR REPORT YOU HAVE, YOU HAVE, WE
9 IDENTIFIED EXHIBIT NUMBER, THE TEST NUMBER TWO, WOULD YOU
10 AGREE WITH ME, YOU DON'T HAVE A PICTURE OF THIS OSB
11 DEPICTED ON PAGE 30 OF YOUR FIRST REPORT, DO YOU?

12 A ACTUALLY NUMBER ONE, THE PICTURES ON PAGE 30 I
13 BELIEVE ARE RELATED TO THE PICTURES ON THE SECTION CUT
14 NUMBER ONE ON THE FRONT WALL

15 Q NUMBER TWO ON PAGE 31 DO YOU SEE ANY OSB LIKE YOU
16 TOOK OUT ON NUMBER ONE?

17 A ON NUMBER ONE?

18 Q TEST CUT NUMBER ON PAGE 31, TEST CUT NUMBER TWO, I AM
19 SORRY

20 A WHICH ONE ARE WE, NUMBER ONE OR NUMBER TWO

21 Q THERE IS NOT A PICTURE OF OSB BOARD, IS IT?

22 A WELL, IT SAYS NO MOISTURE BARRIER OBSERVED THE OSB
23 WAS VISUALLY DETERIORATED AND ELIMINATED NOW, IN THE
24 BLACK AND WHITE PHOTO I CAN'T SEE IF THE DARK AREA IS WHAT
25 IS LEFT OF THE OSB OR NOT IF IT WERE THERE THERE WOULD

0214

APP_0218

1 OF BEEN A PICTURE OF IT

2 Q AND SO, IN YOUR REPORT YOU DO INCLUDE A SECTION WHERE
3 IT SAYS, ONCE MOISTURE GETS BEHIND SYSTEM LIKE YOU
4 TESTIFIED EARLIER, IT IS UNFORGIVING AND IT IS HARD TO GET
5 OUT, RIGHT?

6 A THAT IS CORRECT

7 Q LET'S MOVE ON TO YOUR SECOND REPORT AND I HAVE MARKED
8 THAT AS DEFENDANT'S EXHIBIT NUMBER 40 AND IF YOU CAN
9 IDENTIFY THAT FOR THE JURY I WOULD APPRECIATE IT

10 A YES SIR, THIS IS A REPORT I DID IN JULY OF 2006,
11 APPROXIMATELY SIX WEEKS, I GUESS, AFTER THE FIRST
12 INSPECTION

13 Q ON PAGE 4, YOU SAY THE SYSTEM WAS NOT INSTALLED TO
14 EIMA OR ANY MANUFACTURER SPECIFICATIONS, DON'T YOU?

15 A NO

16 Q PAGE 4

17 A CORRECT, PAGE 4 IS AN EVALUATION SUMMARY

18 THE COURT MR BLACKBURN, GO OVER THERE AND SHOW HIM
19 WHAT YOU ARE TALKING ABOUT, PLEASE

20 MR BLACKBURN YES, SIR

21 Q LET ME GET MY COPY

22 A THIS REPORT HAS TO DO WITH WHETHER THE SYSTEM
23 COMPLIES WITH MOISTURE FREE WARRANTY'S STANDARDS

24 Q AND YOU SAY IN THAT REPORT, WHATEVER PAGE IT IS ON
25 THE COURT SHOW HIM WHAT PAGE IT IS ON SO WE CAN

1 MOVE ALONG

2 Q THAT THE SYSTEM WASN'T INSTALLED TO EIMA OR ANY
3 MANUFACTURER SPECIFICATIONS, RIGHT?

4 A WELL, AGAIN I WOULD HAVE TO LOOK AT, IT DOESN'T SAY
5 IT ON THE EVALUATION

6 THE COURT IF YOU ARE GOING TO ASK HIM THAT QUESTION
7 SHOW IT TO HIM, WHAT PAGE, WHAT LINE SO WE CAN GET OUT OF
8 THIS

9 Q YOU ARE NOT SURE WHO THE MANUFACTURER OF SYNTHETIC
10 STUCCO IS ON THE BABAEE'S HOUSE, ARE YOU?

11 A THAT IS CORRECT UNLESS I IDENTIFIED IT IN MY ORIGINAL
12 REPORT BUT MANY TIMES I FIND THERE IS MULTIPLE
13 MANUFACTURERS

14 Q AND THAT IS WHY YOU USE EIMA GUIDELINES IN YOUR
15 INSPECTIONS BECAUSE YOU MAY NOT KNOW WHO THE MANUFACTURER
16 IS, RIGHT?

17 A THAT IS CORRECT

18 Q OKAY YOU ARE FAMILIAR WITH EIMA GUIDELINES, RIGHT?

19 A THAT IS CORRECT

20 Q AND YOU RELIED UPON EIMA GUIDELINES WHEN YOU
21 INSPECTED THE BABAEE HOUSE ON JULY THE 25TH OF 2006 WHEN
22 YOU GENERATED THIS REPORT, DIDN'T YOU?

23 A NO, SIR I RELIED ON MOISTURE FREE WARRANTY'S
24 GUIDELINES AS TO HOW THE SYSTEM SHOULD BE AT THAT POINT
25 AND TIME THAT THEY PUT THE WARRANTY ON IT

0216

APP_0220

1 Q SO, YOU ARE TELLING ME YOU DIDN'T RELY ON EIMA
2 STANDARDS?

3 A THAT IS CORRECT

4 Q AND YOU ARE FAMILIAR WITH EIMA STANDARDS, RIGHT?

5 A THAT IS CORRECT

6 Q AND YOU BELIEVE THAT IT IS IMPORTANT FOR AN EXPERT
7 LIKE YOU TO UNDERSTAND THE EIMA STANDARDS?

8 A THAT IS CORRECT

9 Q AND DO YOU BELIEVE THAT THE MANUFACTURES MATERIAL
10 THAT HAS BEEN PUT ON THE BABAEE HOUSE APPLIES TO THE EIMA
11 STANDARDS?

12 A AS IT WAS ORIGINALLY INSTALLED?

13 Q RIGHT

14 A NO SIR, IT WAS NOT

15 Q IT DID NOT?

16 A THAT IS CORRECT

17 Q I AM GOING TO HAND YOU A COPY OF THIS DOCUMENT AND
18 ASK YOU IF YOU RECOGNIZE THIS DOCUMENT I AM HANDING YOU?

19 A YES, SIR

20 Q YOU RECOGNIZE IT?

21 A SURE

22 Q AND WHAT IS IT?

23 A IT IS A DOCUMENT PUT OUT BY EIMA, GUIDELINE FOR
24 INSPECTION FOR EIFS CLAD HOMES

25 MR BLACKBURN I WOULD LIKE TO MARK THIS AS

1 DEFENDANT'S EXHIBIT NUMBER 41

2 MR PHILLIPS NO OBJECTION, YOUR HONOR

3 (WHEREUPON, DEFENDANT'S EXHIBIT NO 41 WAS ADMITTED
4 INTO EVIDENCE)

5 Q THIS DEFENDANT'S EXHIBIT NUMBER 41, THIS EIMA
6 GUIDELINES FOR INSPECTION IS THE EIFS CLADDING HOUSE,
7 RIGHT?

8 A YES, SIR

9 Q AND ON THE FIRST PAGE, CAN YOU READ THAT FOR THE
10 JURY

11 A WOULD THIS BE PAGE 2 OR THE COVER PAGE

12 Q PAGE 1 WHERE IT STARTS, THE PRIMARY OBJECTIVE

13 A YES, SIR

14 Q LET ME READ IT TO YOU THE PRIMARY OBJECTIVE
15 INSPECTING EXTERIOR EXISTING HOUSE DETERMINES WHETHER OR
16 NOT IT IS FUNCTIONING PROPERLY, SIMPLY REPAIRING THE HOME
17 OF THE EXISTING DETAILS OF THE CURRENT PUBLIC GUIDELINES
18 FAILS TO ACCOMPLISH THIS OBJECTIVE, RIGHT?

19 A THAT IS CORRECT

20 Q AN INSPECTION SHOULD IDENTIFY REPAIRS THAT ARE
21 NECESSARY DEFECTIVE ECONOMICALLY, RIGHT?

22 A THAT IS CORRECT

23 Q IT SAYS STRICT PERFORMANCE TO A MANUFACTURERS
24 PUBLISHED DETAILS DOES NOT ANSWER THE QUESTION, IS A
25 REPAIR NECESSARY AND WILL IT BE EFFECTIVE DO YOU AGREE?

1 A THAT IS CORRECT

2 Q AND THEN IT GOES ON TO SAY, INSPECTION REPORT THAT
3 IDENTIFY EXISTING DETAILS AND CONDITIONS AS, "DEFECTIVE",
4 BECAUSE THEY DEVIATE FROM THE CURRENT PUBLISHED
5 MANUFACTURER GUIDELINES CAN MISLEAD THE HOMEOWNER, REAL
6 ESTATE AGENT OR OTHER PARTIES AND TO INITIATE UNNECESSARY
7 REMEDIAL WORK, RIGHT?

8 A THAT IS WHAT IT SAYS, YES

9 Q AND YOU AGREE WITH THESE GUIDELINES, RIGHT, YOU USE
10 THEM?

11 A THESE ARE NOT EIMA GUIDELINES AS TO HOW THE SYSTEM
12 WAS TO HAVE BEEN INSTALLED INITIALLY THIS IS A DOCUMENT
13 PUT OUT BY EIMA AND I CAN'T REMEMBER THE YEAR IT WAS PUT
14 OUT BUT AT SOME POINT TO DEAL WITH ALL THE LITIGATION
15 THAT WAS GOING ON

16 Q AND THE DOCUMENT DOES SAY IN THE SECOND PARAGRAPH IN
17 THE FIRST PAGE, THE LAST SENTENCE SAYS, WE ARE TALKING
18 ABOUT INSPECTION REPORTS THAT IDENTIFY EXISTING DETAILS
19 AND CONDITIONS AS, "DEFECTIVE", BECAUSE THEY DEVIATE FROM
20 CURRENT PUBLISHED MANUFACTURERS, GUIDELINES CAN MISLEAD
21 THE HOMEOWNER, REAL ESTATE AGENT OR OTHER PARTIES AND TO
22 INITIATE UNNECESSARY REPAIRS, REMEDIAL WORK, RIGHT?

23 A THAT IS WHAT IT SAYS, YES

24 Q THIS IS ESPECIALLY TRUE IF THERE IS POSITIVE EVIDENCE
25 THAT EXISTING DETAILS ARE FUNCTIONING PROPERLY, RIGHT?

1 A THAT IS WHAT IT SAYS, YES

2 Q AND YOU ARE SAYING THAT THIS REPORT, DEFENDANT'S
3 EXHIBIT NUMBER 40, YOUR SECOND REPORT, THE PURPOSE OF THIS
4 REPORT WAS NOT TO EVALUATE PURSUANT TO THE EIMA
5 GUIDELINES?

6 A THAT IS CORRECT

7 Q YOU ARE SAYING IT WAS TO INVESTIGATE THE MOISTURE
8 FREE WARRANTY'S GUIDELINES, RIGHT?

9 A THAT IS CORRECT WHETHER THE DETAILS ON THE HOUSE
10 CONFORM TO MOISTURE FREE WARRANTY'S SPECIFICATIONS

11 Q I AM GOING TO HAND YOU THIS DOCUMENT AND ASK YOU IF
12 YOU CAN IDENTIFY THAT DOCUMENT?

13 A WELL, IT LOOKS TO BE FROM THE TRAINING MANUAL FROM
14 MOISTURE FREE WARRANTY

15 Q AND WHAT I AM HOLDING IN MY HAND IS MARKED AS
16 DEFENDANT'S EXHIBIT 37 IS A TRAINING MANUAL YOU ARE
17 REFERRING TO, RIGHT?

18 A YES, SIR

19 Q AND WHEN YOU WERE OUT AT THE BABAEE'S HOUSE DOING
20 YOUR INSPECTION FOR EVALUATING THE STANDARDS THAT MOISTURE
21 FREE WANTS YOU TO CUT INTO SOME OF THAT SEALANT, DIDN'T
22 YOU?

23 A YES, SIR ACTUALLY I DID THAT IN THE INITIAL
24 INSPECTION

25 Q RIGHT

0220

APP_0224

1 A NOT, I MAY OR MAY NOT HAVE IN THE SECOND ONE BUT I
2 KNOW I DID IN THE FIRST ONE

3 Q NOW, AND THE WINDOW THAT YOU CUT INTO IN YOUR FIRST
4 INSPECTION, THAT WINDOW, YOU DIDN'T HAVE ELEVATED MOISTURE
5 IN THERE, DID YOU?

6 A I CAN'T REMEMBER I CUT THE CEILING ON SEVERAL
7 JOINTS ON THE HOUSE SO I CAN'T REMEMBER IF I DID OR
8 DIDN'T

9 Q AND WILL YOU AGREE WITH ME, SINCE YOU SAY THE SECOND
10 REPORT IN JULY OF '06 IS PURPOSED FOR MOISTURE FREE
11 GUIDELINES, THE FIRST REPORT IN JUNE OF 2006, PART OF THAT
12 INCLUDES EVALUATING THE EIMA GUIDELINES, DOESN'T IT?

13 A PART OF IT, IT IS DONE TO THE EIMA GUIDELINES

14 Q AND YOU BASICALLY SEE THAT ON PAGE 3, RIGHT, OF YOUR
15 REPORT THAT YOU HAVE IN FRONT OF YOU

16 THE COURT WHICH REPORT

17 Q THE FIRST ONE

18 A PAGE 3 YOU SAID?

19 Q YES AND I WILL READ IT THE PURPOSE, ON THE TOP OF
20 THE PAGE, VISUAL INSPECTION OF PROPERTY, THE EXTERIOR
21 INSULATION SYSTEM WAS EXAMINED WITH THE INTENTION OF
22 FINDING AND DISCLOSING TO DEVIATE FOR MANUFACTURED
23 SPECIFICATIONS, RIGHT?

24 A YES, SIR

25 Q AND YOU SAID YOU DON'T KNOW THE MANUFACTURER THEN,

1 YOU USE THE EIMA GUIDELINES, CORRECT?

2 A THAT IS CORRECT THAT IS HOW IT WAS TO BE INSTALLED
3 ORIGINALLY

4 Q HOW IT WAS TO BE INSTALLED ORIGINALLY?

5 A RIGHT

6 Q LOOK AT PAGE 10 AND 11 OF DEFENDANT'S EXHIBIT NUMBER
7 39 AND IT IS TALKING ABOUT SEALANTS AND JOINTS

8 THE COURT WHAT IS 39

9 MR BLACKBURN IT IS THE JUNE 2006 REPORT OF MR
10 FLAHERTY

11 Q AND ON PAGE 10 AND 11 YOU ARE ANALYZING CEILING
12 JOINTS, RIGHT?

13 A CORRECT, AS TO HOW THEY WERE TO BE INSTALLED
14 ORIGINALLY

15 Q AND YOU ONLY FOUND ONE WINDOW, THE ELEVATED MOISTURE,
16 RIGHT, AT THAT TIME?

17 A YES

18 Q AND THEN PER EIMA, NO REPAIRS NECESSARY TO THE OTHER
19 WINDOWS, RIGHT, THE EIMA GUIDELINES?

20 A YOU MEAN THIS OTHER DOCUMENT THAT YOU HANDED ME?

21 Q YES YOU ARE TALKING ABOUT DEFENDANT'S EXHIBIT
22 NUMBER 41 WHICH ARE THE EIMA GUIDELINES INSPECTION?

23 A WELL, I DON'T KNOW THAT IT SAYS NO REPAIRS ARE
24 NECESSARY

25 Q IT SAYS IF IT IS FUNCTIONING AS SHOULD BE THEN NO

1 REPAIRS ARE NECESSARY, RIGHT

2 THE COURT SHOW IT TO HIM

3 Q I AM GOING TO READ IT TO HIM

4 THE COURT I WANT YOU TO SHOW IT TO HIM SO HE CAN
5 VERIFY WHAT YOU ARE SAYING POINT IT TO HIM

6 Q I AM POINTING TO THE SECOND PAGE, SECOND PARAGRAPH,
7 WHERE IT SAYS, INSPECTION REPORTS THAT IDENTIFY EXISTING
8 DETAILS AND CONDITIONS AS, "DEFECTIVE", BECAUSE THEY
9 DEVIATE FROM CURRENT PUBLISHED MANUFACTURED GUIDELINES CAN
10 MISLEAD HOMEOWNER, REAL ESTATE AGENT OR OTHER PARTIES INTO
11 INITIATING UNNECESSARY REMEDIAL WORK, RIGHT?

12 A THAT IS CORRECT

13 Q AND THIS IS ESPECIALLY TRUE IF THERE IS POSITIVE
14 EVIDENCE THAT EXISTING DETAILS ARE FUNCTIONING PROPERLY,
15 RIGHT?

16 A CORRECT

17 Q SO TO THE EIMA GUIDELINES THE OTHER WINDOWS MUST HAVE
18 BEEN FUNCTIONING RIGHT, RIGHT?

19 A THEY DIDN'T HAVE ELEVATED MOISTURE UNDER THEM THE DAY
20 I WAS THERE

21 Q AND THEY DIDN'T HAVE ELEVATED MOISTURE LEVELS WHEN
22 YOU WENT BACK IN 2008 EITHER, DID THEY, EXCEPT FOR THE ONE
23 WINDOW WE TALKED ABOUT?

24 A RIGHT AND THERE WAS MORE MOISTURE AND MORE DAMAGE
25 UNDER THAT ONE

1 Q SO, PURSUANT TO THE EIMA GUIDELINES THEN THERE IS
2 REALLY NO REASON TO MAKE REPAIRS WHERE YOU CAN'T FIND ANY
3 EVIDENCE OF DAMAGE OF WHAT THEY SAY CAN MISLEAD, RIGHT,
4 BECAUSE THEY CAN MISLEAD HOMEOWNERS, REAL ESTATE AGENTS OR
5 OTHER PARTIES TO INITIATE UNNECESSARY REMEDIAL WORK,
6 RIGHT

7 MR PHILLIPS YOUR HONOR, OBJECTION, ASKED
8 THE COURT SUSTAINED, ASKED AND ANSWERED YOU HAVE
9 ASKED THAT QUESTION MORE TIMES THAN I CAN COUNT, MOVE
10 ALONG

11 Q LET'S LOOK AT PAGE 14 OF YOUR REPORT I AM REFERRING
12 TO DEFENDANT'S EXHIBIT 39 AND YOU SAY ON PAGE 14 THAT
13 THE EFIS COME INTO CONTACT WITH THE STOOP, RIGHT

14 A WITH THE FRONT STOOP AND THE REAR PATIO

15 Q YOU HAD NO EVIDENCE OF MOISTURE DAMAGE IN THAT AREA
16 AT THAT TIME, DID YOU?

17 A THAT IS CORRECT

18 Q PURSUANT TO EIMA GUIDELINES, THE EIMA GUIDELINES DO
19 NOT RECOMMEND REPAIRS, YES OR NO?

20 A I DON'T KNOW IF THAT IS TRUE

21 Q WHY NOT IF THEY SAY IF YOU DON'T HAVE ANY EVIDENCE OF
22 DAMAGE THEN NO REPAIRS ARE NECESSARY?

23 A I DON'T KNOW IF I CAN MAKE AN ANALOGY AS TO THE
24 ANSWER TO YOUR QUESTION BUT IF THERE WERE NO SEALANTS AT
25 THE WINDOWS AND THERE WASN'T ELEVATED MOISTURE WOULD YOU

1 SAY THAT YOU SHOULD NOT PUT SEALANT AT THE WINDOW

2 THE COURT NO SIR, LET HIM ASK THE QUESTION

3 Q I DON'T WANT TO ASK AND ANSWER IT AGAIN BUT I THINK
4 IT IS FAIRLY CLEAR THAT YOU HAVE ANSWERED MY QUESTION ON
5 PAGE 12--

6 THE COURT GO ON TO SOMETHING ELSE PLEASE, NOW, I
7 TRY TO BE PATIENT, I AM TRYING TO BE PATIENT

8 Q I AM GOING TO PAGE 12, THE EXPANSION JOINTS ON PAGE
9 12, YOU DIDN'T FIND ANY EVIDENCE OF DAMAGE ON THE
10 EXPANSION JOINTS EITHER, DID YOU?

11 A THAT IS CORRECT

12 Q SO, PURSUANT TO THE EIMA GUIDELINES THEN THERE IS NO
13 REPAIRS NECESSARY, RIGHT?

14 A THAT IS CORRECT

15 Q AND ON PAGE 15, YOU TALK ABOUT THE TRIM NOT PROPERLY
16 SLOPED, RIGHT?

17 A YES, SIR

18 Q AND NO DAMAGE KNOWN TO THIS CONDITION EITHER, RIGHT?

19 A NO, NOT THAT DATE

20 Q NOT IN 2007, RIGHT?

21 A THAT IS CORRECT

22 Q AND ON PAGE 16, TALK ABOUT THE FLASHING, RIGHT?

23 A YES, SIR

24 Q YOU SAID THAT NO HEAD FLASHING WAS OBSERVED IN THOSE
25 WINDOWS, RIGHT?

0225

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1 A YES, SIR

2 Q BUT YOU DIDN'T FIND ANY EVIDENCE OF DAMAGE ON THAT
3 WINDOW, DID YOU?

4 A THAT IS CORRECT THEY WERE VINYL CLAD WINDOWS

5 Q WERE THEY NAIL PIN FLANGED?

6 A I CAN'T TELL WITH THE EFIS OVER THE NAIL PIN IF IT IS
7 THERE

8 Q SO, WILL YOU AGREE WITH ME THAT NAIL PIN FLANGED
9 WINDOWS DON'T REQUIRE ANY FLASHING?

10 A NO

11 Q NO?

12 A NO

13 Q LET ME HAND YOU THIS DOCUMENT AND ASK YOU IF YOU ARE
14 FAMILIAR WITH THIS DOCUMENT RIGHT HERE AND I WILL READ
15 IT TO YOU

16 THE COURT NO SIR, DO NOT PUBLISH IT UNTIL HE IS
17 FAMILIAR WITH IT

18 Q ARE YOU FAMILIAR WITH IT?

19 A YES, SIR I BELIEVE WE HAD THIS CONVERSATION IN
20 ALABAMA A NUMBER OF YEARS BACK

21 Q YOU AND I?

22 A IT MAY HAVE BEEN YOU OR ANOTHER ATTORNEY IN ANOTHER
23 CASE

24 THE COURT DON'T GET INVOLVED IN THAT, JUST ASK THE
25 QUESTIONS

1 Q CAN YOU READ, I WILL READ R503 8, WHAT IS THIS
2 DOCUMENT?

3 A THIS IS A PAGE OUT OF A CABO CODE MANUAL, I DON'T
4 KNOW WHAT YEAR

5 Q IT IS THE CABO CODE?

6 A YES, SIR

7 Q WOULD IT BE APPLICABLE TO THE CONSTRUCTION OF THE
8 PLAINTIFF'S HOME AT THIS TIME?

9 A DEPENDING ON WHAT YEAR IT WAS ISSUED

10 Q AND YOU RECOGNIZE THIS DOCUMENT, RIGHT?

11 A YES, SIR

12 Q LET'S GO AHEAD AND MARK IT AS EXHIBIT NUMBER 42

13 MR PHILLIPS YOUR HONOR, I OBJECT, IT CAME UP WITH
14 CODE CHANGES

15 THE COURT WHAT YEAR IS IT, SIR

16 MR BLACKBURN IT IS THE CABO CODE, 1997

17 THE COURT IS THAT THE YEAR THAT WAS APPLICABLE IN
18 THE HOUSE IN QUESTION, RIGHT?

19 A YES, SIR

20 MR BLACKBURN AND I WOULD LIKE TO MARK AS EXHIBIT
21 NUMBER 42 FOR ID

22 THE COURT ANY OBJECTION

23 MR PHILLIPS YOUR HONOR, I WOULD LIKE FOR THE
24 WITNESS TO LOOK AT THE ORIGINAL DOCUMENT

25 THE COURT YOU MAY, SHOW HIM THE BOOK, WHICH PAGE

1 Q IN TERMS OF THE CODE R503 8?

2 A YES, SIR

3 Q AND YOU SAID YOU DON'T KNOW WHAT TYPE OF WINDOW

4 FLANGE THIS WINDOW HAS, RIGHT?

5 A THAT IS CORRECT

6 Q ARE YOU AT THE CODE DIVISION NOW?

7 A YES

8 Q R-503 8 FLASHING, APPROVED, CORRODED, RESISTENCE

9 FLASHING SHALL BE PROVIDED AT TOP AND SIDES OF ALL

10 EXTERIOR WINDOWS AND DOOR OPENINGS IN SUCH MANNER AS TO BE

11 LEAK PROOF EXCEPT THAT SELF FLASHING WINDOWS HAVE A

12 CONTINUOUS LAP OF NOT LESS THAN ONE AND AN EIGHT INCHES

13 OVER THE SHEATHING MATERIAL AROUND THE PERIMETER OF THE

14 OPENING INCLUDING CORNERS DO NOT REQUIRE ADDITIONAL

15 FLASHING AND YOU WOULD AGREE WITH ME THAT NAIL PIN

16 FLASHING, NAIL PIN FLANGED WINDOWS IS A SELF FLASH WINDOW?

17 A NO

18 Q NO DOES A NAIL PIN HAVE AN INCH AND AN EIGHT

19 OVERLAP ONTO THE SHEATHING IN HOW THEY PUT THE NAIL PIN

20 FLANGE WINDOW IN, RIGHT?

21 A YES, SIR

22 Q AND WOULD YOU NOT AGREE WITH ME THAT WHEN IT SAYS AN

23 INCH AND AN EIGHT INCHES OVER THE SHEATHING MATERIAL

24 AROUND THE PERIMETER OF THE OPENING INCLUDING CORNERS DO

25 NOT REQUIRE ADDITIONAL FLASHING SUCH AS HEAD FLASHING?

1 A THAT IS WHAT IT STATES, THESE ARE NOT SELF FLASHING
2 WINDOWS IN THIS HOUSE

3 Q HOW DO YOU KNOW?

4 A BECAUSE A SELF FLASH WINDOW HAS A DRIP CAP
5 INCORPORATED AT THE WEEP HOLES AT THE BASE OF IT TO ALLOW
6 MOISTURE THAT GETS IN IT AT THE CONSTRUCTION JOINTS OF THE
7 WINDOWS TO ESCAPE THIS HOUSE DOES NOT HAVE THOSE

8 Q ARE ALL THE WINDOWS LIKE THAT?

9 A THIS IS A STRAIGHT VINYL CLAD WINDOW SO, THE
10 STATEMENT, THE SECTION OF THE CODE WHICH I AM AWARE OF IS
11 THAT SELF FLASHING WINDOW THAT HAVE THAT CHARACTERISTIC
12 DON'T REQUIRE ADDITIONAL HEAD FLASHING THESE ARE NOT
13 SELF FLASHING WINDOWS

14 Q BUT YOU DON'T KNOW THAT, DO YOU?

15 A I KNOW THOSE ARE NOT SELF FLASHING WINDOWS BECAUSE
16 THEY DON'T HAVE THE WEEP HOLES AT THE BOTTOM OF THE SILL
17 TO ALLOW THE MOISTURE, THAT IS WHAT SELF FLASHING WINDOWS
18 ARE IS THEY HAVE A WEEP HOLE AT THE BASE OF THE WINDOW
19 KNOWING THAT WATER GETS IN AT THE CONSTRUCTION JOINTS TO
20 DELIVER THE WATER TO ATMOSPHERE

21 Q AND THAT IS YOUR OPINION, RIGHT?

22 A YES, SIR

23 Q LET'S LOOK AT PAGE 18 OF YOUR REPORT AND THAT
24 LAMINA CRACK THAT YOU ARE TALKING ABOUT ON PAGE 18 OF
25 EXHIBIT NUMBER 39 IS DEPICTED ON PAGE 25 OF DEFENDANT'S

1 EXHIBIT NUMBER 2 ON PAGE 25, RIGHT?

2 A YES SIR, IT IS SIMPLY WHERE THAT ELEVATED MOISTURE
3 WAS ON JUNE OF 2006

4 Q AND WOULD YOU AGREE WITH ME THAT THIS LAMINA CRACK IS
5 NOT A HORIZONTAL CRACK, IS IT?

6 A IT GOES OFF ON A DIAGONAL

7 Q DIAGONAL AND IT IS ALSO STAINED, ISN'T IT?

8 A IT IS STAINED OR SOMEONE APPLIED SEALANT TO IT, LIKE
9 A CLEAR SEALANT

10 Q OKAY AND DO YOU NOT BELIEVE THAT COMPRESSION CRACKS
11 ARE GENERALLY HORIZONTAL?

12 A THAT IS CORRECT

13 Q AND THIS IS NOT HORIZONTAL, IS IT?

14 A THAT IS CORRECT

15 Q YOU ARE STILL CALLING IT A COMPRESSION CRACK, AREN'T
16 YOU?

17 A THAT IS A GENERAL CATEGORY FOR CRACKING IN THE
18 SYSTEM, IT COULD ALSO BE AN INDICATOR THAT THE SEAMS OF
19 THE INSULATOR--

20 Q JUST YES OR NO

21 THE COURT SIR, DON'T CUT HIM OFF LIKE THAT

22 MR BLACKBURN I AM SORRY

23 Q YOU ARE STILL CALLING IT A COMPRESSION CRACK, RIGHT?

24 A THAT IS JUST A CATEGORY THAT I PUT CRACKING IN IN THE
25 REPORT, YES SIR

1 Q ON PAGE 19, THE ROOF LINE TERMINATION, YOU SAY THE
2 EFIS ARE PROPERLY TERMINATED WITH KICKOUT FLASHING, RIGHT?

3 A YES, SIR

4 Q AND THEN YOU SAID THAT THE KICKOUT THAT IS OVER THE
5 REAR DOOR APPEARS TO HAVE BEEN RETROFITTED?

6 A YES, SIR

7 Q AND WHEN YOU ARE TALKING, IT IS ON PAGE 25 OF
8 DEFENDANT'S EXHIBIT NUMBER 2 THAT IS BLOWN UP FROM PAGE 19
9 OF THIS REPORT, DEFENDANT'S EXHIBIT NUMBER 39, RIGHT?

10 A YES, SIR

11 Q AND DO YOU KNOW IF ANY MOISTURE ELEVATED AT THAT
12 KICKOUT AT THAT TIME?

13 A NO, THAT IS THE ONE THAT I INDICATED THERE WAS NO
14 MOISTURE BUT THE WALL WAS ROTTED

15 Q THE WALL WAS ROTTING?

16 A NO, NOT ROTTING, ROTTED THAT WAS THE SECTION CUT
17 THAT I DID AT THE BASE OF THAT LINE UNDERNEATH THAT
18 KICKOUT ALTHOUGH THERE WAS NO ELEVATED MOISTURE WHEN I
19 PROBED IT, OBVIOUSLY MY PROBE WENT THROUGH TELLING ME
20 THERE WAS A PROBLEM ALTHOUGH IT WAS NOT WET ON THAT DAY

21 Q ON PAGE 20 OF YOUR REPORT, MOISTURE MEASUREMENTS A
22 MEASUREMENT OF 20 PERCENT INDICATES THAT CONDITIONS ARE
23 FAVORABLE FOR ROT TO BEGIN, IS THAT YOUR OPINION?

24 A YES, SIR

25 Q AND 30 PERCENT OR HIGHER WOULD INDICATE THAT THE

0230A

1 STRUCTURAL MATERIAL IS CONTINUALLY WET AND ROT IS POSSIBLY
2 OCCURRING, RIGHT?
3 A YES, SIR
4 Q NOW, YOU TALK ABOUT KICKOUTS ON THAT PAGE, ON PAGE
5 19 YOU SAY THERE ARE ONLY THREE KICKOUTS IN THIS HOUSE?
6 A MAINLY KICKOUTS, YES
7 Q THREE?
8 A YES
9 Q WHAT DO YOU CALL THEM?
10 A PRIMARY KICKOUTS
11 Q PRIMARY AND WHAT DO YOU CONSIDER A PRIMARY KICKOUT?
12 A IT IS A ROOF TERMINATION SUCH AS THOSE, IT IS A MAIN
13 ROOF THAT TERMINATES WITH A VERTICAL WALL
14 Q OKAY AND YOU TALKED ABOUT THE KICKOUT FLASHING ON
15 PAGE 23 DEPICTED RIGHT HERE IS WHAT CAUSES THE DAMAGE AT
16 23 AND 40 PERCENT RIGHT THERE, RIGHT?
17 A YES, SIR
18 Q AND THAT KICKOUT IS DEPICTED, WHAT ABOUT THE TWO
19 KICKOUTS IN THE AREAS WHERE I AM POINTING RIGHT HERE?
20 A THOSE ARE WHAT ARE CALLED SECONDARY KICKOUTS THAT IS
21 ON A QUEEN END ACCENT LIKE THAT
22 Q BUT THEY ARE CALLED KICKOUTS, RIGHT?
23 A YES, BUT THEY ARE SECONDARY, THE PRIMARY ARE AT A
24 MAIN ROOF
25 Q YOU DIDN'T MAKE A DISTINCTION EARLIER, DID YOU?

0230B

1 A NO

2 Q BUT THERE IS NO DAMAGE ON THAT EITHER, IS THERE?

3 A NO

4 Q SO, YOU HAVE GOT ONE, TWO, THREE AND THEN ON THE LEFT

5 SIDE OF THE HOUSE YOU HAVE GOT ANOTHER ONE, SECONDARY ONE?

6 A SECONDARY ONE

7 Q IN YOUR OPINION, RIGHT?

8 A RIGHT I PRIMARILY, IN MY REPORT, AM DEALING WITH

9 PRIMARY ROOF TERMINATIONS

10 Q FOUR KICKOUTS AND THEN FIVE OVER HERE, RIGHT AND ON

11 THE BACK SIDE OF THE HOUSE WE HAVE THE SAME AREA, SIX,

12 SEVEN, EIGHT, NINE?

13 A I COUNT THREE PRIMARY KICKOUTS

14 Q THREE PRIMARY?

15 A RIGHT

16 Q BUT THEY ALSO INCLUDE SECONDARIES AS WELL AS

17 KICKOUTS?

18 A IT COULD BE KICKOUTS THERE OR NOT

19 Q OKAY YOU EXAMINED THE HOUSE THE SECOND TIME ON JULY

20 THE 25TH OF 2006, RIGHT?

21 A YES, SIR

22 Q AND YOU PRODUCED DEFENDANT'S EXHIBIT NUMBER 40

23 A YES, SIR

24 Q AND THE MOISTURE FREE GUIDELINES, RIGHT?

25 A THE PURPOSE IS TO EXAMINE WITH THE INTENTION OF

1 DETERMINING IF THE REMEDIATION TECHNIQUES USED TO CORRECT
2 EFFICIENCIES AND EFIS INSTALLATION WERE PERFORMED
3 ACCORDING TO REQUIREMENTS SET FORTH BY MOISTURE WARRANTY
4 COMPANY IN ORDER TO REQUIRE A WARRANTY ON THE EFIS
5 CLADDING SYSTEM

6 Q AND YOU ARE READING THAT FROM WHAT PAGE?

7 A PAGE 3

8 Q AND YOU BASICALLY TOLD ME IN YOUR DEPOSITION THAT THE
9 REPORT'S PURPOSE IS TO EVALUATE THE MOISTURE FREE
10 GUIDELINES, RIGHT?

11 A IF THE CONDITION OF THE HOME CONFORMED TO THEIR
12 REQUIREMENTS

13 Q AND YOU WERE A CERTIFIED INSPECTOR FOR MOISTURE FREE
14 AT ONE TIME, RIGHT?

15 A THAT IS CORRECT

16 Q AND YOU WERE CERTIFIED TO DO INSPECTIONS RELATED TO
17 THE DRYVIT CLASS ACTION SETTLEMENT, RIGHT?

18 A YES, SIR

19 Q THAT WAS BACK IN 2002, RIGHT?

20 A I DID INSPECTIONS FROM 2003 THROUGH 2005

21 Q AND THAT IS WHAT IS CONFUSING, WHEN YOU WERE
22 TESTIFYING EARLIER TO MR PHILLIPS ABOUT WHEN YOU DID THE
23 INSPECTIONS FOR MY CLIENT, IF YOU CAN PICK UP YOUR
24 DEPOSITION OF THE TRANSCRIPT

25 THE COURT ASK THE QUESTION AND IF HE DISAGREES WITH

1 IT THEN YOU CAN IMPEACH HIM

2 Q YOU TOLD ME DURING YOUR DEPOSITION--

3 THE COURT ASK THE QUESTION, PLEASE IF HE

4 DISAGREES THEN YOU CAN TAKE HIM TO THE DEPOSITION

5 Q YOU TOLD ME THAT YOU DID MOISTURE FREE INSPECTIONS IN

6 2002, RIGHT?

7 A 2002 TO 2005

8 Q THAT IS NOT WHAT YOU TOLD ME DURING YOUR DEPOSITION,

9 IS IT?

10 THE COURT TAKE HIM TO THE PAGE AND LINE

11 Q PAGE 12, LINE 3 THROUGH 7 HAVE YOU GOT THAT

12 A PAGE 12

13 Q STARING ON PAGE 11, LINE 23 I SAID, ARE YOU A

14 CERTIFIED INSPECTOR FOR MOISTURE FREE WARRANTY AND YOU

15 ANSWERED, I WAS THEN I DON'T DO ANYTHING WITH THEM ANY

16 MORE SO, I DON'T KNOW THAT THAT WOULD STILL HOLD UP

17 TODAY RIGHT?

18 A THAT IS CORRECT

19 Q AND MY QUESTION WAS, AND WHAT ARE YOU TALKING ABOUT

20 THEN, WHEN WAS THEN AND YOU SAID BACK IN 2002 AREA WHERE

21 MOISTURE WARRANTY COMPANY DRYVIT SETTLEMENT WAS HAPPENING

22 AT THAT POINT SO, NOW YOU ARE TELLING ME THAT YOU DID IT

23 IN 2003 TO 2005

24 A THAT IS HOW LONG THE INSPECTIONS WERE TAKEN THAT THEY

25 ISSUED FOR THE DRYVIT CLASS SETTLEMENT I BELIEVE THE

1 DRYVIT CLASS SETTLEMENT WAS IN 2002, WE WENT THROUGH THE
2 CERTIFICATION AND THE INSPECTIONS HAPPENED OVER THE NEXT
3 TWO AND A HALF TO THREE YEARS

4 Q AND YOU WENT THROUGH A TRAINING PROGRAM,
5 CERTIFICATION EXAMS WITH MOISTURE FREE WARRANTY AS PART OF
6 THE INSPECTION ON THE DRYVIT CLASS SETTLEMENT, RIGHT?

7 A COULD YOU SAY THAT AGAIN

8 Q YOU WENT THROUGH A TRAINING PROGRAM, A CERTIFICATION
9 EXAM THROUGH MOISTURE WARRANTY COMPANY AS PART OF THE
10 INSPECTION ON THE DRYVIT CLASS SETTLEMENT, RIGHT

11 THE COURT WHAT IS THE PURPOSE OF THAT QUESTION

12 MR BLACKBURN IT IS THE FOUNDATION FOR HIM BEING AN
13 INSPECTOR FOR MOISTURE FREE AND HIS KNOWLEDGE OF THE
14 MOISTURE FREE GUIDELINES

15 THE COURT BUT YOU DIDN'T OBJECT TO HIS
16 QUALIFICATIONS, YOU ARE NOT ATTACKING HIS QUALIFICATIONS,
17 ARE YOU?

18 MR BLACKBURN NO, SIR

19 THE COURT MOVE ON

20 Q AND YOU TOOK A VIDEO TRAINING SESSION AND AN EXAM TO
21 CERTIFY ON THE PROTOCOL ON HOW TO DO IT, RIGHT?

22 A THAT IS CORRECT

23 Q AND PART OF THAT EXAM AND TRAINING INVOLVED
24 DEFENDANT'S NUMBER 37, RIGHT?

25 A ASSUMING THAT IS THE SAME MANUAL I RECEIVED THEN,

1 YES

2 Q AND YOU PRODUCED A COPY OF THIS TOO, DIDN'T YOU?

3 A LIKE I SAY, WE HAD A BUNCH OF DOCUMENTS AND
4 DEPOSITIONS, VERY WELL MAY OF BEEN

5 MR PHILLIPS YOUR HONOR, I WOULD LIKE TO OBJECT TO
6 THAT, THAT IS A DIFFERENT MANUAL THAN WHAT MR FLAHERTY
7 PRODUCED AT HIS DEPOSITION AT LEAST LET HIM LOOK AT IT
8 THE COURT IS IT THE SAME THING?

9 MR BLACKBURN YES IT IS, YOUR HONOR I MEAN, WE
10 MARKED THIS PREVIOUSLY AND THERE WAS NO OBJECTION TO IT
11 THEN

12 THE COURT I DIDN'T ASK YOU THAT IS IT THE SAME
13 THING THAT HE PRODUCED, YOU ARE NOT TRYING, IT IS THE SAME
14 THING?

15 MR BLACKBURN I BELIEVE SO

16 THE COURT HE PRODUCED THAT TO YOU?

17 MR BLACKBURN HE PRODUCED THE COVER AND COPIES
18 OUTSIDE OF THAT

19 MR PHILLIPS HIS VERSION OF IT WAS A TAPE AND AN
20 OLDER VERSION, THEY ARE TWO SEPARATE VERSIONS

21 THE COURT MOVE ON, USE WHAT YOU HAVE ALREADY

22 Q MR FLAHERTY, I AM GOING TO HAND YOU DEFENDANT'S
23 EXHIBIT NUMBER 37 THAT IS PART OF THE TRAINING SERIES
24 THAT YOU WENT THROUGH, RIGHT?

25 A I AM ASSUMING IT IS, YES

1 Q NOW, LET'S GO, WHILE YOU HAVE EXHIBIT NUMBER 37
 2 LET'S GO THROUGH THAT WITH EXHIBIT NUMBER 40 TO DETERMINE
 3 IF YOU FOUND ANY DAMAGE DURING YOUR INSPECTION RELATED TO
 4 THE MOISTURE FREE GUIDELINES VIOLATIONS YOU CLAIM
 5 HAPPENED OKAY STARTING ON PAGE 5 OF EXHIBIT,
 6 DEFENDANT'S NUMBER 40 OKAY AND THESE ARE FILLER
 7 JOINTS, RIGHT?

8 A YES, SIR

9 Q AND YOU SAID THERE WERE NO FILLER JOINTS ON THE
 10 BABAE HOUSE, RIGHT?

11 A THERE WAS NO BOND BREAKER INCORPORATED BEHIND THEM

12 Q LOOK ON PAGE, CHAPTER 15 OF WHAT I JUST HANDED YOU ON
 13 EXHIBIT NUMBER 37 AND THE WINDOW ON PAGE 5--

14 THE COURT PAGE 5 OF WHAT

15 Q PAGE 5 OF YOUR REPORT, DEFENDANT'S EXHIBIT NUMBER 40
 16 WHERE YOU ARE TALKING ABOUT FILLER JOINTS AND YOU CUT OPEN
 17 THAT FILLER JOINT, RIGHT?

18 A YES, SIR

19 Q DID YOU NOTICE ANY ELEVATED MOISTURE CONCENTRATIONS
 20 IN THAT AREA?

21 A I WASN'T DOING ANY MOISTURE TESTING THAT DAY IT WAS
 22 FOR THE PURPOSE TO SEE IF THE DETAILS THAT WERE PRESENT
 23 CONFORMED TO MOISTURE FREE WARRANTY'S STANDARDS

24 Q ALL RIGHT AND YOU CUT IT OPEN ANYWAY, RIGHT?

25 A THAT IS HOW I WOULD TELL IF THE CEILING JOINT HAD

1 BEEN CONSTRUCTED PROPERLY

2 Q LET'S GO TO CHAPTER 15 OF EXHIBIT NUMBER 37

3 A YES, SIR

4 Q ARE YOU THERE?

5 A I AM, YES

6 Q AND IT SAYS PROPER CAULKING TECHNIQUES AND YOU
7 WOULD AGREE WITH ME THAT THAT CAULK JOINT THAT WE JUST
8 TALKED ABOUT, PAGE 5 OF DEFENDANT'S EXHIBIT NUMBER 40, CUT
9 OPEN, RIGHT?

10 A THAT IS CORRECT

11 Q AND THE SECOND PARAGRAPH WHERE IT SAYS, UNDER PROPER
12 CAULKING TECHNIQUES AND IT SAYS PROPER CAULKING IS NEEDED
13 TO PREVENT MOISTURE INTRUSION ON ALL CLADDING SYSTEMS
14 MOST EFIS HOMES WERE BUILT WITHOUT THE RECOMMENDED BACKER
15 ROD JOINT INSTALLED IN MANY LOCATIONS IS THAT RIGHT?

16 A THAT IS CORRECT

17 Q AM I READING IT RIGHT?

18 A THAT IS CORRECT

19 Q IT SAYS, HOWEVER RETROFITTING OF A BACKER ROD IS NOT
20 RECOMMENDED SINCE IMPROPER RETROFITTING IS COMMON AND
21 TENDS TO INCREASE THE LIKELIHOOD OF MOISTURE PENETRATION
22 IS THAT CORRECT?

23 A THAT IS CORRECT

24 Q SUCH RETROFITTING IS NOT COVERED BY THE DRYVIT
25 SETTLEMENT, IS THAT RIGHT?

1 A THAT IS CORRECT

2 Q BUT YOU CUT IT OPEN ANYWAY?

3 A THE BOND BREAKER BEHIND THE SEALANT THERE IS SUPPOSE
4 TO BE

5 Q AND THAT IS NOT RECOMMENDED BY THE MOISTURE FREE
6 GUIDELINES, IS IT?

7 A THAT IS NOT WHAT IT SAYS IT SAYS NOT TO RETROFIT
8 THE ORIGINAL DETAILS

9 Q NOT TO RETROFIT

10 A RIGHT, I WASN'T RETROFITTING ANYTHING, I WAS
11 IDENTIFYING THE COMPONENTS OF THE SEALANT JOINT

12 Q IF YOU DON'T HAVE ANY MOISTURE DAMAGE BACK THERE AND
13 IT APPEARS TO BE FUNCTIONING FINE, IT SAYS RETROFITTING IS
14 NOT NECESSARY, IS THAT RIGHT?

15 A RETROFITTING HAS NOTHING TO DO WITH THE REPORT OF
16 ITEM NUMBER 40

17 Q ITEM 40 AND WHAT I AM TALKING ABOUT, SINCE YOU WERE
18 OUT THERE ALLEGEDLY CONFIRMING THE MOISTURE FREE
19 GUIDELINES AND ON PAGE 5, THE FILLER JOINTS OF YOUR SECOND
20 REPORT, YOU ARE CUTTING IT OUT WHAT IS THE PURPOSE OF
21 THAT?

22 A TO SEE IF A BOND BREAKER MATERIAL, AS THEIR STANDARDS
23 CALL FOR, IS PRESENT BEHIND THE SEALANT

24 Q AND IF IT WASN'T PRESENT THEN WOULDN'T YOU AGREE WITH
25 ME THAT CHAPTER 15 OF THE PROPER CAULKING TECHNIQUE SAYS,

1 DO NOT RETROFIT IT IF IT IS NOT THERE?

2 A THERE IS A DIFFERENCE BETWEEN RETROFITTING AND
3 REMEDIATION THEY ARE TWO ENTIRELY DIFFERENT THINGS
4 RETROFITTING IS PUTTING THE ORIGINAL DETAILS THAT WERE
5 REQUIRED TO BE WHEN THE HOUSE WAS CONSTRUCTED
6 REMEDIATION ARE THE TYPES OF TECHNIQUES THAT MOISTURE
7 WARRANTY SAYS THAT IT EXPECTS IN THEIR REPAIRS THEY ARE
8 TWO ENTIRELY DIFFERENT THINGS

9 Q AND THIS DOESN'T DISTINGUISH BETWEEN, THAT IS YOUR
10 OPINION?

11 A NO, IT IS NOT MY OPINION

12 Q WHAT IS THE BASIS FOR IT?

13 A THEY DON'T CALL FOR THE EFIS TO BE CUT BACK AWAY FROM
14 THE WINDOW

15 Q THAT IS RIGHT?

16 A THAT IS RIGHT

17 Q THAT IS RIGHT SO,--

18 THE COURT GENTLEMEN, ASK YOUR QUESTION YOU ANSWER
19 IT

20 Q AND WHAT WE ARE TALKING ABOUT HERE AND NOT TO BELABOR
21 THE POINT, MR FLAHERTY, BECAUSE I DON'T WANT TO WASTE THE
22 JURORS TIME EITHER BUT IT DOESN'T SAY ANYTHING ABOUT
23 REMEDIATION VERSUS RETROFITTING, DOES IT?

24 A IN WHICH DOCUMENT

25 Q ON CHAPTER 15, PARAGRAPH 2 OF EXHIBIT, DEFENDANT'S

1 EXHIBIT NUMBER 37 WHERE IT SAYS PROPER CAULKING IS NEEDED
2 TO PREVENT MOISTURE INTRUSION ON ALL CLAD SYSTEMS IF IT
3 WAS IMPROPER IT WOULD NEED REMEDIATION OR RETROFITTING,
4 WOULDN'T IT?

5 A AT THIS POINT AND TIME NO ONE SUBSCRIBED TO
6 RETROFITTING WHICH IS WHAT USED TO HAPPEN BEFORE THE
7 DRYVIT SETTLEMENT AND THE MOISTURE FREE WARRANTY'S
8 STANDARDS CAME ABOUT PEOPLE WOULD TRY TO RETROFIT WHAT
9 ARE CALLED ISOLATION JOINTS AROUND THE WINDOWS AND DOORS
10 AND WOULD CREATE BIGGER PROBLEMS THAN THEY MAY HAVE
11 ALREADY HAD

12 Q WHAT IS THE BASIS OF THAT OPINION?

13 A HAVING BEEN AROUND FOR THAT PERIOD OF TIME TO KNOW
14 WHAT PEOPLE ARE DOING AND IN THE, THIS DRAWING THAT IS IN
15 MY REPORT, THE GRAPH HERE ON PAGE 5 OF ITEM 40 IS MOISTURE
16 FREE WARRANTY'S DIAGRAM OF HOW THEY EXPECT THE REMEDIATION
17 TO BE DONE

18 Q AND THAT DRAWING IS IN DEFENDANT'S EXHIBIT NUMBER 37,
19 ISN'T IT?

20 A WHAT IS NUMBER 37?

21 Q THE GUIDELINES

22 A RIGHT, THAT IS NOT CALLED RETROFITTING

23 Q CAN YOU TELL ME THE BOOK WHERE IT SAYS IT IS NOT
24 CALLED RETROFITTING?

25 A WELL, SPECIFICALLY BECAUSE IT SAYS NOT TO RETROFIT

1 OBVIOUSLY WHAT THEY ARE CALLING FOR TO DO CAN'T BE
2 RETROFITTING IF THEY ARE SAYING NOT TO RETROFIT

3 Q RETROFITTING MEANS TO GO BACK AND DO SOMETHING THAT
4 WASN'T THERE ORIGINALLY?

5 A THAT'S RIGHT

6 Q SO, RETROFITTING WOULD BE TO BRING SOMETHING UP TO
7 STANDARDS, RIGHT?

8 A TO THE ORIGINAL STANDARD WHEN THE HOUSE WAS BUILT

9 Q AND WHAT MOISTURE FREE IS TELLING YOU HERE IS DO NOT
10 RETROFIT IF IT IS NOT THERE, RIGHT?

11 A THAT IS CORRECT

12 Q THANK YOU

13 A IT IS NOT SAYING NOT TO REMEDIATE

14 MR PHILLIPS YOUR HONOR, IF HE CAN FINISH HIS
15 ANSWER

16 THE COURT YES, MOVE ALONG, PLEASE

17 Q AND THESE GUIDELINES, LIKE CHAPTER 15, THEREFORE,
18 LIKE YOU SAY, REMEDIATION LIKE WHEN YOU GO IN AND FIX
19 SOMETHING, RIGHT?

20 A THAT IS CORRECT

21 Q THEY ARE NOT FOR THE ISSUANCE OF A WARRANTY, ARE
22 THEY?

23 A YES, THEY ARE

24 Q IS THAT YOUR OPINION?

25 A YES

1 Q AND IF MR BURTON SAYS THAT HE DISAGREES WITH THAT
2 OPINION--

3 THE COURT NOW, DON'T START PITTING WITNESSES
4 AGAINST EACH OTHER YOUR GUY CAN TESTIFY TO WHATEVER HE
5 WANTS TO, DON'T PIT WITNESSES, THAT IS NOT PROPER

6 Q THAT IS YOUR OPINION, RIGHT?

7 A THAT IS CORRECT

8 Q AND YOU DIDN'T HAVE ANY INPUT IN DEVELOPING THE TERMS
9 OF THE WARRANTY, MOISTURE FREE WARRANTY DID YOU?

10 A THAT IS CORRECT

11 Q YOU HAD NO INVOLVEMENT WITH DEVELOPING THESE
12 GUIDELINES EITHER, DID YOU?

13 A THAT'S CORRECT

14 Q SO, THE BEST PERSON TO ANSWER--

15 THE COURT NO SIR, THAT IS IMPROPER THAT IS
16 PITTING, THE JURY DETERMINES CREDIBILITY, WHO THEY
17 BELIEVE, WHAT THEY WANT TO BELIEVE YOU CAN'T PIT
18 WITNESSES AGAINST EACH OTHER THAT IS THEIR FUNCTION

19 Q NOW, LET'S GO TO PAGE 6 OF THE 2006 REPORT YOU TALK
20 ABOUT ANOTHER DETAIL WHERE THE, THE FLUSH WINDOWS AND
21 DOORS AND I AM READING FROM THIS WHERE THERE ARE TWO
22 SUGGESTED TECHNIQUES FOR CREATING A FILLER JOINT AT A
23 WINDOW OR DOOR THAT IS FLUSHED, RIGHT?

24 A THAT IS CORRECT

25 Q AND YOU CUT INTO THAT JOINT, THAT IS THE SAME WINDOW

1 ON PAGE 5, ISN'T IT?

2 A THOSE PICTURES ARE CONTINUANCES OF PAGE 5, YES IT
3 IS ADDITIONAL PICTURES OF THE SAME PROBLEM

4 Q AND THE TOP RIGHT PHOTOGRAPH, THAT IS NOT THE SAME
5 AREA AS THE TOP LEFT PHOTOGRAPH, IS IT?

6 A THE TOP LEFT IS ON THE SIDE OF THE WINDOW, THE TOP
7 RIGHT IS AT THE BOTTOM OF THE WINDOW

8 Q AND WHICH WINDOW WAS THAT?

9 A I CAN'T REMEMBER

10 Q BUT YOU DON'T KNOW IF THERE WAS ANY ELEVATED MOISTURE
11 CONTENT ON THAT WINDOW, EITHER, DO YOU?

12 A I WASN'T DOING MOISTURE TESTING THEN

13 Q YOU WERE JUST CUTTING OPEN--

14 A TO SEE IF IT CONFORMED TO MOISTURE FREE WARRANTY
15 STANDARDS

16 Q SO, YOU COULD RETROFIT?

17 A NO

18 Q NO?

19 A I DON'T DO ANY--

20 Q BUT YOU RECOMMENDED THAT IT HAVE THAT DONE, RIGHT?

21 A NO I AM RECOMMENDING THAT THE SYSTEM BE REMOVED
22 BECAUSE OF THE VAPOR RETARDERS THAT, IN MY OPINION, IS A
23 FUNDAMENTAL FLAW TO THE SYSTEM I AM NOT SUGGESTING THAT
24 THEY REMEDIATE ANYTHING

25 Q TAKE IT ALL OFF, CORRECT?

1 A THAT IS CORRECT

2 Q SO, BASICALLY THAT WOULD BE TWO AREAS ON THE HOUSE?

3 A NO SIR, IT IS THE VAPOR RETARDER IS THE DEAL KILLER
4 FOR ME AND MR CLARK'S REPORT, 14 MONTHS BEFORE MINE AT A
5 DIFFERENT POINT AND TIME WHEN THERE WAS LIKELY MORE RAIN
6 THAN WHEN I WAS OUT THERE HAD MANY MORE AREAS OF ELEVATED
7 MOISTURE AND MANY MORE LOCATIONS OF MODERATE TO SOFT
8 SUB-STRAIGHT AND STRUCTURAL MATERIALS EVEN THOUGH THERE
9 WAS NOT ELEVATED MOISTURE EVEN THAT DAY SO, THE
10 STRUCTURE OF THE HOUSE IS BEING COMPROMISED

11 Q AND YOU BECAME AWARE OF THAT REPORT AFTER THE LAW
12 SUIT WAS FILED, RIGHT?

13 A THAT IS CORRECT

14 Q AND YOU DIDN'T KNOW ABOUT IT WHEN YOU DID YOUR
15 INSPECTIONS, RIGHT?

16 THE COURT MR BLACKBURN, YOU HAVE ASKED THAT AT
17 LEAST FIVE TIMES MOVE ALONG

18 Q LET'S GO TO YOUR THIRD VISIT WHICH IS THE DAY BEFORE
19 I TOOK YOUR DEPOSITION ON JULY THE 9TH OF 2008 YOU WENT
20 TO THE BABAEE'S HOUSE FOR THE THIRD TIME ON JULY THE 8TH,
21 RIGHT?

22 A I BELIEVE THAT IS THE DATE, YES

23 Q AND MY CLIENT WASN'T THERE, WAS HE?

24 A NO, SIR

25 Q AND DO YOU KNOW IF ANYONE TOLD MY CLIENT OF THE THIRD

1 INSPECTION?

2 A I HAVE NO WAY OF KNOWING THAT

3 Q YOU WENT THE THIRD TIME BECAUSE YOU WANTED TO REVISIT
4 BECAUSE YOU HADN'T BEEN THERE IN A COUPLE OF YEARS, RIGHT?

5 A BECAUSE I HAD A DEPOSITION THE NEXT DAY, TO REFRESH
6 MYSELF WITH THE HOUSE, YES

7 Q BECAUSE IT HAD BEEN ABOUT TWO YEARS SINCE THE FIRST
8 TIME YOU HAD BEEN THERE, RIGHT?

9 A YES, APPROXIMATELY

10 Q AND YOU FOUND FOUR AREAS OF ELEVATED MOISTURE, RIGHT?

11 A AS BEST I CAN REMEMBER, YES

12 Q AND THOSE FOUR AREAS OF ELEVATED MOISTURE WAS ONE
13 UNDER THE WINDOW OF THE BACK SIDE OF THE HOUSE, RIGHT?

14 A THAT WAS A PLACE WHERE THERE WAS 23 PERCENT MOISTURE
15 WHEN I WENT THERE INITIALLY

16 Q AND NOW IT IS ELEVATED, RIGHT?

17 A NO, THAT, 23 IS ELEVATED NOW THERE WAS 30 PERCENT
18 MOISTURE AND UNDERNEATH THAT WINDOW WAS COMPLETELY ROTTED
19 OUT

20 Q BASED ON YOUR TESTS, RIGHT?

21 THE COURT BASED ON WHAT?

22 Q BASED ON THE TEST CUTS THAT YOU DID, THAT IS HOW YOU
23 DETERMINED THAT IT WAS COMPLETELY ROTTED OUT?

24 A IT WAS ROTTED OUT WHEN I PROBED IT TO GET 30 PERCENT,
25 MY PROBE WENT THROUGH THE WALL THAT INDICATED TO ME THAT

1 THERE WAS A PROBLEM THERE

2 Q AND ONE UNDER THE KICKOUT ON THE FRONT OF THE HOUSE,

3 THAT WAS THE THIRD AREA, RIGHT?

4 A I DON'T KNOW IF I DID ONE THAT DAY, THAT IS WHERE I

5 DID AN INITIAL SECTION CUT I MAY OF DONE MOISTURE

6 TESTING BUT I DON'T KNOW IF I DID A CUT THERE

7 Q DID YOU GO BACK THERE AND REPROBE?

8 A REPROBE IT, YES

9 Q AND IN YOUR FORTH AREA WAS UNDER THE SEAL BAND

10 A OFF THE RIGHT SIDE OF THE PATIO ON THE REAR

11 Q AND THAT SEAL BAND, WHEN YOU WENT OUT THERE IF 2006

12 DID YOU NOTICE ANYTHING ABOUT THE CAULK CONDITION IN THAT

13 SEAL BAND?

14 A I DON'T BELIEVE THERE WAS A PROBLEM WITH THE SEALANT

15 AT THAT TIME AS FAR AS IT BREAKING DOWN LIKE IT WAS AT

16 WINDOWS AND DOORS

17 Q DO YOU AGREE THAT THE DAMAGE DOESN'T HAPPEN UNTIL AT

18 LEAST 28 PERCENT, RIGHT?

19 A WELL, EXCEPT AT THE POINT AND TIME I MEASURE IT IT

20 MAY BE ON THE WAY DOWN IT MAY OF BEEN 28 PERCENT FOR A

21 YEAR FOR ALL I KNOW

22 Q IN YOUR DEPOSITION YOU SAID THAT DAMAGE DOES NOT

23 OCCUR UNTIL 28 TO 31 PERCENT, RIGHT?

24 A THAT IS CORRECT

25 Q AND YOU DON'T BELIEVE YOU SHOULD RECOMMEND ANY TYPE

1 OF MAINTENANCE TO PREVENT THE MOISTURE ELEVATING AT THAT
2 TIME?

3 A WHEN I WAS OUT THERE AT 2006, WHAT I CAME AWAY FROM
4 THAT WAS THAT THE COMBINATION OF COMPONENTS OF THAT HOME
5 WOULD ALLOW IT TO GO FORWARD WITH A EFIS CLADDING ON IT
6 SO AT THAT POINT REMEDIATION IS NOT A OPTION FOR ME WHEN I
7 FIND THAT

8 Q BUT YOU DIDN'T WANT TO HELP NOT GET IT WORSE, DID
9 YOU?

10 MR PHILLIPS OBJECTION, IT HAS ALREADY BEEN ASKED
11 THE COURT WELL, HELP MAKE IT NOT GET WORSE

12 A IN THAT CASE MAYBE MOISTURE FREE WARRANTY SHOULD HAVE
13 REPAIRED THE HOUSE BEFORE LIKE THEY WERE SUPPOSE TO HAVE
14 DONE SINCE THEIR INSPECTOR WAS THERE A COUPLE OF MONTHS
15 BEFORE ME AND FOUND SIMILAR CONDITIONS AND TO MY KNOWLEDGE
16 THERE WAS NO RECOMMENDATION TO REPAIR IT

17 Q THE 2008 SUIT HAD ALREADY BEEN FILED, RIGHT?

18 A THAT IS CORRECT

19 Q AND YOU DON'T REALLY KNOW WHEN MOISTURE FREE'S
20 INSPECTOR WENT OUT THERE AND LOOKED AT THE HOUSE?

21 A I BELIEVE THERE WAS AN INTERIM INSPECTION DONE, I
22 BELIEVE IN MARCH OF 2006, BEFORE I CAME OUT MY FIRST TIME

23 Q AND YOU BELIEVE THAT?

24 A I HAVE SEEN THE REPORT FROM THAT VISIT

25 Q AND YOU WERE THERE IN 2006?

1 A AND APPROXIMATELY THREE MONTHS LATER AND HE NOTED
2 SOME OF THE SAME THINGS THAT I NOTED AND TO MY KNOWLEDGE
3 THERE WAS NO REQUIREMENT FOR MOISTURE FREE WARRANTY TO
4 REMEDY THOSE PROBLEMS THAT THEY KNEW EVEN BEFORE I CAME
5 OUT THERE IN JUNE

6 Q AND YOU TALKED ABOUT MOISTURE FREE'S, AN INTERIM
7 INSPECTION, RIGHT?

8 A THAT IS CORRECT

9 Q WHAT DOES MOISTURE FREE GIVE, THE WARRANTY AS FAR AS
10 INTERIM INSPECTION, WHEN IS THE TIME FOR INTERIM
11 INSPECTION NORMALLY TAKE PLACE?

12 A I THINK THEY CALL IT ROUGHLY 16 TO 18 MONTHS AFTER
13 THE WARRANTY'S IS INITIALLY ISSUED

14 Q OKAY AND DO YOU KNOW, THE WARRANTY IN THIS CASE WAS
15 ISSUED ON NOVEMBER THE 29TH OF 2004, RIGHT?

16 A THAT IS CORRECT

17 Q SO, ON NOVEMBER THE 29TH OF 2005, THAT IS A YEAR,
18 RIGHT?

19 A THAT IS CORRECT

20 Q AND THEN IN DECEMBER, JANUARY OF 2006, FEBRUARY OF
21 2006, MARCH OF 2006, APRIL OF 2006, BY THEN YOU DON'T, BY
22 THEN, BY YOUR COUNT THEY HAD THE INTERIM INSPECTION DONE,
23 RIGHT?

24 A IT IS MY UNDERSTANDING, AS I REMEMBER IT IT WAS MARCH
25 OF 2006 WHICH WOULD BE 16 MONTHS FROM THE INITIAL

1 INSPECTION

2 Q SO, BY YOUR OWN TESTIMONY MOISTURE FREE HAD INTERIM
3 INSPECTION OUT THERE TO LOOK AT THE HOUSE, RIGHT?

4 A THAT IS CORRECT

5 Q AND YOU DON'T KNOW IF MOISTURE FREE WAS EVER AWARE OF
6 THE CLARK REPORT AT THAT TIME, DO YOU?

7 A I DON'T KNOW THAT BUT I DON'T KNOW WHAT THAT HAS TO
8 DO WITH IT

9 Q OKAY WELL, IT HAS TO DO WITH IT, IF THE CLARK WERE,
10 LIKE YOU SAY, WHAT THE CLARK REPORT WOULD HAVE TO DO WITH
11 IT IS, IF THERE IS DAMAGE TO THAT HOUSE, WOULDN'T YOU
12 THINK THAT MY CLIENT SHOULD KNOW ABOUT IT?

13 A I DON'T KNOW

14 Q AND WHEN YOU WENT OUT TO THE HOUSE ON THAT THIRD
15 VISIT, THE SEALANT ON THAT SEAL BAND, WE DON'T HAVE A
16 PICTURE OF THAT SEAL BAND, BUT THAT SEAL BAND, YOU NOTED
17 THAT THE SEALANT WAS FAILING IN THIS LOCATION OF 2006,
18 DIDN'T YOU?

19 A IF I REMEMBER CORRECTLY THAT WAS THE FRONT STOOP AND
20 PATIO DETERMINATION WHERE THERE WAS A PICTURE OF THE
21 DETERMINATION THERE AND I DON'T RECALL A COMMENT ABOUT THE
22 SEALANT FAILING AT THAT TIME IN THAT LOCATION

23 Q AND I WANT TO READ YOU FROM YOUR DEPOSITION

24 THE COURT NO SIR, ASK THE QUESTION AND IF HE
25 DOESN'T ANSWER IT LIKE HE DID IN THE DEPOSITION THEN YOU

1 CAN IMPEACH HIM AS THE RULES REQUIRE YOU TO DO

2 Q WHEN I ASKED YOU ABOUT THAT SEAL BAND ON THE BACK OF
3 THE HOUSE THAT YOU FOUND IN 2008, THAT I ASKED YOU ABOUT
4 IN YOUR DEPOSITION, RIGHT?

5 A I THINK SO

6 Q AND YOU STARTED, YOU ANSWERED IT AND SAID--

7 THE COURT YOU ARE NOT LISTENING TO ME YOU CAN'T
8 READ FROM HIS DEPOSITION ASK HIM A QUESTION AND IF HE
9 ANSWERS DIFFERENT THAN IN THE DEPOSITION THEN YOU MAY USE
10 IT TO IMPEACH HIM

11 MR BLACKBURN HE IS, YOUR HONOR, BECAUSE IN HIS
12 DEPOSITION HE TOLD ME HE KNOWS--

13 THE COURT ASK THE QUESTION YOU WANT TO ASK HIM

14 Q DID YOU NOT NOTICE THAT THE SEALANT WAS FAILING AT
15 THE BAND ON THE BACK PORCH IN 2006?

16 A YOU ARE TALKING ABOUT WHERE THE EFIS MEETS THE PATIO?

17 Q WHERE THE EFIS MEETS THE BRICK PAVERS

18 A I DON'T RECALL THAT THE SEALANT WAS FAILING AT THAT
19 POINT OR THAT I NOTED IN 2006

20 THE COURT NOW, IF HE ANSWERED SOMETHING DIFFERENT
21 IN THE DEPOSITION YOU MAY IMPEACH HIM, IF HE DIDN'T YOU
22 MAY NOT

23 Q WHEN I ASKED YOU ABOUT THE BELLY BAND AND YOU ARE
24 TALKING ABOUT RIGHT HERE, THAT IS THE BAND THAT YOU FOUND
25 WITH THE ELEVATED MOISTURE, RIGHT?

1 A YES SIR, IN 2008

2 Q AND YOU SAID THAT IT IS NOT AN EFIS BELLY BAND, THIS
3 IS WHEN THE PROBE--

4 THE COURT YOU ARE GOING BACK TO THE DEPOSITION,
5 AREN'T YOU?

6 MR BLACKBURN I AM, YOUR HONOR, I AM HAVING A HARD
7 TIME GETTING HIM TO--

8 THE COURT HE MAY NOT BE ANSWERING THEM LIKE YOU
9 WANT HIM TO ANSWER THEM BUT IF HIS ANSWER IS THE SAME AS
10 IT WAS IN THE DEPOSITION YOU CAN'T USE THE DEPOSITION, IF
11 IT IS DIFFERENT YOU MAY IMPEACH HIM I AM NOT GOING TO
12 TELL YOU AGAIN THAT IS WHAT THE RULES SAY ON THE USE OF
13 DEPOSITIONS YOU ASKED HIM, TODAY IS MONDAY AND HE SAYS
14 SOMETHING DIFFERENT IN THE DEPOSITION YOU CAN IMPEACH HIM,
15 IF HE SAYS THE SAME THING IN THE DEPOSITION THEN YOU
16 CAN'T AND THE REASON FOR THAT IS WE DON'T WANT TO GO
17 BACK TO THE DEPOSITIONS UNLESS IT IS A DIFFERENT ANSWER

18 Q LET'S MOVE ON THE FRONT OF THE HOUSE, THAT THIRD
19 AREA YOU BELIEVE THAT THE KICKOUT IS THE REASON THAT THE
20 DAMAGE IS DOWN HERE, RIGHT?

21 A MOISTURE FROM THAT AREA, YES

22 Q AND IT IS COMING DOWN THE WALLS, IS WHAT YOU SAID,
23 RIGHT?

24 A THAT IS CORRECT

25 Q AND YOU TALKED ABOUT VAPOR RETARDER ISSUES, DO YOU

1 BELIEVE, TO REMEDIATE AN EFIS HOUSE, RIGHT?

2 A I DON'T HAVE A PROBLEM WITH MOISTURE FREE WARRANTY'S
3 REMEDIATION TECHNIQUES OTHER THAN IN SOUTH CAROLINA OR
4 AREAS THAT EMPLOY VAPOR RETARDERS ASSUMING THEY ARE DONE
5 PROPERLY

6 Q SO, YOU AGREE WITH ME THAT YOU CAN PROPERLY REMEDIATE
7 A SYNTHETIC STUCCO HOME, RIGHT?

8 A I THINK THERE IS A GOOD CHANCE OF IT WORKING IN
9 AREAS

10 Q OKAY YOU EXPECT THAT MOISTURE FREE DID A STUDY OF
11 EIFS HOME IN ORDER TO PUT THEIR MOISTURE PLAN IN PLACE,
12 DON'T YOU?

13 A ASK THAT QUESTION AGAIN, PLEASE

14 Q YOU EXPECT THAT MOSTBURE FREE DID A STUDY OF EIFS
15 HOMES IN ORDER TO PUT THEIR WARRANTY PROGRAM IN PLACE,
16 DON'T YOU?

17 A I UNDERSTAND, MY UNDERSTANDING IS THEY GOT
18 INFORMATION FROM INSPECTORS THAT ACTUALLY DID INSPECTIONS
19 AND PUT TOGETHER THE WARRANTY PROGRAM FROM THAT THAT IS
20 MY UNDERSTANDING

21 Q AND YOU THINK THAT IF MOISTURE FREE PUT TOGETHER A
22 LARGE PROGRAM LIKE THEY DID THEY WOULD BASE ON A KNOWLEDGE
23 OF WHAT IS GOING ON IN THE, "REAL WORLD", OF EIFS
24 APPLICATIONS

25 MR PHILLIPS YOUR HONOR, I WOULD OBJECT TO THAT,

1 THAT IS SPECULATING

2 MR BLACKBURN IT HAS ALREADY BEEN TESTIFIED TO,
3 YOUR HONOR, I AM JUST READING FROM, STRAIGHT FROM HIS
4 DEPOSITION, ASKING QUESTIONS

5 THE COURT ASK HIM THE QUESTION

6 Q DO YOU THINK THAT IF MOISTURE FREE PUT TOGETHER A
7 LARGE PROGRAM LIKE THEY DID THEY WOULD BASE IT ON A
8 KNOWLEDGE OF WHAT IS GOING ON, "REAL WORLD", OF EIFS
9 APPLICATION, DON'T YOU

10 MR PHILLIPS YOUR HONOR, AGAIN, THAT CALLS FOR
11 SPECULATION HE DOESN'T HAVE ANY PERSONAL KNOWLEDGE OF
12 THAT

13 THE COURT DO YOU HAVE PERSONAL KNOWLEDGE?

14 A NO SIR, I WASN'T INVOLVED IN THE DEVELOPING

15 THE COURT HOW CAN HE ANSWER IT, MR BLACKBURN, HOW
16 CAN HE BASE IT, HE IS NOT INVOLVED AND HE DOESN'T KNOW
17 SUSTAINED

18 Q YOU CLAIM THAT MOISTURE FREE DIDN'T TELL YOU OR
19 ANYONE ELSE THAT THE STRUCTURES IN SOUTH CAROLINA WERE
20 DIFFERENT THAN IN GEORGIA, RIGHT?

21 A THAT IS CORRECT

22 Q YOU DON'T DO ANYTHING FOR MOISTURE FREE THESE DAYS,
23 DO YOU?

24 A THAT IS CORRECT

25 Q AND YOU HAVE A PROBLEM WITH THE MOISTURE FREE

1 WARRANTY PROGRAM IN HOMES IN SOUTH CAROLINA BECAUSE OF THE
2 WIDESPREAD USE OF VAPOR RETARDERS, RIGHT?

3 A I HAVE A COUPLE OF PROBLEMS WITH THE MOISTURE FREE
4 WARRANTY PROGRAM THAT IS ONE, THAT IN THIS PARTICULAR
5 AREA I BELIEVE THE PRESENCE OF WIDESPREAD USE OF THE VAPOR
6 RETARDERS, WHICH SHOULD NOT BE ON THE HOMES IN THE FIRST
7 PLACE SECONDLY, MY PROBLEM WITH IT IS WHY I STOPPED
8 SENDING CUSTOMERS TO THEM AFTER 2005 WAS THAT THEY END UP
9 NOT REPAIRING DAMAGE DONE TO THE HOME AS A RESULT OF THE
10 FAILURE OF REPAIRS THEY HAVE THAT CLIENT MAKE THAT IS MY
11 OPINION, AND I BELIEVE THAT THE MARKETING OF THE SYSTEM,
12 OF THE PROBLEM LEAVES THE PURCHASER TO THINK THAT THEY ARE
13 BEING PROTECTED AND IN REALITY THEY GET NOTHING

14 Q THAT IS YOUR OPINION?

15 A THAT IS MY OPINION

16 Q THE LAST TIME YOU DID ANYTHING WITH MOISTURE FREE WAS
17 BACK IN 2002?

18 A IT STARTED IN 2002 WHEN I TOOK THE CERTIFICATION
19 THE LAST INSPECTION WOULD OF GONE INTO 2005

20 THE COURT MR BLACKBURN, DO NOT REFER TO THAT
21 DEPOSITION AGAIN UNLESS YOU IMPEACH THE WITNESS YOU WANT
22 ME TO READ YOU THE RULE

23 MR BLACKBURN I UNDERSTAND, YOUR HONOR

24 THE COURT I DON'T KNOW WHY YOU DON'T LISTEN TO ME
25 AND I DON'T ENJOY FUSSING AT YOU BUT YOU GO RIGHT BACK TO

1 THE DEPOSITION ARE YOU AT A STOPPING POINT

2 MR BLACKBURN CAN I APPROACH THE BENCH?

3 THE COURT YES

4 (WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE
5 PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE
6 JURY)

7 THE COURT MR FOREMAN AND LADIES AND GENTLEMEN, HE
8 HAS JUST GOT A FEW MORE MINUTES YOU TOLD ME IT WAS ABOUT
9 FIVE MORE MINUTES

10 Q MR FLAHERTY, WHEN WAS THE LAST TIME YOU DID AN
11 INSPECTION FOR MY CLIENT?

12 A I BELIEVE THE LAST ONE WAS IN DECEMBER OF '05

13 Q DO YOU REMEMBER A HOUSE AT 124 LAKE FOREST TRAIL?

14 A NO, NOT RIGHT OFF HAND, NO SIR

15 Q IN CHAPIN, SOUTH CAROLINA?

16 A I DON'T REMEMBER THE NAME OFF HAND, NO SIR

17 Q LET ME HAND YOU THIS DOCUMENT AND ASK YOU IF YOU
18 RECOGNIZE IT

19 A THIS WOULD BE THE NELSON'S, THIS WAS A, THEY HAD
20 ASKED ME TO GO OUT TO DO AN INTERIM INSPECTION AND I
21 BELIEVE A RENEWAL INSPECTION ON THAT CLIENT'S HOUSE,
22 MOISTURE FREE WARRANTY WHERE INDICATED EARLIER THAT THE
23 GIRLS HAD ASKED IF I WOULD GO OUT AND DO THAT

24 Q AND YOU SAID THAT YOU HADN'T DONE ANY INSPECTIONS
25 FOR, YOU NEVER SENT ANY OF YOUR CLIENTS TO MOISTURE FREE,

1 RIGHT, AFTER 2005?

2 A THAT IS RIGHT THE NELSON'S WERE NOT MY CLIENT, THEY
3 WERE MOISTURE FREE WARRANTY'S CLIENTS

4 Q DO YOU RECOGNIZE THIS EXHIBIT NUMBER 43 I WOULD
5 LIKE TO HAVE THIS MARKED

6 THE COURT THAT IS 43

7 (WHEREUPON, DEFENDANT'S EXHIBIT NO 43 WAS ADMITTED
8 INTO EVIDENCE)

9 Q MR FLAHERTY, THIS IS WHAT WE JUST MARKED AS
10 DEFENDANT'S EXHIBIT NUMBER 43, THIS IS AN EXTERIOR
11 INSULATION FINISH SYSTEM REPORT YOU DID FOR THE NELSON'S
12 WHO LIVE AT 124 LAKE FOREST TRAIL IN CHAPIN, SOUTH
13 CAROLINA?

14 A THAT IS CORRECT

15 Q AND YOU DID THIS REPORT OCTOBER 25TH OF 2002, DIDN'T
16 YOU?

17 A YES

18 Q AND WHY DID YOU DO THIS REPORT?

19 A I ASSUME THAT THEY CALLED ME TO DO AN INSPECTION OF
20 THE PROPERTY

21 Q THEY CALLED YOU?

22 A YES, SIR

23 Q AND DO YOU KNOW ANYTHING--

24 THE COURT ANYTHING WHO?

25 Q THE NELSON'S, YOU BELIEVE THE NELSON'S CALLED YOU?

1 A YES, SIR

2 Q AND HOW WOULD THE NELSON'S HAD GOTTEN YOUR NAME?

3 A PROBABLY THROUGH FINKEL LAW FIRM I SUSPECT, AT THAT

4 TIME

5 Q DO YOU KNOW IF THIS HOUSE HAS EVER BEEN INVOLVED IN

6 LITIGATION?

7 A I DON'T KNOW AS I INDICATED, MANY OF THE PEOPLE I

8 DO INSPECTIONS, I HAVE NO IDEA WHAT HAPPENS AFTER THAT

9 Q AND THIS REPORT IS DATED OCTOBER 25TH OF 2002, RIGHT?

10 A YES, SIR

11 Q AND THIS REPORT, THIS HOUSE IS IN SOUTH CAROLINA,

12 RIGHT?

13 A YES, SIR

14 Q AND YOU WOULD EXPECT THIS HOUSE TO HAVE A VAPOR

15 RETARDER IN IT, WOULDN'T YOU?

16 A PROBABLY

17 Q LIKE YOU TESTIFIED, YOU DON'T BELIEVE THAT THE

18 MOISTURE FREE WARRANTY IS APPLICABLE TO HOMES IN SOUTH

19 CAROLINA BECAUSE OF VAPOR RETARDER ISSUES, RIGHT?

20 A THAT IS CORRECT

21 Q AND IF YOU CAN LOOK THROUGH THIS REPORT AND TELL ME

22 ON THIS HOUSE IN CHAPIN, SOUTH CAROLINA, IF YOU MENTIONED

23 TO THEM IN THIS REPORT ANY EVIDENCE OF VAPOR RETARDERS IN

24 THE HOUSE?

25 A NO AND I WILL TELL YOU WHY I BELIEVE THE

1 SUB-STRAIGHT IS BRICK IF I REMEMBER THIS CORRECTLY THAT
2 IT WAS A HOUSE THAT WAS ORIGINALLY A BRICK HOME THAT THEY
3 HAD EIFS INSTALLED AND I AM TRYING TO GO FROM MEMORY BUT
4 I BELIEVE THAT WAS THE SITUATION, THAT THEY APPLIED EIFS
5 OVER THE BRICK

6 Q THEY APPLIED EIFS OVER THE BRICK?

7 A THE HOME AT THE TIME I WAS THERE IN 2002 WAS 13 YEARS
8 OLD BY THE INFORMATION THAT THEY GAVE ME WHICH WOULD OF
9 MADE IT BUILT IN THE 80'S

10 Q AND IN THIS REPORT, ON PAGE 3, YOU DON'T MENTION
11 ANYTHING ABOUT WHERE IT SAYS, CLADDING, YOU DON'T MENTION
12 ANYTHING ABOUT IT BEING BRICK CLAD, DO YOU?

13 A I AM NOT SEEING CLADDING

14 Q IT SAYS THAT THE SHEATHING IS A TYPE OF EIFS PB,
15 RIGHT?

16 A WE ARE ON A DIFFERENT PAGE

17 Q ON PAGE 5 PAGE 5, YOU TALK ABOUT THIS HOUSE, IT HAS
18 GOT SHEATHING GYPSUM RATHER THAN ORION STRAND BOARD,
19 RIGHT?

20 A YES, SIR

21 Q AND YOU TALK ABOUT THE TYPE OF EIFS IS PB?

22 A THAT IS CORRECT

23 Q AND WHAT DOES THAT STAND FOR?

24 A POLYMER BASED

25 Q YOU DON'T MENTION ANYTHING AS TO IT HAVING BRICK ON

1 IT?

2 A I BELIEVE THAT WAS THE CASE

3 Q AND THEN YOU GO ON AND ON PAGE 6, YOU TALK ABOUT, YOU
4 GIVE THESES PICTURES ABOUT HOW A EIFS HOME IS BUILT,
5 RIGHT?

6 A THAT IS CORRECT

7 Q ON PAGE 6, PAGE 7, PAGE 8, INSULATION DETAILS PAGE
8 9 YOU TALK ABOUT SEALANT JOINTS, YOU TALKED ABOUT SEALANT
9 JOINTS A LITTLE BIT TODAY YOU SAID NO ISOLATION JOINTS
10 WERE OBSERVED, SEALANT WAS PRESENT, NO BOND BREAKER WAS
11 OBSERVED

12 A RIGHT

13 Q YOU DIDN'T CUT INTO ANY OF THE BOND BREAKER SEALANTS
14 ON THIS HOUSE, DID YOU?

15 A I MUST HAVE TO NOTE THAT THERE WAS NO BOND BREAKERS
16 INVOLVED

17 Q YOU SAID NO ISOLATION JOINTS WERE OBSERVED AND
18 SEALANT WAS PRESENT BUT NO BOND BREAKER WAS OBSERVED

19 A CORRECT

20 Q HOW WOULD YOU KNOW IT WASN'T THERE UNLESS YOU CUT
21 INTO IT?

22 A THAT IS RIGHT, THAT IS MY POINT, I WOULD SUSPECT I
23 DID

24 Q OKAY BUT YOU DON'T HAVE ANY PHOTOGRAPHS OF CUTTING
25 INTO THERE IN YOUR REPORT, DO YOU?

1 A AGAIN, I CAN'T SEE COMPLETELY BLACK AND WHITE BUT
2 THIS LOOKS LIKE IT MAY BE AN OPEN SPACE ALONG SIDE A
3 WINDOW, I AM GOING FROM THE BLACK AND WHITE I CAN'T
4 TELL

5 Q AND THEN ON PAGE 10 YOU HAVE GOT ANOTHER DIAGRAM OF
6 THE EXPANSION JOINTS AND YOU USE EIMA SPECIFICATIONS,
7 RIGHT?

8 A YES

9 Q AND YOU HAVE NO INDICATION ON THIS REPORT THAT THERE
10 IS A BRICK CLADDING UNDERNEATH THAT SYNTHETIC STUCCO, DO
11 YOU?

12 A THAT IS RIGHT

13 Q NOW, LOOK ON PAGE 11 THE FOUNDATION TERMINATION,
14 THAT FOUNDATION TERMINATION, THAT IS INCLUDED IN YOUR
15 REPORT FOR THE BABAEE'S TOO, ISN'T IT?

16 A THAT IS CORRECT

17 Q AS A MATTER OF FACT, THIS IS SIMILAR TO THE REPORT
18 THAT YOU DID FOR THE BABAEE'S, ISN'T IT?

19 A SURE ONLY IN THE SPECIFICATIONS, ARE THE SAME

20 Q AND THEN ON PAGE 12 YOU TALK ABOUT THE EIFS IS
21 TERMINATED PROPERLY AT CONCRETE PADS AND STOOPS AND A
22 FINISHED GRADE, RIGHT?

23 A YES

24 Q AND YOU USE THE EIMA DETAIL, RIGHT?

25 A YES

0260

APP_0266

1 Q THEN ON PAGE 13 YOU TALK ABOUT THE WINDOWS AND DOORS

2 AND YOU USE THE EIMA SPECIFICATIONS, RIGHT?

3 A YES, SIR

4 Q NO REFERENCE OF BRICK, DO YOU?

5 A IT DOESN'T HAVE THE SPECIFICATIONS FOR BRICK

6 Q BUT WHAT YOU ARE TALKING ABOUT, JUST SO WE ARE CLEAR

7 YOU SAID YOU THOUGHT YOU MIGHT OF RECALLED THERE WAS

8 BRICK--

9 A I THOUGHT IT WAS AN OLDER HOME WHERE THEY HAD BRICK

10 AND THEY PUT EIFS OVER IT, AS I WAS TRYING TO RECALL

11 Q AND ON PAGE 14 YOU TALK ABOUT THE FLASH OF THE

12 WINDOWS, RIGHT AND YOU USE ANOTHER EIMA SPECIFICATION ON

13 PAGE 14, RIGHT?

14 A THAT IS CORRECT

15 Q AND ALL THE WINDOWS AND DOORS ARE VINYL CLAD AND/OR

16 RECESSED, RIGHT?

17 A THAT IS CORRECT

18 Q AND ON PAGE 15, YOU HAVE GOT EXTERIOR WOOD TRIM AND

19 GENERAL CONDITIONS NO ROT WAS OBSERVED, WINDOWS AND

20 DOORS ARE VINYL CLAD, INTERNAL WINDOW JUNCTIONS WERE

21 ADEQUATELY SEALED, RIGHT?

22 A YES, SIR

23 Q AND YOU TALK ABOUT THE ROOF LINE TERMINATIONS ON PAGE

24 16 YOU USE THE SAME EIMA SPECIFICATIONS THAT IS INCLUDED

25 IN THE BABAEE'S REPORT, DON'T YOU?

1 A THAT IS CORRECT

2 Q AND ON PAGE 17, WE HAVE GOT ATTACHMENTS, YOU ARE
3 TALKING ABOUT BRICK AND YOU HAVE AN EIMA SPECIFICATION
4 ABOUT HOW A DECK IS SUPPOSE TO BE ATTACHED, DON'T YOU?

5 A THAT IS CORRECT AND I INDICATED IT IS A FREE
6 STANDING DECK

7 Q FREE STANDING DECK BUT YOU STILL HAVE AN EIMA
8 SPECIFICATION ABOUT HOW A DECK IS SUPPOSE TO BE ATTACHED
9 TO A SYNTHETIC STUCCO, RIGHT?

10 A IT IS ATTACHED TO THE HOUSE, A FREE STANDING DECK IS
11 NOT ATTACHED TO THE HOUSE

12 Q THE DECK APPEARS TO BE FREE STANDING BUT YOU, IN THE
13 EIMA SPECIFICATIONS, 17 01, IS THAT A DETAIL THAT
14 CORRESPONDS TO A FREE STANDING DECK?

15 A NO, IT CORRESPONDS TO HOW 99 PERCENT OF DECKS ARE
16 WHICH IS ATTACHED TO THE FRAME OF THE HOUSE

17 Q SO, YOUR SPECIFICATION IS NOT REALLY RELEVANT TO THE
18 ACTUALITY OF THE HOUSE?

19 A THAT IS RIGHT, AM NOT SAYING THERE IS ANYTHING WRONG
20 THERE

21 Q AND THEN ON PAGE 18, THE MOISTURE METER YOU ARE
22 PROBING, YOU SAY EXCESSIVE MOISTURE MEASUREMENTS SYSTEM
23 UNDER THE WINDOW ON THE LEFT ELEVATION, ANY LOCATION
24 GREATER THAN 20 PERCENT ARE NOTED ON THE ELEVATION
25 PROGRAMS, RIGHT?

1 A YES

2 Q AND THEN ON PAGE 19 YOU HAVE ELEVATIONS, RIGHT?

3 A YES

4 Q AND ON PAGE 20 YOU HAVE THE ELEVATIONS, FRONT, WHICH

5 IS A LOT SIMILAR TO THE ONE ON THE BABAEE'S

6 A YES

7 Q AND THIS IS IN 2002, RIGHT?

8 A THAT IS CORRECT

9 Q AND THEN ON THE LEFT ELEVATION YOU HAVE AN AREA, 23

10 MOISTURE, 40 PERCENT MOISTURE, RIGHT?

11 A THAT IS CORRECT

12 Q 83 AND WHAT IS CAUSING THAT MOISTURE ON THAT ONE?

13 A THERE IS A WINDOW RIGHT BEHIND THAT LARGE BUSH ON THE

14 LEFT SIDE IT LOOKS LIKE

15 Q DO YOU RECALL THAT WINDOW BEING THERE?

16 A I CAN SEE THE RADIUS PORTION

17 Q AND ON THE REAR ELEVATION, PAGE 22, YOU HAVE 6

18 PERCENT MOISTURE SOLID BUT NO OTHER OBSERVATIONS OR ANY

19 DAMAGE ON THE REAR ELEVATION, RIGHT?

20 A THAT IS CORRECT

21 Q ON THE RIGHT ELEVATION YOU HAVE 4 PERCENT MOISTURE, 5

22 PERCENT MOISTURE, 6 PRECENT MOISTURE, 8 PERCENT MOISTURE

23 SOLID, IS THAT RIGHT?

24 A THAT IS CORRECT

25 Q AND THAT IS ON YOUR REPORT, ISN'T IT?

1 A YES

2 Q NO TEST CUTS, RIGHT?

3 A THAT IS CORRECT

4 Q IN 2002 IN YOUR OPINION, THIS HOUSE SHOULD HAVE VAPOR

5 RETARDERS, SHOULDN'T IT?

6 A I DON'T KNOW, IT WAS CONSTRUCTED IN THE 80'S

7 Q THE AGE OF THE HOUSE, IT WAS CONSTRUCTED IN 1989,

8 RIGHT?

9 A BASED ON THE INFORMATION THAT WOULD SOUND LIKE WHEN

10 THE CO WAS ISSUED, OBVIOUSLY IT IS UNDER CONSTRUCTION AT

11 SOME POINT BEFORE THAT

12 Q VAPOR RETARDERS WEREN'T REQUIRED?

13 A I DON'T KNOW

14 Q AND YOU SAID THE NELSON'S PROBABLY CALLED YOU, RIGHT?

15 A I WOULD EXPECT

16 Q LET ME ASK YOU IF YOU RECOGNIZE THIS ITEM?

17 A I DON'T RECOGNIZE IT BUT I KNOW--

18 Q IT HAS GOT YOUR NAME ON IT, RIGHT?

19 A YES

20 Q AND WHERE DOES IT SAY YOUR NAME

21 THE COURT ARE YOU GOING TO INTRODUCE

22 Q DO YOU RECOGNIZE THE DOCUMENT?

23 A I DON'T RECOGNIZE THE DOCUMENT, NO

24 Q OKAY YOUR NAME IS ON IT, RIGHT?

25 A MY NAME IS ON IT, YES

1 Q AND YOU ARE FAMILIAR WITH THE MOISTURE FREE LETTERS
2 OF APPROVAL, RIGHT?

3 A I HAVE SEEN A COUPLE OF THEM, YES

4 Q HAVE YOU SEEN THE ONES THAT WAS ISSUED TO THE
5 BABAEE'S?

6 A NO, I DON'T KNOW IF I HAVE OR NOT

7 Q DOES THAT APPEAR TO YOU TO BE A LETTER APPROVAL THAT
8 IS NORMALLY GENERATED BY MY CLIENT TO APPROVE A WARRANTY?

9 A IT IS A TYPICAL FORM, I DON'T KNOW IF THIS WAS ISSUED
10 TO THE BABAEE'S OR NOT

11 Q I WILL HAND YOU THIS DOCUMENT AND ASK IF YOU
12 RECOGNIZE THIS DOCUMENT?

13 A YES

14 Q WHAT IS THIS DOCUMENT?

15 A THIS IS, APPARENTLY THE RENEWAL INSPECTION THAT I
16 INDICATED THAT THEY ASKED ME TO GO OUT AND DO, THEY BEING
17 MOISTURE FREE WARRANTY

18 Q THEIR RENEWAL, OKAY?

19 A RIGHT

20 Q AND THE REPORT WE WERE TALKING ABOUT IN 2002, THAT
21 REPORT WASN'T DONE FOR A RENEWAL, WAS IT?

22 A THAT REPORT WAS JUST DONE AS AN INSPECTION

23 Q AND WHAT I AM HANDING YOU RIGHT NOW, YOU RECOGNIZE
24 IT, RIGHT?

25 A THIS ONE, YES

1 THE COURT THE RENEWAL OF WHICH HOUSE?

2 MR BLACKBURN THE NELSON'S

3 THE COURT HOW IS THAT RELEVANT

4 MR BLACKBURN THIS IS ANOTHER INSPECTION THAT HE
5 DID FOR MOISTURE FREE

6 A NO, THE WARRANTY WAS ALREADY IN PLACE, RENEWAL

7 THE COURT HOW IS THAT RELEVANT TO WHAT IS GOING ON
8 WITH THESE PLAINTIFF'S

9 MR BLACKBURN ABOUT WHY HE SAID HE WAS QUITTING,
10 AFTER HE TESTIFIED HE QUIT WORK FOR MOISTURE FREE IN 2005,
11 HE DIDN'T DO ANY OTHER INSPECTIONS THE DATE OF THIS
12 REPORT IS WHAT?

13 A I AM LOOKING

14 THE COURT TELL HIM WHAT IT IS

15 Q IT IS ON PAGE 2, IT IS DATED DECEMBER THE 6TH OF
16 2005, RIGHT?

17 A RIGHT

18 Q SO, IS THIS THE LAST TIME YOU DID ANY WORK FOR
19 MOISTURE FREE?

20 A I WOULD EXPECT IT IS, YES

21 MR BLACKBURN I WOULD LIKE TO MARK THIS INTO
22 EVIDENCE, EXHIBIT NUMBER 44

23 MR PHILLIPS NO OBJECTION

24 THE COURT 44

25

1 (WHEREUPON, DEFENDANT'S EXHIBIT NO 44 WAS ADMITTED
2 INTO EVIDENCE)

3 THE COURT I ASSUME THAT TAKES CARE OF WHAT YOU WERE
4 GOING TO DO

5 MR BLACKBURN ONE OTHER THING, YOUR HONOR

6 THE COURT BEAR WITH US, IF HE DOESN'T GET THROUGH
7 IN A MINUTE WE ARE GOING TO CUT HIM OFF

8 Q MR FLAHERTY, YOU HAVE BEEN QUESTIONED ABOUT THIS
9 CLEMSON REGULATION?

10 A YES, SIR

11 Q LET ME SEE IF I CAN FIND IT

12 THE COURT MR BLACKBURN, LET ME SEE YOU

13 (WHEREUPON, A BENCH CONFERENCE WAS HELD IN THE
14 PRESENCE OF THE JURY BUT OUT OF THE HEARING OF THE
15 JURY)

16 THE COURT LADIES AND GENTLEMEN, WE ARE GOING TO
17 BREAK FOR THE DAY, BE BACK AT 9 30 IN THE MORNING DON'T
18 TALK ABOUT THE CASE

19 *** END OF PARTIAL REQUESTED TRANSCRIPT OF RECORD ***
20
21
22
23
24
25

State of South Carolina)

County of Richland)

Court of Common Pleas
06-CP-40-7215

Fariborz Z Babaei and Malihe
Babaei,)

Plaintiffs)

vs)

Transcript of Record

Moisture Warranty Corporation)
d/b/a Moisture Free Warranty,)
and Preferred Home)
Inspections Inc)
Defendants)

November 18 - 20 2008
Columbia, South Carolina

B E F O R E

The Honorable Doyet A Early, III Judge and a jury

A P P E A R A N C E S

Robert B Phillips Esq
Howard S Sheftman Esq
Attorneys for the Plaintiff

Charles G Blackburn, Esq
Attorney for the Defendant

Lisa H Davenport
Official Court Reporter

0268

1 (Whereupon, on November 18, 2008 the following
2 proceedings were held)

3 (Whereupon, Defendant's Exhibit Nos 45 - 50 were
4 marked for identification only)

5 (Whereupon, the jury came into open court at
6 approximately 9 30)

7 THE COURT Mr Foreman, ladies and gentlemen good
8 morning I hope everyone had a pleasant evening and my
9 sausage biscuit was good And y all decided on Jimmy
10 Jones?

11 THE JUROR Yes, sir

12 THE COURT Good selection

13 Mr Blackburn?

14 CROSS-EXAMINATION

15 BY MR BLACKBURN

16 Q We have previously marked Defendant s exhibit number
17 44 Mr Flaherty, are you familiar with Defendant's
18 exhibit no 44?

19 A Yes, I am

20 Q And what is that document?

21 A It's a document produced by the Clemson Extension
22 regarding wood moisture content in residential housing

23 Q And that's the same document that's been previously
24 marked as Plaintiff's exhibit no 2, right?

25 A I believe it is yes sir

1 Q And that document, exhibit no 44, Defense no 44,
2 has two pages, right?

3 A Yes, sir

4 THE COURT It's not 44, though

5 THE WITNESS It's 45, sir

6 Q Forty-five I'm sorry Forty-five has two pages and
7 Plaintiff's exhibit no 2 has one page, right?

8 A Yes, sir

9 Q And this wood moisture content they re talking about,
10 page one of Plaintiff's exhibit no 2, is the same as
11 Defendant s exhibit no 45 right?

12 A Yes, sir

13 Q And when it goes out it says that this leaflet
14 describes the practical meaning to the homeowner of
15 readings from a wood moisture meter, right?

16 A Yes, sir

17 Q And is this what you used to determine the moisture
18 content in wood? One of the means?

19 A This document --

20 Q Yes

21 A -- or the moisture meter?

22 Q The --

23 A I don't just rely on this document I rely on the
24 training I received other documents of other
25 organizations It is a combination of organizations that

1 also ascribe to the same standard

2 Q It is one of several right?

3 A Several, yes

4 Q But would you agree that this document is what you
5 rely upon in part to determine moisture content?

6 A In part, yes

7 Q And in this document the wood moisture content -- I'm
8 reading from page one -- of wooden members of the
9 substructure of residences being sold in the state is
10 routinely being disclosed in the closing process of the
11 sales to buyers The reading is usually provided by pest
12 control operators and is included in or near the termite
13 letter right?

14 A Yes, sir

15 Q And in this document, the Clemson standards would
16 you agree that it's generally used with termite letters
17 right?

18 A That s correct

19 Q And the wood moisture content is for termite letters
20 right?

21 A As this is dealing with it yes

22 Q Are you familiar -- Has this document, Plaintiff's
23 exhibit no 2 and Defense exhibit no 45, has it ever been
24 codified in the South Carolina State Law?

25 A I do not know that

0271

1 Q You don't know that Okay We'll move on It is
2 says, The notation such as WMC-18 is usually meaningless
3 or at the most a curiosity since seldom is there a
4 question or interpretation notation but the disclosure is
5 highly significant, right?

6 A Yes, sir

7 Q And then it sets out the measurement readings, below
8 12, and all this stuff and the third paragraph, South
9 Carolina suffers extensive moisture damages in residences
10 across the state stemming from multiple causes right?

11 A That's correct

12 Q The problem is so widespread and the damages that
13 area caused to repair that pressure for disclosure of
14 conditions led to reporting substructural wood and
15 moisture content right?

16 A That's correct

17 Q Would you agree with me that this document is
18 generally used to determine wood moisture content in the
19 substructure of a house?

20 A This particular document, yes

21 Q Okay And this document doesn't really apply to for
22 instance, areas above the subfloor, right?

23 A The document, but the percentages in wood are the
24 percentages in wood whether they're the substructure or
25 the framing of the house

0272

1 Q But, and -- okay So, I hear what you're saying but
2 the moisture contents in this document -- the Clemson
3 standards, Plaintiff's 2 -- they can't be used for other
4 areas of the homes other than the ground floor -- above
5 the ground floor we're standing on right?

6 A That document, yes

7 Q That's right So, the wood moisture contents in
8 these which by the way, if you look at page two of
9 exhibit no 45 it says Decay organisms are active at full
10 biosaturation of 28 to 31 percent right?

11 A That's correct

12 Q And that s consistent with your testimony about when
13 damage actually occurred, right?

14 A Yes That's when the decay organisms are active
15 yes

16 Q Twenty-eight to thirty-one percent right?

17 A Yes

18 Q And it says here 20 to 24 on page -- on Plaintiff s
19 exhibit no 2, page one of Defendant s exhibit no 45 --
20 that readings indicate a serious problem somewhere --
21 20-24?

22 A Yes, sir

23 Q And the excess moisture source must be immediately
24 corrected and the situation monitored until the wood
25 moisture returns to the 12 to 16 range, right?

0273

1 A That's correct

2 Q And that's only talking about in your crawl space in
3 your house, right?

4 A In this document, yes

5 Q In this document And you can't bootstrap that
6 reading into a third floor window, can you?

7 A Well, that's why it's not the only source of
8 information that I use to determine what the standard for
9 dry is

10 Q Okay And you're familiar with CLAPCA, right?

11 A Yes

12 Q Are you familiar with their position paper?

13 A No, sir

14 Q Okay I want to hand you Defendant's --

15 THE COURT Did you introduce that last exhibit 47?
16 Did you introduce 47?

17 MR BLACKBURN I gave it to him and asked him to
18 recognize it

19 THE COURT I know that but did you move to
20 introduce it in the record?

21 MR BLACKBURN And I'll move to introduce it in the
22 record now Is that --

23 THE COURT Any objection?

24 MR PHILLIPS I would just like to look at it No
25 objection Your Honor

1 THE COURT Without objection

2 (WHEREUPON, Defendant's Exhibit No 45 was admitted
3 into evidence)

4 Q I'm going to hand you Defendant's exhibit no 47

5 THE COURT Which has been marked for ID That's 47?

6 THE COURT REPORTER The first one was 45

7 THE WITNESS The first one was 45, sir

8 Q That's 47

9 A Yes, sir

10 Q What I have just handed you is Defendant s exhibit
11 no 47, right? That's what it says?

12 A Yes, sir

13 Q And you are are familiar with this document,
14 Defendant's exhibit no 47 right?

15 A Similar documents not necessarily this particular
16 one

17 Q Did you not produce this document to me during your
18 deposition?

19 A I don't know if this is the one I gave you or not

20 Q You don t?

21 A No

22 MR BLACKBURN Your Honor, can I pull out his file
23 he gave me?

24 THE COURT He says he recognized it He is just not
25 sure it's the same one Why is that relevant? You can do

0275

1 whatever you want to do, Mr Blackburn

2 MR BLACKBURN Okay

3 THE COURT Within the rules

4 Q Okay This document is a moisture free warranty,
5 right?

6 A Yes, sir

7 Q It is approved by the Georgia Department of
8 Insurance, isn't it? Right up there at the top right
9 corner?

10 A Oh, yes, sir

11 MR PHILLIPS Objection Your Honor

12 THE COURT Is it in evidence or not in evidence?

13 MR BLACKBURN I would move to put it into evidence,
14 Your Honor

15 THE COURT Well, you've got to do that for us to
16 understand where we are

17 MR BLACKBURN All right

18 THE COURT Any objection?

19 MR BLACKBURN Any objection?

20 THE COURT I ask that question, Mr Blackburn
21 Any objection?

22 MR PHILLIPS No objection

23 THE COURT Without objection

24 (Whereupon, Defendant's Exhibit No 47 was admitted
25 into evidence)

1 Q You would agree Defendant's exhibit no 47 is a
2 moisture free warranty, right?

3 A Yes sir

4 Q And it's been approved by the Georgia Insurance
5 Department, Property and Casualty Division right?

6 A Yes sir

7 Q Okay And what moisture concentration has been
8 approved by the Georgia Insurance Department for the
9 moisture free warranty?

10 A I don't know that sir

11 Q Okay If you can look on page two, paragraph six,
12 where it says failure -- Any of the area of the home's
13 substrate or framing wood which supports the EIFS cladding
14 system which contains relative moisture equal to or in
15 excess of 25 percent as measured using an accepted level
16 or distance-type moisture meter right?

17 A Excuse me sir Page two is

18 Q I'm sorry Page three

19 A I m sorry

20 Q Paragraph six

21 A Yes, sir

22 MR PHILLIPS Your Honor, if I could this is
23 hearsay All Mr Flaherty has said is he recognizes this
24 document

25 THE COURT Well, you didn't object then Now you re

0277

1 objecting?

2 MR PHILLIPS For identification purposes, Your
3 Honor, I have no objection As to testifying --

4 THE COURT He identified it Then he moved to
5 introduce it You said no objection It is full of
6 hearsay I'm surprised you didn't object, but you didn't

7 MR PHILLIPS Thank you, Your Honor

8 THE COURT A lot of these documents have been full
9 of hearsay but there was no objection

10 Q Mr Flaherty, I am going to hand you a stack of
11 documents that have been produced by you and ask if you
12 recognize these documents and you can go through them and
13 would you not agree I'll submit to you that these are the
14 documents that you gave me after your subpoena --

15 A Okay

16 Q - and the first one is moisture free warranty
17 approved by the Department of Insurance, right? Georgia
18 Department of Insurance

19 A Yes sir

20 Q And you re telling me that you didn't give this
21 document to me?

22 A I didn t say that

23 Q You did give it to me, didn t you?

24 THE COURT Now, Mr Blackburn, we're going to get
25 started right today

1 MR BLACKBURN Okay

2 THE COURT You're not going to badger this witness
3 He told you a while ago he didn't realize that was the
4 same one he gave you He looked at it So, don't try to
5 make a mountain out of a molehill

6 Q Okay But you would agree with me that you did give
7 me the document?

8 A I would yes sir

9 Q Thank you I'll move on Mr Flaherty have you
10 produced any position paper or document that substantiates
11 your opinion that the vapor retarder is the reason why the
12 moisture free warranty will not work in South Carolina?

13 A No sir

14 Q You haven't?

15 A No sir

16 Q So, the only evidence we have right now is your
17 opinion that the moisture free warranty won't work in
18 South Carolina is because of vapor retarder is that
19 right?

20 A My opinion is drawn on the statements of other
21 organizations

22 Q But you have you produced any of those statements?

23 A No, sir

24 Q You have not, have you?

25 A No, sir

0279

1 Q Okay So we have no way of confirming that your
2 opinion has been substantiated by those other
3 organizations that you're talking about?

4 A Not yet, no, sir

5 Q Okay And you testified yesterday about the soft
6 substrate?

7 A Yes, sir

8 Q All right And a soft substrate like OSB is damaged
9 by moisture because it's soft - can it fix itself?

10 A No, sir

11 Q Okay So --

12 A When you say 'fix itself' do you mean dry out?

13 Q Dry out

14 A Well, sure

15 Q But it can't actually come back to the piece that we
16 got right here right?

17 A Oh not likely

18 Q I'm talking about exhibit no 1

19 A That's right

20 Q It won't fix itself to that?

21 A That's right

22 Q Okay And you were aware of the CK report after the
23 litigation started right?

24 A CK being Mr Clark?

25 Q Yes

0280

1 A Yes, sir

2 Q And you weren't aware of it in June of 2006?

3 A That's correct

4 Q Okay But when you went out there in July of 2008
5 the third inspection you were aware of the CK report,
6 weren't you?

7 A I don t know that I was then

8 Q The day before your deposition?

9 A I don t think I was I can't remember if I was or
10 not or if it was since then that I've seen it

11 Q Okay And that was two years into litigation?

12 THE COURT Mr Blackburn, we went over all of this
13 yesterday ad nauseum You promised me this morning that
14 it would be new material I am not going to let you go
15 back into what you went into yesterday

16 MR BLACKBURN I appreciate it Your Honor I ll
17 limit it to new material

18 When you went out there you didn t check any of the
19 areas that Clark inspected in 2004?

20 THE COURT Mr --

21 MR PHILLIPS Asked and answered

22 THE COURT -- Blackburn, I just said -- please You
23 want me to send the jury out and you and I have a
24 discussion?

25 MR BLACKBURN No sir

1 THE COURT Then follow my instructions

2 MR BLACKBURN I will, Your Honor

3 Q Do you consider yourself an expert in vapor retarder
4 transmission?

5 A I think I'm an expert in that I have read enough
6 other people's test results and studies to understand the
7 ramifications of it when applied to an EIFS cladding, yes,
8 sir

9 Q But you haven't produced any of those documents today
10 to substantiate that position have you?

11 MR PHILLIPS Your Honor, we just talked about that

12 THE COURT Well not only that I gave you an
13 opportunity yesterday to cross examine on his
14 qualifications before he was admitted as an expert

15 Q Would you expect the claims rate in South Carolina --
16 because of that vapor retarder, would you expect the
17 claims rate in South Carolina to be higher than the claims
18 rate in Georgia?

19 A Claims rate on what?

20 Q On homes that claims were made on the moisture free
21 warranty?

22 MR PHILLIPS Your Honor, that's beyond the scope of
23 his direct testimony

24 THE COURT Well, not only that, it's irrelevant to
25 this litigation Sustained

1 Mr Blackburn, we're not trying this case in Georgia
2 We're trying one case with this Plaintiff against your
3 client

4 MR BLACKBURN And the reason I was asking that --
5 THE COURT I have ruled, sir

6 Q Mr Flaherty, are you familiar the saturate
7 (phonetic) standards as it applies to vapor retarders?

8 A Not specifically where I have it memorized, no sir

9 Q You mentioned yesterday -- this is my last question
10 -- that EIFS homes applied with vapor barrier can't dry
11 out effectively right?

12 A The studies have shown that they dry out
13 significantly slower and in models that were produced by
14 others studies indicated that the home would not
15 completely dry over a three-year period

16 Q And what you re referencing is the document that we
17 marked as Plaintiff's exhibit no 17 is that right?

18 A Yes sir

19 MR BLACKBURN Okay That s all I have for this
20 witness

21 THE COURT Would you please take that poster down so
22 I can see my jury?

23 MR BLACKBURN I'm sorry

24 THE COURT Redirect if any

25 MR PHILLIPS Yes Your Honor I'll be brief

REDIRECT EXAMINATION

BY MR PHILLIPS

Q We are going to go back through the couple of the Defendant s questions, if I could I direct your attention to Defense 38

Mr Blackburn 38 seems to be missing from the stack Did you pick it up?

I'll tell you what Let me move on Let me show you Defense 39 and Defense 40 I would ask Mr Blackburn if he could find that exhibit for me

MR BLACKBURN I don't have it I have looked I don't have the original exhibit I'll look again, but I don't --

THE COURT Is 38 in -- Where is the list of exhibits?

THE COURT REPORTER You ve got my list

MR PHILLIPS Here is the Plaintiff's list It's the Defendant s list

THE COURT Defendant s list What's the list right there?

THE COURT REPORTER I've got a list of what it is

THE COURT Let me see

MR PHILLIPS Defendant's 38 was the --

THE COURT Moisture --

MR BLACKBURN The NEHB?

0284

1 THE COURT REPORTER Damage -

2 THE COURT Moisture D-A-M something I can't read
3 the writing

4 MR BLACKBURN Are you talking about Defendant's 38?
5 My copy is right here

6 THE COURT Well, that's what he wants

7 MR BLACKBURN My copy?

8 THE COURT Well, we can't find the one that he put
9 into evidence So, we'll use that

10 MR BLACKBURN Thank you

11 Q Mr Flaherty take a look at defense no 38 Do you
12 recognize that document?

13 A Yes I do

14 Q Do you remember during the cross examination you
15 wanted to read another portion of that? Let me ask you in
16 that document do you recall we talked about the need to
17 reevaluate the condition with the moisture barrier in
18 1996 Let me ask you simply, has that occurred?

19 A Could you ask that question again?

20 Q Sure Has the construction industry reevaluated the
21 problems identified in Defendant's 38 with moisture vapor
22 retarders built into wall cavities? Has that been
23 reevaluated since 1996?

24 A Well and that even newer products put out by
25 Dryvit -- their drainable systems indicate that a moisture

1 barrier transfer study should be done even using that
2 material

3 Q So, now, when you say a new product, the product that
4 we're talking about here is barrier EIFS?

5 A Yes

6 Q Is it still sold?

7 A It may be in commercial applications It's been
8 banned I know in the State of Georgia since 1997

9 Q For residential homes?

10 A For residential structure yes, sir

11 Q Are they building residential structures in South
12 Carolina with barrier EIFS?

13 A I don't know that I would suspect they're not

14 THE COURT No sir Don't speculate

15 THE WITNESS I'm sorry

16 THE COURT That's not a problem

17 THE WITNESS I don't know for sure

18 Q Let me ask you this Have EIFS manufacturers
19 developed a new product?

20 A Yes, sir

21 Q Is it marketed and sold to residential construction?

22 A I would suspect that is, yes sir

23 Q Let me ask you to look at Defendant's 39 That's one
24 of your inspection reports

25 A Yes, sir

1 Q You testified at length about EIMA standards Please
2 tell the jury what EIMA is

3 A EIMA is an organization that was founded in the early
4 80 s which is comprised of the manufacturers of EIFS
5 components and it was designed to have generic standards
6 that were common to all of the manufacturers to use on
7 woodframe construction, primarily in the residential
8 marketplace in the United States when they took a product
9 that had been developed in Europe and had been brought to
10 the United States primarily for use on commercial
11 applications they now decided to put it into the
12 residential marketplace and they have generic standards
13 that they publish periodically that pretty much reflect
14 the standards of its members for some commonality as to
15 how things are done

16 Q And in your cross examination you talked about EIMA
17 details Tell the jury what that is

18 A Well as you're installing the product everytime that
19 it meets a dissimilar material or it meets a roof
20 termination or whatever it may happen to be, there are
21 details that describe how it's to be done for the purpose
22 of trying to let the system perform as they intended it to
23 which is to in effect, not allow moisture to get behind
24 it because of the ramifications of that So there are
25 details that say how you're to do every item depending on

0287

1 where it is on the home to try and accomplish that goal

2 Q For the layman a detail is, basically, an
3 instruction? Words or pictures --

4 A It is a diagram and or a combination of diagram and
5 words that tells you how to accomplish it

6 Q And you looked at a page in that report during your
7 cross examination regarding windows Could you turn to
8 that page?

9 Your Honor I would ask if Mr Flaherty could step
10 down and be able to show the exhibit to the jury

11 THE WITNESS Are you talking about this one here?

12 Q Yes Could you show the jury what the detail is?

13 A The detail and keep in mind this inspection report
14 I was inspecting if the system was installed to the way it
15 was supposed to have been when the house was constructed
16 and this detail is a drawing right out of the EIMA
17 guidelines for that point in time that shows how the
18 system is to be terminated as it affects a window -- to be
19 held back from the window a quarter to a half an inch, a
20 material called a backer rod put in that opening to get it
21 mass and then a sealant to install over that in a way that
22 allowed it to expand and contract so as to stand up to the
23 movement under the system

24 Then the pictures are pictures I take when I'm at the
25 house That shows - This is how it was supposed to have

1 been done This is how it was done

2 Q What do those pictures show you as to the windows on
3 the Babae house?

4 A Well, this shows that there is no backer rod in place
5 or any form of bond breaker around the windows

6 Additionally, the system was put completely right up
7 against the side of the windows It was not held back as
8 it was supposed to have been, and, therefore, there was no
9 space to be able to put a backer rod in there at that
10 time So, there was just a regular bead of sealant that s
11 been put into around the perimeter of the windows on that
12 house

13 Q You may take your seat Thank you, sir Please
14 explain to the jury what a backer rod is

15 THE COURT Hold on a second Mr Blackburn?

16 MR BLACKBURN I'm sorry Your Honor

17 THE WITNESS At --

18 THE COURT Hold on one second Please have a seat

19 THE WITNESS At the risk of boring you with it, but
20 a backer rod is technically what s called a closed cell
21 material that, in effect, the sealant can t stick to and
22 what its purpose is to as I talked about yesterday as you
23 remember where the width of the joint became the point
24 where the window and the stucco came together, in effect
25 caused the width of the joint that couldn t expand enough

1 to stand up to the movement Well, that's why that
2 material is put into the opening that's supposed to be
3 left so that the sealant only sticks to the side of the
4 window and only sticks to the side of the EIFS, therefore,
5 having enough width where it can't stick to the closed
6 cell material to allow it to expand and contract without
7 being interfered with by another material in place

8 Q So backer rod is a piece of foam, kind of like the
9 shape of my finger?

10 A Yes In some areas it could also be in form of
11 what's called a bond breaker tape The concept is the
12 same It is a piece of tape that the sealant can't stick
13 to so that again, it creates a wide joint so that it can
14 stand up to the movement of the system

15 Q Who were the EIMA standards -- the instructions --
16 who were they written for?

17 A They primarily were written for the applicators to
18 use Obviously, the applicators when they purchased the
19 materials, are given instructions as to how it's to be put
20 on also when they do their training, but this just
21 reinforces to whoever is putting it on as to how things
22 are to be done

23 Q So if I could do a crude demonstration if this were
24 the synthetic stucco wall and it was coming up against the
25 window -- the jury rail -- it's supposed to stop short

0290

1 short of there?

2 A Right It's not supposed to come in contract with
3 any dissimilar material

4 Q And then the backer rod goes in between?

5 A That s correct and then the sealant applied over it
6 so it sticks to the side of the window and the sides of
7 the EIFS

8 Q Now, Mr Blackburn asked you several questions
9 yesterday about remediation and repair Tell the jury
10 what the technique is called that tries to take an
11 improper application of EIFS and add that joint? What is
12 that called?

13 A That would be call retrofitting where you literally
14 would route out a space around the window or door and
15 hopefully the person would find away to back-wrap the
16 insulator board and then they would insert the backer rod
17 and apply the sealant That was done in what I called the
18 older days is the late 90's where homes were found to be
19 done wrong People were trying to do that to bring the
20 system up to the way it should have been originally Many
21 cases because of the quality of the contractors that
22 didn't do it right the first time they weren't doing that
23 right either and then you were getting another whole set
24 of problems

25 Q So as to your first report, exhibit 39 in your

0291

1 opinion to a reasonable degree of professional certainty
2 was the Babae's EIFS installed to the manufacturer's
3 instructions?

4 A No, it was not

5 Q All right

6 A When I say the manufacturer, remember I don't know
7 exactly who the manufacturer is and as I inspect all of
8 those homes what I find is many times different
9 manufacturer's products would be mixed on a house as the
10 applicator is using up a supply that he may have left over
11 from another house and mixing it So, many times there
12 isn't one manufacturer's product on it

13 Q But all of the manufacturers follow the EIMA
14 guidelines?

15 A Well EIMA reflects its member group as far as what
16 they call for

17 Q All right Now, and is that the standard that you in
18 the 1500 or so inspections that you've done that's the
19 standard you follow?

20 A Yes

21 Q Set aside that report and let's go to Defense
22 exhibit 40 Is that the second report that you prepared
23 for the Babaees?

24 A Yes, sir

25 Q What standards did you use in that inspection?

1 A In that case after I done my initial inspection to
2 the EIMA standards then I was informed that actually the
3 house had a moisture free warranty on it and I was asked
4 to reinspect it only for the purpose of determining if the
5 way that everything had been terminated on the house --
6 windows and doors, roof terminations, et cetera -
7 conformed to what Moisture Free Warranty requires for
8 their warranty

9 Q And Moisture Free Warranty has instructions --
10 details just like EIMA does?

11 A That's correct

12 Q Could you show the jury the same page in your
13 Moisture Free Warranty report that reflects the Moisture
14 Free Warranty detail?

15 A Do you want me to get down to do that?

16 MR PHILLIPS Your Honor?

17 THE WITNESS The Moisture Free Warranty - in
18 effect what they're doing and it's -- again I don't
19 necessarily disagree with the concept -- is a house that's
20 not been done properly originally and so now we're X
21 number of years later So, what do you do about it as far
22 as trying to make it work and they have what's called
23 remediation guidelines which is something different than
24 what should have been done originally but has got some of
25 the same requirements to it as the original in that it

1 uses a bond breaker material -- bond breaker tape or
2 backer rod underneath the sealant but they don't require
3 them to cut out around the windows and cause those
4 problems

5 This is a diagram of how they from their document say
6 that you would remediate around the window on an existing
7 home where the window was raised relative to the EIFS and
8 on the next page I have where it is some situation where
9 the window and EIFS are plumb where there is no raised
10 edge to do it to, and then they have a couple of other
11 techniques that they suggest to accomplish the goal there,
12 but they still require either some form of backer rod or a
13 bond breaker tape to be behind the sealant to give it the
14 width to do be able to move with the system and then I
15 have a picture that shows that that was not there

16 Now, this sealant wasn't remediated by a Moisture
17 Free Warranty contract It s what was in place when the
18 initial inspection for the purpose of getting a Moisture
19 Free Warranty was done and the inspector did not do what I
20 do which is say is it done right in order to provide the
21 information to them to know that it would conform to what
22 they would want in order to get the warranty, and it was
23 no bond breaker behind the sealant and you could see where
24 I cut it

25 Q Just sort for the clarity of the record, the "they"

1 you referred to in your last record is the Moisture Free
2 Warranty?

3 A That's correct

4 Q Thank you, sir You may take your seat So let me
5 ask you again, sir in your opinion to a reasonable degree
6 of professional certainty was the Babae home remediated
7 to Moisture Free Warranty standards?

8 A Well, what was in place did not conform to Moisture
9 Free Warranty standards when the warranty was put on it
10 Now it's not that Moisture Free Warranty had it done on
11 the house to get the warranty This is what was in place
12 but it didn't conform to what they would require to be
13 done if they were inspecting the house and giving you a
14 list of things to do

15 Q And that work was required to be done under the
16 advertising materials that we looked at yesterday in order
17 to get a warranty, right? To keep the house dry?

18 A That there would be a list provided with things to
19 correct in order to get the warranty to quote allow the
20 system to perform

21 Q The materials that you have seen have you seen that
22 list the Moisture Free Warranty?

23 A I've seen --

24 THE COURT Hold on one second please Just hold
25 on

0295

1 THE WITNESS On this home?

2 Q Yes on the Babae --

3 A I have seen no list of anything that s to have been
4 done on this home to correct not only in the beginning but
5 after they came out as we discussed yesterday roughly 16,
6 17 months after the warranty was issued Another Moisture
7 Free Warranty inspector came out and did what was called
8 the interim inspection noted several of the things that I
9 found in my first inspection three months later where the
10 sealant was failing, and to my knowledge nothing was
11 provided again to the Babaees telling them that you have
12 deficiencies that have to be maintained and corrected in
13 order to maintain the warranty and allow the system to
14 perform

15 Q Now, when you worked -- when you did Moisture Free
16 Warranty inspections, how does that list of repairs get
17 generated?

18 A From Moisture Free Warranty From the report that's
19 provided to them from the initial inspection

20 Q That s not an inspector responsibility to generate
21 that?

22 A No, it s not

23 Q Thank you sir Briefly I d like to direct your
24 attention to Defendant's 41 Mr Flaherty, I am going to
25 look over your shoulder I don't have a copy of that In

1 it it talks about positive -- There is a section that
2 talks about positive evidence that the system isn't
3 functioning properly

4 A I am trying to find that in here

5 Q Let me ask you about this Where it says that
6 function -- a gap should be maintained between EIFS and
7 the finish grade?

8 A Yes sir

9 Q Strike that I'll withdraw that question May I ask
10 you to read the last sentence on the second paragraph?

11 A It says "This is especially true if there is
12 positive evidence that the existing details are
13 functioning properly "

14 Q That's what I want to focus on Do you recall
15 testifying about that yesterday?

16 A Yes sir when Mr Blackburn brought this up

17 Q The positive evidence that the system is
18 functioning -- would your test cuts -- Would that be
19 considered positive evidence that the system is
20 functioning properly?

21 A That would be positive evidence to me that it is not
22 functioning properly

23 Q What about the lack of sealant, all of the things
24 that you testified to the deficiencies in this house per
25 the Moisture Free Warranty standards -- not the original

1 insulation -- the Moisture Free Warranty -- Would those
2 deficiencies -- Would that be positive evidence that this
3 system is functioning properly?

4 A Again, to me it a positive evidence that it was
5 failing

6 Q So, under EIMA guidelines there is no way that this
7 house qualifies --

8 A That s correct

9 Q -- as a functioning EIFS system? Thank you, sir
10 Now, we ve talked a lot about moisture levels That's
11 those percentage numbers?

12 A Yes sir

13 Q Are they constant over time in a house?

14 A No Moisture levels will fluctuate based on climatic
15 conditions

16 Q So if an inspection occurred during the drought you
17 wouldn't expect to see the moisture levels that you would
18 see after a torrential rain?

19 A That's correct

20 MR PHILLIPS Your Honor if you would, I just want
21 to put this up and if you don't mind I ll hang it right
22 here?

23 THE COURT I don't mind as long as y'all play by the
24 rules I fuss when you don't play by the rules

25 MR PHILLIPS Thank you, Your Honor

1 Let's focus in on this -- the 20 to 24 percent
2 moisture reading I know it's hard, but let me read it
3 for the jury Quote, 20 to 24 percent readings indicate a
4 serious problem somewhere The excess moisture source
5 must be immediately corrected and the situation carefully
6 monitored until the WMC returns to the 12 to 16 range, end
7 quote

8 Is that an accurate reflection of the exhibit?

9 A That's what it says, yes, sir

10 Q In your opinion to a reasonable degree of
11 professional certainty is that statement an accurate
12 representation of what a homeowner should do when moisture
13 levels inside their wall -- inside the wall of their house
14 behind the EIFS -- rises to 20 to 24 percent level?

15 A Well, yes but remember the moisture reading is
16 actually being taken at the outside of the substrate
17 It's not being taken in the wall cavities or in the studs
18 inside the wall cavities It's being taken -- if I could
19 use your markup very quickly

20 Q Sure Let me hand you exhibit 1

21 A When you're taking a moisture reading with EIFS you
22 take a small probe and it goes through the EIFS until it
23 reaches the face of the OSB That's the wood So it's
24 going through there until it hits there That's where
25 you're taking your moisture reading You're not taking

1 your moisture reading in here which is the cavity of the
2 wall where water may have gotten into and may potentially
3 still be there So, all of your moisture readings that
4 you see in reports are taken at the substrate level and on
5 the exterior part of it

6 Q Let me ask it a little differently And the probes
7 you're talking about, they're icepick-like things that go
8 through this foam?

9 A That's right

10 Q In your opinion to a reasonable degree of
11 professional certainty if the moisture level of the front
12 face of this substrate -- the side that's in contact with
13 the EIFS -- if that reading is between 20 and 24 percent,
14 do you believe that quote the excess moisture source
15 must be immediately corrected, unquote?

16 A Yes because it's an indication obviously, that
17 moisture is getting behind the EIFS cladding and as we
18 discussed before you can't allow that to happen because of
19 the way the system is designed the water can't get back
20 out So all of the details that not only the original
21 installation instructions were when they were putting on
22 the house, but even to moisture free warranty standards of
23 how repairs are to be made, the whole purpose is to not
24 let water get behind it because of the problems that have
25 caused it

0300

1 Q Let me ask you the basis of that opinion Tell me
2 the basis of that opinion except for the Clemson -- Let's
3 set that aside What is the basis of that opinion that
4 you just gave?

5 A Well, the training I had when I'm certified by the
6 Exterior Design Institute It is the Dryvit class
7 settlement standards itself as to what is to be reported
8 as an elevated level in the report which is over 19
9 percent National Association of Home Builders anything
10 over 20 percent indicates that there is an issue that has
11 to be dealt with The National Wood Forestry Product
12 Service established a long time ago 19 percent as what's
13 considered dry for lumber to be used in residential
14 construction

15 So, all of these organizations that I read or am
16 trained by or what-have-you all have a common standard as
17 to what is considered elevated -- and elevated indicating
18 that moisture is getting access to the lumber

19 Q So, under the terms and conditions of the Moisture
20 Free Warranty that the Babaees were sold, no action is
21 taken for the moisture reading between 20 and 24 percent?

22 A Actually, in their initial inspection it's anything
23 over 19 percent is reported It is only after they've put
24 the warranty in place that now 25 percent is acceptable

25 Q Now that initial inspection, that's when Moisture

0301

1 Free Warranty is deciding if they're going to issue the
2 warranty, correct?

3 A That's correct

4 Q That interim inspection is -- when the level goes up,
5 that's after the homeowner has already purchased it and is
6 looking to have a dry house correct?

7 A That's correct

8 Q Defense exhibit no 47 -- I am not even going to
9 hazard to look for it Do you have it?

10 A I don't know

11 Q Now Mr Flaherty you recognize that document, don't
12 you?

13 A Yes, sir

14 Q Who gave you that document?

15 A I believe I got this as part of the training for
16 Moisture Free Warranty

17 Q Do you have any independent knowledge sitting there
18 today about what the Georgia Department of Insurance may
19 or may not have done?

20 A No, sir

21 Q Whether that stamp is even accurate or not?

22 A Well, I don't doubt that it's there

23 Q What does it mean? Do you know?

24 A Oh, I don't know what it means

25 Q Let me show you Defendant's 2 I point this out

1 That square box -- That's at the base of the wall, isn't
2 it?

3 A Yes It is lower half

4 Q And that's what we call the back kickout -- the
5 kickout on the back of the house?

6 A Yes sir

7 Q Let me show you Defense exhibit no 1 -- another box
8 The bottom layer of that box is also at the base of the
9 wall?

10 A Yes sir

11 Q Is there any significance to moisture damage at the
12 base of a wall as opposed to somewhere above that?

13 A Well, when you're doing your moisture testing and
14 particularly on the roof termination because of the
15 opportunity for large volumes of water to gain access
16 there you probe at where the kickout location should be
17 if there is a joist band below there at that level and
18 then at the base of the wall to track how is the moisture
19 content at various points of the house because you may
20 have deteriorated material on the upper part of the wall
21 that isn't holding water anymore and it continues to work
22 its way down So you may have higher readings at the
23 base of the wall than you do at the top of the wall
24 Q This is going to sound like a silly question, but in
25 your opinion to a reasonable degree of professional

0303

1 certainty, does water migrate down through the wall
2 cavity?

3 A Yes, sir

4 Q Let me show you what's been admitted as Plaintiff's
5 36 and ask you if you recognize that

6 A That looks like the page from the initial inspection
7 done by Mr Strickland

8 Q In your opinion to a reasonable degree of
9 professional certainty would moisture damage to the lower
10 portion of the structure that holds it up -- Would that be
11 more significant than the damage up above?

12 A Well, sure, because of the weight of the house above
13 the area The further up the wall you go the less weight
14 there would be above it

15 Q And underneath this kickout location here how many
16 probe readings does moisture free warranty require an
17 inspector to take?

18 A That should be three

19 Q Where should it be?

20 A One at the kickout location which we talked about
21 yesterday right there

22 Q Okay

23 A Then one down where there would be a structural band
24 between the first and second floor of the house

25 Q Right --

0304

1 A Right in this area here
2 Q Okay Is that accurate?
3 A Yes
4 Q Two?
5 A And then you would do one at the base of the wall
6 which, again, where there is another structural band
7 Q That structural band that's what holds the walls up?
8 A Yes
9 Q All right Those three inspections --
10 A Three points
11 Q Three points of -- You're supposed to probe there and
12 record the readings?
13 A Yes, sir
14 Q Did Mr Strickland do that?
15 A No, sir
16 Q Do you have any reason why he wouldn't?
17 A No sir
18 Q In your experience are kickout locations -- Well let
19 me ask you in your opinion to a reasonable degree of
20 professional certainty how likely is it that there is
21 severe moisture damage underneath the kickout location?
22 A Well, assuming the kickout is installed properly
23 there shouldn't be any, but if it's not and they're
24 installed improperly then because of the high volumes of
25 water that's running down the roof after a rain you've got

0305

1 an opportunity for significant amounts of water to get in
2 at those locations

3 Q And you testified that your procedure is that you
4 don't look at other people's inspections You do your
5 own

6 A That's right

7 Q But if you were reviewing an inspection and you saw
8 there was a kickout location and there was no probe
9 underneath it, what would you think of that inspection?

10 A I would think it was incomplete

11 MR PHILLIPS Thank you Nothing further That s
12 all I have

13 THE COURT All right You may step down

14 MR BLACKBURN Just a couple of follow ups

15 THE COURT No, sir Recross is discretionary with
16 the court and I don t allow it

17 You may step down

18 THE WITNESS Thank you, sir

19 MR PHILLIPS Everybody will be fed out of the same
20 spoon

21 MR PHILLIPS Your Honor I'd ask that Mr Flaherty
22 be excused

23 THE COURT Any objection?

24 MR BLACKBURN No objection Your Honor

25 THE COURT He may be released from your subpoena

0306

1 Next witness Next witness

2 MR PHILLIPS Your honor, I apologize I'd like to
3 call Chris Cooper to the stand

4 THE COURT If you got one

5 MR PHILLIPS I do Your Honor I apologize

6 CHRIS EDWARD COOPER, after being duly sworn
7 testified as follows

8 THE WITNESS My name is Chris Edward Cooper,
9 C-O-O P-E R

10 DIRECT EXAMINATION

11 BY MR PHILLIPS

12 Q Mr Cooper tell me, how are you presently employed?

13 A I am employed with Prime South Construction

14 Q How long have you worked with the construction
15 industry?

16 A Since 1982 when I graduated high school

17 Q Tell me what type of work you've done for the
18 construction industry

19 A A wide variety of it I started off building bridges
20 and went into residential construction a lot of
21 commercial construction Then about 1988 I started doing
22 barrier EIFS systems which is what we re discussing today
23 I have installed a lot of barrier EIFS systems for a
24 particular company out of Raleigh and then I started my
25 own business and that lasted for about six months and I

0307

1 decided to take a job with Prime South who is my current
2 employer now We installed a lot of more barrier EIFS
3 systems

4 Then in '95 '94, they started discovering issues
5 with that system and tried a lot of things to try to work
6 with the industry to repair those systems I became a
7 member of EIMA, which is EIFS Industry and Manufacturers
8 Association, CLAPCA, Carolina Lathing And Plastering
9 Contractors Association trying to come up with ways to
10 resolve these issues We did that for a while - did
11 repairs that failed We have done all type of different
12 repairs that are mentioned in the moisture warranty books
13 They failed It didn't work, and we decided that we
14 needed to go ahead and do a reclad to do a job right I
15 mean removed everything off the outside of the building,
16 pull the windows out or you know, add some type of proper
17 flashing or weather barrier and installed a new type of
18 system that has a secondary weather barrier that allows
19 for water to drain behind it That s what we re doing
20 today

21 I have had classes in certified mold remediation,
22 attended several EIFS Industry Manufacturers Application
23 seminars, just a wide variety of different classes
24 regarding this exterior building industry

25 Q Mr Cooper I want you to define to the jury when you

0308

1 say repairs of EIFS what you mean

2 A When I say repairs I'm talking about taking a barrier
3 EIFS house which -- I wasn't here yesterday, but if you
4 know a barrier EIFS is when the foam is glued or applied
5 directly to the wood sheathing without a secondary
6 barrier In taking that system which is now outlawed and
7 banned and trying to patch it up or bandaidd it to stop
8 water from getting in behind it which is what we did but
9 water still got behind because it was a failure to begin
10 with and it was a failure to try to repair and it didn't
11 work It was like putting a bandaidd on a broken leg It
12 did not work

13 Q You heard -- you were present this morning when
14 Mr Flaherty testified and he talked about retrofitting
15 EIFS Is that what you called repairing EIFS?

16 A A lot of us use different personal terminology A
17 while ago it was called retrofitting We call
18 retrofitting removing the stucco from the outside of the
19 building and replacing it with a different cladding or a
20 different type of stucco So, that's why we called it
21 retrofitting in the past, but you know, I hear some
22 people called it retrofitting as repairs as well So, now
23 I refer to it as repairs and reclads I don't even use
24 the term retrofitting

25 THE COURT Mr Phillips let me stop you for a

0309

1 second You got them?

2 THE CLERK Yes, sir

3 THE COURT Outside?

4 THE CLERK Yes, sir

5 THE COURT Bring them in Come give me the list of
6 who you got You got the list?

7 THE CLERK The ones that are circled, they are the
8 ones that are here

9 (Whereupon a discussion was held off the record not
10 concerning this case)

11 MR BLACKBURN Your Honor, may we approach the
12 bench?

13 THE COURT Yes

14 (Whereupon a bench conference was held)

15 THE COURT You may continue

16 MR PHILLIPS Thank you sir

17 Q Mr Cooper an EIFS applicator, that s the trade term
18 for people who install barrier EIFS -- an EIFS applicator?

19 A That's correct

20 Q You were familiar with the EIMA standards that
21 Mr Flaherty was discussing?

22 A That's correct

23 Q As well as manufacturer s standards?

24 A Yes

25 Q The repair process that you described, is that an

0310

1 attempt to bring an EIFS --

2 MR BLACKBURN Your Honor, I'll object to this line
3 of questioning Mr Flaherty has already testified to
4 this It is cumulative evidence I just object to this
5 line of questioning It's already been testified to, and
6 Mr Cooper is not the expert on EIFS repairs It is my
7 understanding that he is a repair contractor that's coming
8 in to give a cost of repair to fix the house

9 THE COURT Objection overruled

10 Q Please answer the question Mr Cooper

11 A The question again was?

12 Q Please, I - The repairs that you talked about
13 earlier --

14 A Correct

15 Q -- that's an attempt to make a non-conforming system
16 conformed the EIMA guidelines?

17 A That's correct

18 Q And you have personally performed that work?

19 A Yea, not only have we personally performed it but I
20 am the patent holder and the inventor of the sill sentry
21 Dryvit calls it the sill vent It s in the Moisture Free
22 protocol book of a product to use which I spent about
23 \$18,000 on that patent I made a lot of efforts to try to
24 repair barriers EIFS systems and make them work and didn't
25 do it

0311

1 Q I am quite sure that the jury doesn't know what you
2 mean by sill vents

3 A Okay

4 Q So, let me get you a picture Sill vent is used
5 around the window, isn't it?

6 A Below the window

7 Q Let me show you this exhibit, Plaintiff's exhibit
8 no 13

9 And, Your Honor with your permission I'd -- stand up
10 here Try to describe what you're talking about to the
11 jury, please

12 A The sill vent?

13 Q Sill vent

14 A A sill vent is a pan flashing -- pan flashing being a
15 material that would go up underneath a window to prevent
16 water from entering through these cracks on the window
17 like you see right here from gaining access behind the
18 stucco cladding or any type of cladding What it is is
19 it's a PVC product It extends beyond the window You
20 cut a slot beneath the window You extend that product
21 beneath the window It has ridges in it a sloped bottom
22 and a front guard that stops water from coming in so that
23 when water gains access through the system it gets into
24 that vent and it drains it to the outside We call that
25 through-wall pan flashing, and that's the product I'm

0312

1 talking about We do have a picture in the courtroom I
2 don t have one in my hand, though

3 Q That's fine Take your seat Thank you, sir And
4 you invented that, and you're the patent holder of it?

5 A That's correct

6 Q Anybody else the holder of that patent?

7 A I share that with Mark Burroughs because he was
8 working on it with me

9 Q Do you currently use that product to repair barrier
10 EIFS homes?

11 A No we re not allowed to repair barrier EIFS homes

12 Q Thank you, sir Mr Cooper, how long have you been
13 employed by Prime South?

14 A Since about 1990

15 Q In that amount of time how many EIFS repair jobs has
16 Prime South done?

17 A Okay Can we define are we talking about repair or
18 recladding?

19 Q Trying to -- my fault How many homes has Prime
20 South tried to change the barrier EIFS system to
21 conforming EIMA application?

22 A Probably somewhere between 50 and 100

23 Q And during what period of time was that work done?

24 A Ninety-five, 96 timeframe

25 Q 1995 '96?

1 A I believe so

2 Q Okay And how many homes has Prime South just
3 removed the EIFS, fixed the damage, and put some other
4 material on the outside of the house? I believe you
5 called that a strip and reclad?

6 A I did Probably about 300

7 Q What time period is that?

8 A From about 96 to the present date And that s only
9 homes We have done several condominiums as well

10 Q Mr Cooper what licenses do you hold?

11 A I personally have a builders license -- a residential
12 builder s license The company I work for, though, has an
13 unlimited contractor's license meaning we can build
14 anything any price

15 Q Have you had personal experience with litigation as
16 in either an expert or a witness?

17 A Yes

18 Q Could you tell the jury about that?

19 A Okay I mean, I've testified as a witness Are you
20 talking about have I personally --

21 Q How many times have you testified as a witness in a
22 South Carolina court?

23 A I believe this will be the fourth time

24 Q And have you ever been qualified as an expert in the
25 court?

1 A Everytime

2 Q All four times?

3 A Yes

4 Q Those were all South Carolina?

5 A Yes

6 Q And what were you qualified as an expert in? What
7 field?

8 A Different times I have been qualified as an expert in
9 pricing, remediating or recladding the home we're
10 building I have been qualified as an expert witness in
11 regards to repairs and the condition and the theory behind
12 EIFS

13 MR PHILLIPS Your Honor I'd offer Mr Cooper as an
14 expert in the areas of repairing barrier EIFS systems and
15 doing strip and reclads

16 MR BLACKBURN No objection Your Honor

17 MR PHILLIPS Thank you, sir

18 THE COURT Without objection

19 Q When is the first time you became aware of a moisture
20 problem barrier EIFS products?

21 A I believe that would be about 1994

22 Q Tell me how you came to know that

23 A Well we were EIFS synthetic stucco applicators and
24 we were the largest one, I believe in the southeast
25 Wilmington is where we were located, and it was discovered

0315

1 by a Wilmington inspector that there was moisture contents
2 and wood was rotting behind the barrier EIFS system and
3 that was our bread and butter at the time We were
4 installing barrier EIFS, and so it, you know, became
5 public information that there was problems with it and
6 that's when we began our attempts to try to repair those
7 systems because we believed in it that it was a viable
8 system -- the barrier EIFS system So we thought we could
9 stop the moisture from getting in behind the walls

10 Q When you say "we ' could you describe --

11 A When I say "we, I mean Prime South the company that
12 I'm working for and also we did that in conjunction with
13 EIMA which is EIFS Industry Members Association CLAPCA
14 was formed which is Carolina Lathing and Plastering
15 Contractors Association There was a wide variety of
16 people who were working on focusing on trying to remedy
17 the problems behind the barriers EIFS cladding

18 Q Wasn't there a particular group up in Wilmington that
19 tried to address this problem?

20 A Yes There was the EIFS task force in Wilmington and
21 it consisted of the owner of the company and I assisted
22 him I believe Frank Clark was on that task force The
23 inspection department was on that task force Mark
24 Williams was on that task force, I believe He is an
25 expert up in Pennsylvania A few others -- Charlie Smoak,

0316

1 I believe, was on that task force He is an applicator in
2 this area A few others I don't recall exactly who it
3 was

4 Q And the Frank Clark that you mentioned you reviewed
5 the materials on this is that the Frank Clark of the
6 Clark inspection?

7 A Correct

8 Q And Mr Smoak was the applicator of the EIFS on this
9 house wasn't he?

10 A I m not sure

11 Q You have reviewed the Moisture Free Warranty
12 materials?

13 A Correct

14 Q Have you done any work for Moisture Free Warranty?

15 A No

16 Q Why not?

17 A I believe I had a conversation with someone with
18 Moisture Free Warranty at one time and --

19 MR BLACKBURN Your Honor I will object to this
20 line of questioning

21 THE COURT You object to this line of questioning?

22 MR BLACKBURN The response, hearsay He thinks he
23 talked to somebody about something

24 THE COURT Sustained

25 THE WITNESS Okay

0317

1 Q That's fine Let me -- I'm sorry I cut you off

2 Go ahead

3 A I can answer your question

4 THE COURT No, you can't answer the question

5 Q I'm sorry Let me re-ask it Let me ask you a
6 different question

7 I apologize, Your Honor

8 THE COURT Why don't we get to this house?

9 Q Sure Mr Cooper tell me about your involvement
10 with the Babae house

11 A I met Frank Parker out there about three years ago, I
12 believe it was, and I forget the nature of that visit
13 Nothing came of it and viewed the house with him He
14 asked me to come out there, I think to do repairs but I
15 don't recall that After that I believe your firm brought
16 me in to take a look at the house, price of reclad
17 estimate, and I had a project manager of mine go out there
18 and meet with you and cut a sample out and look at a
19 particular area where there is a lot of damage behind the
20 wall

21 I met out there with Bill Flaherty when he was doing
22 the inspection and saw a few areas where he discovered
23 moisture readings

24 Q Okay

25 A Oh, and to reclad the house right next to it, too

1 Q Let me show you Plaintiff's no 9 Let me show you
2 what's been marked as Plaintiff s 21 Do you recognize
3 that photograph?

4 A Yes, I do

5 Q What is that?

6 A That's an area below the kickout behind the stucco
7 that was cut out that shows a tremendous amount of
8 wood-rot damage

9 Q That's a detailed photograph Let me have you look
10 at Defendant's 1 up here Show me on Defendant s 1 where
11 that cut was made

12 A It s kind of hard to see but if you were looking at
13 the house from this direction it s right back there In
14 other words, this band here is this band right here So
15 that s why it s kind of blocked off somewhat from view
16 from that but it is that inside corner above the block

17 Q And that's -- it's essentially at the bottom of that
18 red box, is that fair?

19 A Correct

20 Q Thank you, sir You can have a seat What is the
21 brown stuff in that picture?

22 A It looks like top soil, but it used to be wood It
23 is rotted wood If I assume you re talking about this
24 brown?

25 Q Let's talk about that What the that? What's that

1 called?

2 A Wood rot

3 Q I know it's wood rot, but that board there, does it
4 have a particular name?

5 MR BLACKBURN Objection Your Honor, leading,
6 relevance

7 THE COURT Well, it is certainly relevant He just
8 asked him what is it What is it?

9 THE WITNESS It is the wooden band -- the permanent
10 band for the structure of house

11 Q Okay Explain to the jury what a wooden band does on
12 a house

13 A When you build a house you build it -- On this
14 particular type of house with a crawl space you have a
15 block foundation and then you have a plate that sits on
16 top of that like a 2 X 6 or 2 X 8 or whatever and then you
17 have a band that stands upward usually about 2 X 10 maybe
18 that your floor joists butt into and nail to So it kind
19 of helps support the floor and supports the wall up above
20 the area and then you build your wall on top of that

21 Q Now, the upper brown material tell me what that - I
22 know it's wood rot What was it before it rotted?

23 A It -- I believe it used to be OSB Well, it still is
24 OSB in very poor condition

25 Q Tell the jury what OSB is

0320

1 A OSB is orientated strain board It s a -- If you
2 know what plywood is, OSB is a type of plywood

3 Q Let me show you Plaintiff s 1

4 A That is OSB

5 Q That's a hard board?

6 A Correct

7 Q And why is it textured? It has a textured look to
8 it

9 A Because it's orientated -- it's pieces of wood that
10 are I guess compressed and laminated and glued together
11 to form the plywood or the exterior sheathing

12 Q What has happened to that OSB?

13 A It s had a lot of water introduced to it and it's
14 rotted away

15 Q Let me show you a series of exhibits from 33 to 38 --
16 33 to 37 I apologize I ask if you can identify all of
17 that

18 A Okay I - This is deteriorated OSB

19 Q Well, just -- If you could do you recognize that?

20 A Yea This is some cut-outs that our company did

21 Q From that area depicted in the exhibit 21?

22 A Yes

23 MR PHILLIPS Your Honor, I'd offer exhibits 33
24 through 37 into evidence

25

0321

1 (Whereupon, Plaintiff's Exhibit Nos 33 - 37 were
2 admitted into evidence)

3 THE WITNESS It used to be OSB It still is OSB but
4 with fungus and wood rot involved in with it You can see
5 the mold or the mildew or the fungus behind it You can
6 see that it's very weak Actually, these other bags are
7 more interesting because this looks kind of like a bag of
8 top soil which is -- you know, after wood deteriorates it
9 turns into I guess soil you can grow tomatoes in
10 perhaps The same thing with this -- This is all rotted
11 OSB from that area It s still wet --

12 Q And let me

13 A -- today

14 Q On any of the exhibits read what the annotation on
15 the ziplock evidence bag says

16 A Babae 08/22/08 meaning the date front kickout
17 closest to porch

18 Q What is the date 8/22?

19 A The date we went out there and took these samples out
20 of the wall

21 Q So this is what happens to this after it gets wet,
22 Correct?

23 A Yes

24 Q Is that going to have to be repaired?

25 A If that gets wet and then it s allowed to dry this

0322

1 doesn't happen, but if it continues to get wet this
2 happens So if it just gets wet once and dries out, that
3 doesn't happen, but if the water is allowed to
4 continuously enter behind the wall this is what you get

5 Q So that doesn't occur right away That occurs over a
6 period of time?

7 A That s right

8 Q Okay In your opinion to a reasonable degree of
9 professional certainty do you know how long it took for
10 that wood to deteriorate to that level?

11 A Not exactly It all depends on the climatic
12 conditions It all depends on how much water was
13 introduced behind there It could take from six months to
14 a couple of years I mean it could vary depending on the
15 degree of water getting behind there

16 Q From your examination of the Babae house have you
17 seen any other area on the house that's going to require
18 repair?

19 A Yes

20 Q Where is that?

21 A On the back area of the porch where Bill Flaherty had
22 did come some cut-outs when I was out there He took a
23 little hole saw and cut some of the stucco areas off and
24 dug some rotted wood out similar to this and some other
25 areas further along the back of the house where he cut an

0323

1 area out and the wood was saturated where you could feel
2 it was wet and saturated

3 Q Let me show you what's been admitted as Plaintiff's 8
4 and ask if you recognize that

5 A Could you ask me the question again? I may not have
6 thoroughly answered it

7 Q Sure I think it will be easier with the picture

8 A Okay

9 Q The exhibit we just looked at -- Plaintiff's 21 --

10 A Right

11 Q -- that's on the front of the house?

12 A Correct

13 Q Tell me what Plaintiff's 8 -- What view of the house
14 is that?

15 A That's the rear elevation

16 Q Did you find damage on the back of the house similar
17 to what you found on the front?

18 A Bill showed us damage there when I was out there
19 So, yes, we found damage

20 Q Point out where that damage was

21 A There was damage -- I believe it was to the left of
22 this window and then there was wet wood at this area right
23 along the stairs

24 Q In your opinion to a reasonable degree of
25 professional certainty describe the work, the repair --

0324

1 I'm sorry -- the strip and re-clad and the repair of that
2 moisture-damaged wood What are the steps that have to be
3 taken?

4 A The damage there is a little bit different than the
5 damage in the middle of -- in the ribbon band In this
6 band here as we talked about a while ago is below the top
7 elevation of the slab So, we have this band that about
8 that one much of it maybe is behind the slab that the
9 concrete is poured up against it So, it's rotted away
10 and in order for us to repair that properly we have to
11 jackhammer up the back porch area to gain access to it,
12 repair it, and then flash it again properly because the
13 only way to flash it again properly is to have access to
14 it, waterproof it, and then put everything back together
15 and in doing so the tiles - The new tiles won't match
16 So you'll end up having to replace the tile at least at
17 the outer edge of the porch here to make sure it all
18 matches again Otherwise, it'll look like a patch across
19 the patio on the back of the house

20 Q Mr Cooper, thank you Let me show you what's been
21 marked Plaintiff's 19 Describe for me what that is

22 A That's my bid sheet My bid sheet is It's a
23 paperwork that we have on the computer where we have a
24 list of items and a list of - We used the items that are
25 applicable to a certain house that we need to do In

1 other words, if like this house, for example the first
2 item we have a permit dumps from Porta John where we have
3 to have monies in there to provide to get the permit and
4 the dumpster and Porta John out there on the job site and
5 it goes on down the list of different items that we need
6 and the costs of those items to develop our price to do a
7 reclad

8 Q This itemized sheet of repair costs, what does that
9 total up to?

10 A You handed me this exhibit I didn't explain the
11 backside I didn't notice that was there

12 Q Please go ahead

13 A Okay This here is our numbers from our
14 measurements When we go out in the field we measure
15 every house We measure the walls We measure the
16 windows and come up with all of the necessary measurements
17 we need to develop this It is really two pages The
18 total cost for our reclad repair is \$201,416 but that
19 does not include the wood-rot damage that's hidden beneath
20 the wall That does not include the drywall damage that's
21 going to occur on the inside of the house from the beating
22 and banging and vibrating of the wall You know, some of
23 the drywall is going to crack You're going to have nail
24 pops There are going to be areas that need to be
25 refinished on the interior as well That does not include

0326

1 any floor repairs that may be required due to having to
2 repair the wood-rot underneath that area

3 Q In your experience how often are additional repairs
4 unanticipated repairs, how often do they occur?

5 A Every time

6 Q Every time?

7 A Yes

8 Q I show you Plaintiff's 20 and ask you to identify
9 that document

10 A This is our proposal which is the proposal for our
11 price to repair the house

12 Q Does it have a contingency in there for this
13 unexpected damage that you testified about?

14 A Yes, it does

15 Q How accurate do you think that will be?

16 A This one may be low It usually runs somewhere
17 between 10 and 20 percent and here we have \$16,000 is my
18 estimate for wood rot and ancillary damage So, that's
19 less than 10 percent We try to be accurate but

20 Q So in your opinion to a reasonable degree of
21 professional certainty can you tell me today how much it's
22 going to cost to fix this house to the penny?

23 A No

24 Q In your opinion to a reasonable degree of
25 professional certainty what is your best estimate as to

0327

1 what the cost will be to repair - and I -- Let me be
2 specific I'll ask that again In your opinion to a
3 reasonable degree of professional certainty what would be
4 the best estimate of the cost to remove the EIFS fix the
5 underlying damage, and put the house back together with a
6 brick or hardcoat stucco system?

7 A Greater -- okay, not brick That would be a whole
8 lot more money than what I'm about to say

9 Q A hard coat stucco

10 A It would be my \$201,415 plus the \$16 000 It would
11 probably be slightly greater than that

12 Q Now, Mr Cooper, you know the defense expert Artie
13 McClure, correct?

14 A I know of him I don't believe we ever spoke, but I
15 know he was a member of CLAPCA, Carolina Lathing and
16 Plastering Contractors Association I have read some of
17 his literature I respect him and admire him for the work
18 that he's done in the EIFS industry

19 Q He's not going to agree with your bid, though, is he?

20 THE COURT Mr Phillips I am not going to let you
21 put witnesses like I didn't let Mr Blackburn yesterday

22 MR PHILLIPS I understand, Your Honor, and I
23 apologize

24 Mr Cooper, are you familiar with writings and
25 opinions of Mr McClure in general when it comes to

1 barrier EIFS homes?

2 THE WITNESS Yes

3 Q What does he call for?

4 A Remediation repairs

5 Q Leaving the system in place?

6 A Correct

7 Q In your opinion to a reasonable degree of
8 professional competency is a repair of a barrier EIFS
9 home - a repair of the Babaee home possible?

10 A Certainly not

11 Q Could you do it? Could Prime South do it?

12 A We re not allowed to

13 MR PHILLIPS Your Honor, may I approach with a
14 matter of law?

15 THE COURT I know what you want to do You don t
16 even have to tell me

17 MR PHILLIPS I understand

18 THE COURT Mr Foreman ladies and gentlemen very
19 quickly I'm going to take a short break The next
20 question he wants to ask -- I know what it is -- deals
21 with something I have to deal with to make sure it's
22 proper before -- before I let y'all hear it or decide not
23 to let you hear it Step out for just a few minutes

24 It's almost 11 So, if we want to go ahead and take
25 our morning break we'll do that, but don't discuss the

0329

1 case Do not deliberate Thank you

2 (Whereupon, the jury exited the courtroom at 10 51)

3 THE COURT Mr Phillips I assume what we're going
4 to ask now is the reason why he can't do that type of
5 repair?

6 THE WITNESS Exactly, Your Honor

7 THE COURT Because he can't get insurance for it?

8 MR PHILLIPS That's correct And he has done the
9 type of repair that Moisture Free Warranty has called for
10 That's why when I qualified him he testified to his
11 abilities He s done the work It doesn't work, and he
12 can t do them The reason he can t do them is because he
13 can't get insurance to do them

14 THE COURT What is your position?

15 MR BLACKBURN My position is that he can get
16 insurance Your Honor It might cost him a little bit
17 more money

18 THE COURT That s not the issue The issue is
19 whether or not I let insurance come in in the trial of
20 this case

21 MR BLACKBURN We don't want to let it in at all

22 THE COURT Why?

23 MR BLACKBURN Because it's not relevant

24 THE COURT Well, if you re going to say he can do
25 the repair work and one substantial reason he can't is

0330

1 because he can't get insured to do it --

2 MR BLACKBURN But he can Your Honor There are
3 insurances out there

4 THE COURT I'll let you cross examine him on that

5 MR PHILLIPS Your Honor, just for the record the
6 exhibit A to our motion that we attached is a Frank
7 Guidera -- someone Moisture Free Warranty sent to the
8 Babaee house before litigation began who was paid to come
9 back and look at the house and gave a deposition in this
10 case and he raises that some concern back in 2002 in an
11 affidavit

12 THE COURT Well normally, insurance is not allowed
13 in the litigation but there are certain areas where there
14 is an exception to it and I think in this case where they
15 hadn't got anything to do with whether or not they
16 breached the warranty, I think it would be relevant for
17 the jury to understand why he alleges he cannot do the
18 repair that you say he can do, and, certainly I will
19 allow you to cross examine him If you think he can get
20 insurance and you can prove it, you can ask him all that,
21 but I think it's relevant to the issues in the case

22 MR PHILLIPS I appreciate that

23 THE COURT Now, Mr Blackburn, to protect yourself,
24 make whatever objection you want to make

25 MR BLACKBURN I want to renew my objection Your

0331

1 Honor, and be allowed to cross examine Mr Cooper about
2 why he can get insurance and there are companies out there
3 that will write insurance for repair contractors

4 THE COURT If I allow him to testify that he can't
5 get insurance and that's one of the reason he can't do the
6 repair, you have wide open latitude at him Both barrels

7 MR BLACKBURN Thank you

8 MR PHILLIPS Thank you, Your Honor

9 THE COURT See if they're finished with the bathroom
10 -- I'll tell you what Everybody need a little bathroom
11 break? I m sorry

12 THE WITNESS I can step down?

13 THE COURT But on the record you're in the middle of
14 your testimony Don't discuss the case with either
15 side -- lawyers, witnesses, parties, anybody

16 THE WITNESS Yes, sir

17 THE COURT We ll take about a 10-minute break

18 (Whereupon, a break was taken)

19 THE COURT All right Gentlemen, what I intend to
20 tell the jury I am just going to tell the jury normally in
21 most cases the insurance has nothing to do with a case I
22 will explain to them that the introduction of it in this
23 case is simply an explanation for why he can't go do the
24 repair or I anticipate that being the case with the
25 Defendant having ample opportunity to cross examine him on

0332

1 all issues concerning it, but it has no other relevancy
2 other than for that fact for curative instruction

3 Anybody have any problem with that?

4 MR PHILLIPS No objection, Your Honor

5 THE COURT Any objection?

6 MR BLACKBURN No objection giving --

7 THE COURT The curative instruction -- still
8 remaining your objection as to the introduction of it
9 correct?

10 MR BLACKBURN Yes sir

11 THE COURT Very well You're protected

12 (Whereupon, the jury came into open court at
13 approximately 11 07)

14 THE COURT Mr Foreman, ladies and gentlemen the
15 Defendant - strike that The witness has testified that
16 he was unable to do this certain type of application and
17 I - because of some pretrial matters I know one of the
18 reasons he says that he can't do it and we're going to
19 allow those questions to be asked and it involves
20 insurance Normally, when we try cases -- you and I get
21 in a wreck with each other and I'm at fault whether or
22 not I have insurance has nothing to do with the trial It
23 is totally irrelevant If I am a doctor and botch an
24 operation, whether or not the doctor has insurance is
25 totally irrelevant to the trial of the case, and normally

0333

1 insurance questions are irrelevant in the trial of a case
2 but it's when it's for the limited purpose of an
3 explanation as to why somebody can or can't do something
4 such as it is in this case I am going to allow certain
5 questions to be asked and give the Defendant full
6 opportunity to cross examine him on that

7 So, if one of the reasons this witness gives that he
8 can't do this particular application because he can't get
9 insurance please accept it and give it whatever weight
10 you want to give it but just for that one reason and one
11 reason only because it has nothing to do with the
12 underlying dispute between the Plaintiff and the
13 Defendant

14 Now I notice they put all of that exhibits around
15 what I like to do normally, Mr Phillips I like that jury
16 paying attention to the testimony They will have all of
17 those exhibits back in the jury room and have full access
18 to it and I notice some of them were looking at it
19 They re going to have an opportunity to do so but I want
20 them to pay full attention to the witness Then we'll
21 give that to them at the the appropriate time

22 MR PHILLIPS Thank you, Your Honor

23 THE COURT Any objections to my instructions
24 concerning the use of or the introduction of insurance in
25 the trial of this case -

1 MR PHILLIPS No objection from the Plaintiff

2 THE COURT - per my instructions?

3 MR BLACKBURN None, Your Honor, per your
4 instructions

5 THE COURT And you're still protected as we said

6 MR BLACKBURN I am still continuing my objection

7 THE COURT Your objection is noted You may
8 proceed

9 MR PHILLIPS Thank you, Your Honor

10 Q Mr Cooper you testified your company can't perform
11 repairs of EIFS Tell the jury why

12 A We're not allowed to under our current general
13 liability insurance policy Obtaining insurance to do
14 this type of work is cost-prohibitive It would triple
15 our amount of our current general liability insurance, not
16 to mention we know the repairs don't work So it doesn't
17 make sense to get insurance to do something that you don't
18 want to do because you know you're going to get sued for
19 it Basically our current general liability insurance
20 won't cover it and it'll triple it to get coverage for it

21 Q Let me -- let's just focus on the insurance issue for
22 a moment Could you get insurance if you were willing to
23 pay a certain premium?

24 A If you got the money and you're willing to pay it,
25 you can get the insurance

0335

1 Q Okay How --

2 A You can insure anything

3 THE COURT He just testified that it would triple

4 it Let's move along

5 MR PHILLIPS Thank you, Your Honor

6 Q Let's take insurance out of it

7 A Okay

8 Q Let's say insurance wasn't in here In your opinion
9 to a reasonable degree of professional certainty, would
10 you repair the Babae home?

11 A Certainly not

12 Q Explain to the jury why

13 A Because we'll be sued Quite simply the repairs are
14 ineffective I can go into detail about some of the
15 repair mediations you know if the -- The barrier EIFS
16 system is a band system that does not work even if it was
17 put in installed under perfect conditions which it
18 wasn't then applying repairs to it like caulking against
19 the stucco finish coat which is not recommended by the
20 manufacturer's insulation instructions certainly wouldn't
21 help it So, the repairs are of a substandard to the
22 original application instructions

23 So taking a system with a broken leg and putting a
24 bandaid on it it won't work It kind of reminds me of a
25 commercial I saw where they have a couple of inspectors

0336

1 walking by a dam and a little bit of water is spurting out
2 of the dam and they take a piece of bubble gum out of
3 their mouth and they stick it in that hole and give each
4 other a nod and they keep on walking considering it fixed,
5 and that s exactly what we're looking at It would be
6 like putting bubble gum on the dam and that doesn t fix
7 the underlying damage that's still there That may
8 temporarily resist some of the water from getting in, but
9 you'll still have a bunch of issues that you have to deal
10 with and a tremendous amount of maintenance -- not as much
11 maintenance as cutting the grass but probably one step up
12 in regards to home maintenance

13 Q Let me ask you you said that you re afraid of being
14 sued What would be the basis of that lawsuit?

15 A That we did repairs on a house and the house had
16 problems still existing with it and someone suffers
17 damages and they need to fix those damages and they come
18 to us and our coverage provider to settle it

19 Q In your opinion to a reasonable degree of
20 professional certainty would the type of repairs that are
21 part of the moisture free warranty program do they work?

22 A No

23 MR PHILLIPS Mr Cooper that s all I have Please
24 answer any questions -- oh, I apologize One last
25 question

0337

1 THE WITNESS Okay

2 Q In your opinion to a reasonable degree of
3 professional certainty would the bid that's been put into
4 evidence, would the work described in the bid -- the cost
5 in the bid - cover the strip and re clad of the Babae
6 home?

7 A I would hope so I am reluctant because I don t know
8 would the allowance cover all of the hidden damages

9 Q Take the hidden damage out Just for the strip and
10 re clad and repair of the known damage, would that bid
11 cover those costs?

12 A Yes it would

13 Q And there would be additional charges for additional
14 damage discovered during the process?

15 A Additional damage discovered plus additional damage
16 caused by the destruction to the drywall on the inside of
17 the house because of the wall vibration cracks nail
18 pops

19 Q Why does that damage occur? I mean could you be
20 careful and not cause the damage? I mean, that's not to
21 cover your carelessness, is it?

22 A No It s not due to carelessness Typically, when
23 you build a house you frame the wall and then you do the
24 exterior cladding and then you do the drywall last Okay?
25 When you install drywall you install it with screws and

0338

1 you have a sheetrock that goes over the top of those
2 screws and on the seams and it is just a little layer of
3 mud sheetrock compound going over the top of the screw
4 Well, when you remove the stucco from the house you're
5 kind of scraping it and pushing it and the wall is
6 vibrating and shaking When you're repairing the wood rot
7 you might have to remove some of the drywall plus you're
8 doing a lot of beating and banging

9 So, the interior walls are getting a lot of
10 vibration, and it causes cracks in the seams and it causes
11 the little piece of sheetrock compound joint that's on top
12 of the nails to pop out and due to that you got to repaint
13 wall surfaces -- typically not just a spot because it
14 won't blend in You got to go from corner to corner If
15 it's wallpaper on the inside that's even more expensive
16 A lot of times you can't match it You might have to do
17 the entire room, and, also you may have to deal with
18 trimwork on the inside as well

19 Q So, the scraping process you talk about scraping
20 this from the wood?

21 A Yes, well, scraping it or if it is mechanically
22 attached prying it off and that's going to cause a wall
23 vibration and when you're installing the new system there
24 is a degree of wall vibration from you know, nailing up
25 whatever, you know, the weather barrier that you have to

0339

1 nail up, screwing into the studs the new system you have
2 to apply So, there is a lot of wall vibration taking
3 place that causes damage to the drywall on the inside of
4 the house

5 Q Let me have you -- do you have your proposal?

6 A Yes

7 Q Based open Plaintiff's exhibit 20 in your opinion to
8 a reasonable degree of professional certainty what is the
9 lowest cost of fixing the Babae home?

10 A At best would be the 201 415 plus the \$16,000 At
11 best

12 MR PHILLIPS Thank you, Mr Cooper Please answer
13 Mr Blackburn's questions

14 THE WITNESS You're welcome

15 THE COURT Mr Blackburn?

16 CROSS-EXAMINATION

17 BY MR BLACKBURN

18 Q Mr Cooper, how are you doing?

19 A Doing good

20 Q Good to see you again

21 A Good to see you

22 Q You were in the room when Mr Flaherty testified
23 today, weren t you?

24 A Yes, sir

25 Q Did you hear Mr Flaherty testify that this house

1 could be repaired, retrofitted but for the vapor retarder?

2 A I was reviewing some documents when he was
3 testifying I didn't hear everything he said So, I did
4 not catch all of that

5 Q Would you agree with Mr Flaherty --

6 THE COURT Mr Blackburn, Mr Phillips
7 (Whereupon, a bench conference was held)

8 Q You said you went out to the Babaee house the first
9 time about four years ago, right?

10 A I believe it was about four years ago, correct

11 Q And you went out there with Frank Clark

12 A I met Frank Clark out there

13 Q What was the purpose of that visit?

14 A I don't recall

15 Q You don't recall?

16 A Correct

17 Q Did you ever give someone an estimate at that time to
18 fix the house based on the Clark report?

19 A I don't recall doing that

20 Q You don't recall?

21 A Correct

22 Q Well, what were you out there doing?

23 A Discussing the exterior building envelope I'm sure
24 of that The nature of it I am not sure or don't recall

25 Q And what discussions did you have with who?

0341

1 A Can you clarify that?

2 Q Yea Did you talk with Mr Clark about the house
3 the condition of the house?

4 A Of course

5 Q And what did you tell him your opinion was at that
6 time based on the Clark report that you saw?

7 A As I mentioned, I don't recall I don't recall him
8 showing me a report at that time I recall meeting him
9 out there and I recall discussing the exterior building
10 envelope I don't recall whether was it discussing
11 stripping and removing everything or was it discussing
12 repairing stuff It was four years ago I had millions
13 of conversations with a lot of different people since
14 then I honestly do not recall

15 Q Why did you go out there? Why did Mr Clark have you
16 out there?

17 A I don t recall

18 MR PHILLIPS Your Honor asked and answered

19 THE COURT All right He said he doesn t remember
20 why he went out there Move along, please

21 Q And you never gave an estimate or you don t recall
22 giving an estimate to anybody at that time to repair that
23 house?

24 MR PHILLIPS Same objection

25 THE COURT Mr Blackburn, please listen to me when I

1 ask you to move on He's answered that at least two or
2 three times Please don't make me fuss at you

3 MR BLACKBURN Thank you, Your Honor

4 Q And you said that you are not allowed to repair
5 homes is that right?

6 A That's correct

7 Q And you re not allowed to repair the homes why?

8 A Because the -- our current general liability
9 insurance does not cover and obtaining that insurance
10 would about triple our current general liability insurance
11 and it would be cost prohibitive as well as from our
12 experience in doing this work which is a lot of experience
13 in doing this work we know it doesn t work repairing the
14 houses and we d prefer to avoid litigation

15 Q But you could get insurance if you wanted to pay for
16 it then, couldn t you?

17 A That's what I said

18 Q And there are other repair contractors out there that
19 you know that do retrofit and repair homes isn't there?

20 A That have insurance I don t know

21 Q My question was are you aware of contractors out
22 there that do retrofit?

23 A Is Moisture Free Warranty considered a contractor? I
24 am not aware of ones that do I think maybe Frank
25 Guidera, Performance Exteriors I believe he does

0343

1 repairs, I think

2 THE COURT If you know If you know

3 THE WITNESS I believe Frank Guidera does

4 Q That's the only one you know?

5 A That's the only one I know

6 Q And you said that you've studied -- you re a member
7 of CLAPCA, right?

8 A I was I no longer am

9 Q When did that happen? When were you no longer a
10 member of CLAPCA?

11 A A few years ago CLAPCA was a very active
12 organization and I found it very beneficial going to the
13 meetings going to the seminars and listening to the
14 speakers, and it started with a bang pretty strong good
15 group of people together and then it seemed to me where
16 people started dividing and taking sides then it kind of
17 fizzled out where it wasn't really as viable of an entity
18 as it was and I disagreed with you know, based on our
19 experiences of trying to repair barrier EIFS homes
20 spending \$18,000 for a patent to develop this pan for the
21 window to retrofit an existing barriers EIFS home that it
22 doesn't fix the problems beneath it So I took the
23 position that I disagreed with the positions of CLAPCA
24 So, I quit becoming a member of them

25 Q When was that?

0344

1 A I don't know the exact time Maybe '98 to 2000
2 somewhere in between there

3 Q I'd like to hand you a copy of Defendant's exhibit
4 no 48 and ask you to identify it

5 THE COURT That's been marked for identification?

6 MR BLACKBURN It's been marked for identification,
7 yes, sir

8 Q Chris do you recognize Defendant's exhibit no 48?

9 A No

10 Q You don't recognize it?

11 A Nope No, sir

12 Q Would you read what the top part of it says?

13 THE COURT He said he didn't recognize it

14 MR BLACKBURN Okay All right Thank you I'll
15 move on

16 THE COURT You'll have to put it in there through
17 someone else

18 Q You also are a member of EIMA, right?

19 A No longer

20 Q No longer a member of EIMA?

21 A Correct

22 Q And you said - You testified that homes can't be
23 repaired, right?

24 A Correct

25 Q Okay Let me ask you if you're familiar with

1 Defendant s exhibit no 60?

2 THE COURT That's Defendant s 60 ID, but not
3 introduced Do you recognize it?

4 THE WITNESS I don't

5 Q You don't? And you said you were out at the house
6 the first time about four years ago, right?

7 A I'm sorry Repeat that

8 Q You were out to Bobby's house the first time about
9 four years ago right?

10 A I believe about three years ago

11 Q And when was the second time you went out to the
12 house?

13 A I believe within six months ago

14 Q Within six month ago?

15 A I believe it was in - It was this past summer I
16 recall it was a very hot day

17 Q And what was the purpose of that inspection?

18 A To meet with Sam, to meet with Bill Flaherty to see
19 the cut-outs that he was doing and the damage that he was
20 discovering and also to measure up the house so we could
21 develop a price for reclad

22 Q Was my client there during that inspection?

23 A The only people that were present were me Mitch
24 Carpenter is an employee of mine, Sam Phillips, and Bill
25 Flaherty

- 1 Q I see And during that inspection you cut open this
2 bottom part of the house, right? And I'll identify it
3 A No, I did not
4 Q Did you not cut open that?
5 A You asked me during that inspection we cut that out?
6 Q Right
7 A No
8 Q So, I guess at a subsequent inspection?
9 A Correct
10 Q Was my client at that subsequent inspection?
11 A I don't know
12 Q And you attribute that damage in this area depicted
13 on Plaintiff's exhibit no 21 as resulting from this
14 kickout failing right?
15 A Without a doubt
16 Q Without a doubt?
17 A Correct
18 Q And when a kickout fails -- were you in the room when
19 Mr Flaherty said kickouts --
20 THE COURT Sir, sir
21 MR BLACKBURN Okay I m sorry
22 And when kickouts fail Mr Cooper, doesn't water
23 generally run down the side of the house like this?
24 A Correct
25 Q Okay So, you would expect there to be elevated

0347

1 moisture contents up in here right below the kickout
2 depicted on Defendantt's exhibit 1, page 23 You would
3 expect there to be damage in this area, wouldn't you?

4 A Not always

5 Q Not always?

6 A Correct

7 Q But if water runs downhill, then you would expect it
8 to be generally there wouldn t you?

9 A Not always

10 Q Why wouldn't it?

11 A Because in this situation if you'll take that off and
12 I can explain it better --

13 Q Okay

14 A -- do you see the top of the cutout there is some
15 felt paper there --

16 Q Right

17 A -- that's behind the poly -

18 Q Just for the record we're looking -- I don't mean to
19 interrupt you --

20 A Okay

21 Q -- at Plaintiff s exhibit no 21

22 A Okay Okay All right It appears that this area
23 had been repaired one time where someone had taken some
24 felt paper and applied it to the wall behind a
25 polyisocyanurate system behind the kickout in to where the

1 water ran down and it was on the outside of the felt paper
2 and was not stopped or soaked into the wood but the felt
3 paper ended -- It terminated short of the bottom and so
4 the water ran down the outside of the felt paper and then
5 it gathered at that wood and created these little bags of
6 fertilizer that we see

7 Q Did you find any evidence of damage above that area?

8 A I don't believe -- I don't recall

9 Q And you said you believe this area has been repaired,
10 right?

11 A That s correct

12 Q I ve got exhibit -- Defendant's exhibit no 60 which
13 is a series of photographs Chris, that I would like to
14 ask if you recognize, if you could identify them

15 Sam?

16 MR PHILLIPS No objection Your Honor

17 MR SHEFTMAN What exhibit number?

18 MR PHILLIPS What number, please?

19 Q This is Defendant's number 59 Chris let s start at
20 the first page Do you recognize that photograph?

21 A Yea, this is a photograph of that area there
22 different angle

23 Q And you took that photograph right?

24 A I believe my estimator took the pictures on this one

25 Q You were out there right?

0349

- 1 A Our company took the pictures
- 2 Q And the second page of Defense exhibit no 59, you
- 3 took this photograph, too, didn't you?
- 4 A Mitch took the pictures, I believe
- 5 Q Maybe -
- 6 A Our company took the pictures, yea We took
- 7 pictures
- 8 Q Do you see in this photograph, second page of
- 9 Defendant s exhibit no 59 do you see what looks like a
- 10 water stain on top of that sill plate?
- 11 A It s kind of hard to tell in the picture but, yea, I
- 12 suppose
- 13 Q Does that look like a puddle of water sitting on top
- 14 of that sill plate to you?
- 15 A I can't tell by this picture It may be
- 16 Q And then the third picture, this is the condition of
- 17 the framing after you had moved what you referred to as
- 18 top soil, right?
- 19 A Correct
- 20 Q Okay And that framing behind the OSB you took out,
- 21 does that look significantly damaged to you?
- 22 A It is hard to tell by the picture The framing may
- 23 not look that bad and then you stick a screwdriver in it
- 24 and it goes straight through it So
- 25 Q We hadn't gotten there yet

0350

- 1 A Well, you asked me --
- 2 Q What I'm asking you about is this picture --
- 3 THE COURT Sir, let him finish his answer, please
- 4 THE WITNESS I believe I m finished
- 5 Q Are you finished?
- 6 A Sure
- 7 Q There is no screwdriver depicted in the third page of
- 8 exhibit no 59 is there?
- 9 A I don't see one
- 10 Q My question was the framing that you see here isn t
- 11 as damaged as the OSB you took off, is it?
- 12 A It doesn't appear to be
- 13 Q And then the fourth page is, basically, the same
- 14 picture, same location, right? Same location?
- 15 A I believe it to be the same location
- 16 Q Okay And this picture has a photograph of the
- 17 plastic vapor retarder back there doesn't it?
- 18 A That is a vapor barrier
- 19 Q Vapor barrier But it doesn t go all of the way to
- 20 the bottom of the sill plate, does it?
- 21 A The vapor barrier?
- 22 Q Right
- 23 A I can't tell if it goes all of the way to the bottom
- 24 or if it s lobbed there for some reason, but it does
- 25 appear that it does not go to the bottom

0351

1 Q It is terminated by the sill plate, right?

2 A That's what appears to be

3 Q So, this house isn't completely wrapped in plastic
4 vapor retarder by your photographs, is it?

5 A Well, we just said that it doesn't go all the way

6 MR PHILLIPS Your Honor, I object

7 THE COURT What is your objection?

8 MR PHILLIPS This is beyond the scope of the
9 direct

10 THE COURT Overruled Tell us about the vapor
11 barrier Is it wrapped all the way around?

12 A You can't tell by the pictures it wrapped all the way
13 around You can just see that it's not to the bottom of
14 the wall at this spot

15 Q So it has an area for moisture to go into the
16 drywall the inside of the house in this area, doesn't it?

17 THE COURT Wait a minute Let the moisture go into
18 the drywall?

19 MR BLACKBURN Yes

20 This -- Chris, I mean, you're a contractor, and I
21 don't want to belabor the point but the jury might not
22 know --

23 THE COURT Sir, just ask your question

24 MR BLACKBURN Yes, sir

25 The drywall -- Your Honor, this cladding is stuck on

0352

1 the frame, right, Chris?

2 THE WITNESS It's attached to the framing

3 Q And the framing when you're talking about the nail
4 pops and all of that stuff on the interior when you have
5 to strip and reclad this house, where is that sheetrock
6 that's going to be damaged by the nail popping and stuff?
7 Isn't that generally on the other side of the framing?

8 A Yes, inside the house

9 Q So, in this photograph the vapor retarder is cut
10 short of the sill plate right?

11 A It appears to be

12 Q So any moisture that were trapped between the vapor
13 retarder and the synthetic stucco --

14 A Vapor barrier

15 Q -- would have an avenue to go into the house right,
16 and dissipate wouldn't it?

17 A And dissipate?

18 Q Or just --

19 A Yea, I guess water could come down here and get
20 inside the house

21 Q Okay

22 A It could

23 Q So, the vapor retarder really isn't a barrier at that
24 point in this fourth page?

25 A Well, now, you do have a vapor retarder here as well,

0353

1 I believe I believe this would be Kraft-Faced Insulation
2 which doubles as a vapor barrier, vapor retarder So
3 we're talking retarder or barrier

4 Q You're talking about the --

5 A The insulation

6 Q -- the yellow insulation Yea, the backside appears
7 to have paper on it which is paperface insulation which is
8 a supplement to having a vapor barrier on this side too

9 Q And you had to have insulation like this yellow
10 insulation pursuant to the code when this house was built
11 right?

12 A That's correct

13 Q So there is nothing unusual to have this inside the
14 wall cavity, is it?

15 A Correct

16 Q This is nothing unusual to have a vapor retarder
17 inside the wall cavity pursuant to code either, is there?

18 A Pursuant to code correct

19 Q Let's go to the fifth page and this is where you have
20 -- Is that your finger?

21 A I don't think so I think it might be Mitch's
22 finger

23 Q What is the significance of this photograph on the
24 the fifth page?

25 A Well the areas that you're pointing out the framing

1 that didn't appear to have as much damage as the bags of
2 rotted OSB, he's sticking his finger into the frame, and I
3 mentioned to you that you may could stick a screwdriver in
4 there and it's kind of hard to look at it and this is
5 similar You're looking at it in the picture and you
6 can't tell that it's rotted, but with his finger in there,
7 I mean --

8 Q Yea

9 A I can t stick my finger through this but I can stick
10 my finger through that bag of wood rot

11 Q Right Let's turn to page 6 and this is the same
12 area, right? it is just kind of enlarged, right?

13 A Which is page 6?

14 Q The next page

15 A 0071 at the bottom?

16 Q 0071

17 A Okay The picture with another finger shoving into
18 the wooden plate?

19 Q Yea So you think that this photograph is typical of
20 the wood-rot and decay where you can stick your finger in
21 it even in areas where you hadn't stuck your finger in it,
22 right?

23 A I'm sorry Can you ask me that question again?

24 Q You got your finger stuck in that sill plate right?

25 Or someone's finger

0355

1 A Right

2 Q Would you be able to do this and in the area of
3 the framing on the first page of exhibit 59?

4 A Like in the picture here?

5 Q Yea, well, this is the condition before you removed
6 all of the OSB, right?

7 A Right

8 Q And the first page of exhibit 59 is after you removed
9 the OSB right?

10 A Okay Correct

11 Q What I am asking you is would you be able given the
12 in your opinion the degraded condition of the sill band
13 right here and the framing, would you be able to stick
14 your finger in more than one area like you have in the
15 sixth page of exhibit 59? Is that a typical condition?

16 A If I understand your question, are you asking me can
17 you stick your finger in other wood-rotted areas?

18 Q Yea Like this

19 A Yes Yes

20 Q Did you stick your finger in other areas of wood rot
21 like this?

22 A On the back of the house, I did

23 Q The back of the house?

24 A I know my finger was I don't know whose finger this
25 was

0356

1 Q Do you have any photographs -

2 THE COURT It doesn't matter whose finger it was

3 Just answer the question

4 Q Do you have any photographs of that condition?

5 A You do

6 Q I do?

7 A Yea, in the Bill Flaherty report

8 Q In the Bill Flaherty report Which Bill Flaherty
9 report?

10 A The one the pictures he produced where he cut out
11 holes in the back of the house where he showed rotted
12 damage in that hole --

13 Q And there's --

14 A -- above the porch

15 Q And there's a picture in there of someone's finger
16 stuck in --

17 A Oh a finger in there? I don't know if there is a
18 finger in that picture or not

19 Q Okay And let's look at page 7 of exhibit 59

20 A Would that be 0072?

21 Q That's right 0072

22 A I gotcha

23 Q Okay Did you stick your finger in that sill plate
24 before or after that crowbar was stuck into that sill
25 plate?

0357

1 A I don't recall exactly where I was at in relation to
2 the house when this was taken So, I don't know was that
3 done before or after if these pictures are taken in
4 sequence - chronological sequence or not So

5 Q Let's look at 6 and compare that with 7

6 A Six is 0071

7 Q That s right

8 A Okay

9 Q And 7 is 0072 You would agree with me there s a it
10 looks like a rusty nail to the left of the finger depicted
11 on page number 6 of 59, right?

12 A Yes

13 Q And then on page 7 of 59 it looks like that same nail
14 is right there right?

15 A Yes

16 Q Okay And so we can pretty assume that that
17 crowbar that was stuck or hammered -- Do you know who -
18 Was it hammered into that sill plate?

19 A I don t know if it was hammered or just shoved in
20 there or what So

21 Q All right But it was definitely shoved in the sill
22 plate, right?

23 A It looks like it yes

24 Q And you don't know if it was done before or after you
25 stuck your finger in there, right?

0358

1 A No Correct

2 Q Okay Now, let's get to page 8 That's just another
3 typical condition

4 A You shouldn't be able to shove a prybar in that sill
5 plate anyhow if it was in good condition, though

6 Q If you took a hammer and a crowbar --

7 A If you took a hammer and a crowbar in it it would
8 splinter up in large chunks of splinter It wouldn't come
9 off in little shreds of rotted wood

10 Q I mean, if you look at page 7 --

11 A Is 7 0073?

12 Q 0072

13 A I'm sorry I'm there

14 Q There is really no extensive rot Where are those
15 bags of that stuff?

16 MR PHILLIPS Down to the side

17 Q I mean that framing is not in the condition of that
18 is it? It doesn't look like -

19 A I believe there is one bag that has kind of a similar
20 condition, but no this is certainly not in that
21 condition

22 Q Now let's look -- I will turn the page on page
23 number 9

24 A Nine is 0073

25 Q Seven eight

1 A 0078? Okay I'm there

2 Q And this was, basically, the cut that you took out
3 initially, right?

4 A This is the cut that Prime South took out Correct

5 Q And that's where you got the wood rot on Plaintiff's
6 exhibit 35, right?

7 A Can I clarify when you say me, you're speaking of
8 Prime South our company no matter whether it's me,
9 Mitch or Prime South?

10 Q Yea

11 A Okay

12 Q Yea

13 A I'm sorry I apologize for interrupting

14 THE COURT Is that where you got the stuff in that
15 bag?

16 THE WITNESS Yes

17 Q And then when you removed it it didn't look that bad,
18 did it?

19 A No, it still looks bad

20 Q Not as bad as before though right?

21 A Is your question does the framing look as bad as the
22 OSB?

23 Q That's right

24 A Certainly not OSB is more prone to soaking up
25 moisture and water and damaging that framing is

0360

1 Q Let's flip to page 10

2 A Is 10 0081? 0079?

3 Q It is the next page and it's bates labeled down at
4 the bottom 0079

5 A Okay

6 Q Now, flip the page Turn the page and let's look at
7 the next page It is bates labeled Cooper 0081

8 A I see it

9 Q Okay Now this is -- Where - Let me see Let's
10 just pull out this one This photograph, Cooper 0081,
11 Defendant's exhibit no 59 page 11 this area is prior to
12 any test cuts, right?

13 A I can't see below it So, I don't know is it prior
14 to the test cut below it It's not prior to any test
15 cuts There were other test cuts on the building Maybe
16 clarify that for me

17 Q Okay You hadn't done a test cut in the area on page
18 11 of 59 at this time had you?

19 A I don't believe so

20 Q And the area on Cooper 0081 59 is this area I am
21 pointing to on page 23 of Defendant's exhibit no 1 under
22 that knockout that you believe is failing causing that
23 damage, right?

24 A Yea from a different angle because the tree is
25 obstructing it

0361

- 1 Q Right That's generally the area
- 2 A Oh, that is the area, yes
- 3 Q Let's turn the page
- 4 A 0082?
- 5 Q Right
- 6 A Okay
- 7 Q And that 0082 is before the cut That s in the same
- 8 area Flip the page to Cooper 0084
- 9 A Okay
- 10 Q Now is there a test cut in that area?
- 11 A Yes
- 12 Q Where is that test cut?
- 13 A It s a couple of feet below the kickout That's
- 14 where I was telling you about why the water ran down
- 15 because there is some felt paper there and so the water
- 16 didn't collect there That is one of the reasons I
- 17 believe it to be a repair at some time That's why the
- 18 water collected at the bottom and not there
- 19 Q So there was a repair in that area, right?
- 20 A That's what it appears to be
- 21 Q That let s flip to page 14 That's Cooper 0085
- 22 A Eight five?
- 23 Q Eight six
- 24 A Okay
- 25 Q And that s where the test cut was made That shows a

1 close-up where the test cut was made right under the
2 kickout?

3 A Not a close-up, but a different view from the other
4 side Closer

5 Q And then flip the page to Cooper 0088 That s just
6 another close-up, right?

7 A Yes

8 Q Of the same area?

9 A Yes

10 Q Below the the kickout?

11 A And the felt paper has been cut

12 Q And you re talking about the felt paper?

13 A Obviously right below the kickout, yes

14 Q And did you make the cut in that felt paper?

15 A We did

16 Q You did?

17 A Yea

18 Q Why did you make that test cut?

19 A Well, I guess that area was arbitrary just to check
20 out the spot beneath the kickout to see what was there
21 The felt paper was seen there and the cut was made to see
22 was there wood-rot damage To our surprise one of the
23 other reasons why we believe this to be a repair spot it
24 appears that there is two different types of OSB which is
25 indicative of someone coming out and doing a repair

0363

1 Q Okay And let's flip the page You have gone ahead
2 of me On page Cooper 0089 that's where you --

3 A I'm sorry That's where I thought we were talking
4 about

5 Q No, we're on the other one

6 A Okay

7 Q But you can go on with your answer That s where you
8 have two different types of OSB which tells you there has
9 been a repair made in that area, right?

10 A It suggest there could be yes

11 Q But the OSB in this area where the repair was made
12 doesn't look like this does it?

13 A No It looks like newer wood

14 Q It looks more like this, doesn't it?

15 A It does

16 Q And you have no idea when those repairs were made do
17 you?

18 A I don't

19 Q But, obviously the sheathing is not rotten in that
20 area, is it?

21 A It s protected by felt paper

22 Q Turn the page to Cooper 0090

23 A Okay

24 Q And that's just another picture of it where the
25 sheathing is in good shape, right?

1 A Yes

2 Q Now, wouldn't you expect if the kickout was failing
3 generally -- and kickouts and windows would you agree
4 normally account for about 70 percent of the moisture
5 intrusion in the homes like the Babaees, right?

6 A I don't know if 70 is the right number but I would
7 say a lot You're probably accurate

8 Q Okay And, so you would expect if a kickout was
9 failing like you believe then there should be damage in
10 this area because it's almost directly under the kickout,
11 right?

12 A Not if there was a secondary weather barrier that
13 exists here

14 Q Okay

15 A You see the felt paper is a secondary weather barrier
16 so the water runs on the outside of that which protects
17 the wood It terminated short of the bottom That s why
18 the water collected at the bottom and rotted that area
19 out

20 Q Oh so that's your testimony because on the first
21 page you did mention there is a moisture barrier
22 The felt paper is depicted on the front in the first
23 page 59 --

24 A That stopped shy and the wood rot begins below that,
25 yes

0365

1 Q Well how do we really know that?

2 A Because we cut it out and looked at it

3 Q Okay But we don't have a photograph of the felt
4 paper

5 A You gave me one

6 Q Yea but we don't have it cut short

7 A It is right here

8 Q Yea but that's after you cut the hole right?

9 A Yea

10 Q Okay So, we don't have any indication that -- I
11 mean, you're saying that the first page of exhibit 59 is
12 where that felt paper terminated?

13 A Yes

14 Q Okay

15 A The felt paper did not continue all of the way to the
16 bottom

17 Q Okay So, that would have been an improper repair in
18 your opinion, wouldn't it?

19 A In my opinion, yes

20 Q Okay So, if you took the felt paper all the way to
21 the bottom, then it should be okay just like the condition
22 where it was above that area and below the kickout, right?

23 A Not necessarily

24 Q Okay Now, let's look at --

25 A If there was a means for drainage, then yes, it

1 would have, but if there was no means for drainage, then
2 water would run down and collect and rot in the bottom
3 area

4 Q And you're still saying that that water is coming
5 from the kickout?

6 A Certainly

7 Q Okay Now, let's look at the next page Cooper 0092

8 A Okay

9 Q And there is another little cut pretty much -- Where
10 is that area? Is it the left?

11 A Yea I believe it s to the left -- that little spot
12 right there where there is no kickout above it

13 Q Why did you make that test cut?

14 A I don t know I guess just to check to see was water
15 migrating on the bottom area I don't know -- To show
16 that water - There was not damage in that area not below
17 the kickout perhaps

18 Q And you didn't find any damage in the area depicted
19 on Cooper 0092 of exhibit no 59 did you?

20 A Not in that little tiny 2 X 2 cut-out, correct

21 Q Now let's just go to the next page Cooper 0093

22 A All right

23 Q There is a hand in there and what's the hand doing?
24 Scratching back to investigate the condition of the
25 substrate?

0367

1 A I believe that to be the case, yea

2 Q Okay And then flip the page to Cooper 0094 That
3 shows there is no damage in that area, is there?

4 A That's right

5 Q Okay Now, flip the page -- the next page -- to
6 Cooper 0095

7 A Okay

8 Q You took that photograph too, didn't you?

9 A We did, I believe

10 Q You did And why did you take that photograph?

11 A Because this -- Obviously, you see water coming
12 through the block Apparently, the elevation of the grade
13 on the outside is higher than the elevation of the crawl
14 space area You see all of way across the wall where it s
15 causing water to come in

16 Q Right And just for the jury when you say all the
17 way across the wall, you have a, basically, a nice little
18 line starting above that and that vent we talked about -
19 I wanted to ask you when you were testifying about
20 Plaintiff's exhibit 13 Is this right?

21 A I can't see is that 13, but if you tell me it is I
22 trust you

23 Q I believe it s 13

24 A Okay

25 Q And it looks like 13 Yea, it is 13

0368

1 A Okay

2 Q Is this a window?

3 A That's the corner of a window

4 Q Okay And your testimony is that this condition
5 lends itself to moisture intrusion, right?

6 A Most windows leak The crack between the sill which
7 is the bottom part of the window and the jam which is the
8 side --

9 Q Uh-huh

10 A -- you can obviously see a crack that s not sealed
11 They sealed it at the manufacturer and by the time it gets
12 shipped to the job site it s been bounced around and
13 jarred around and that seal comes loose Winter and
14 summer conditions allow it to expand and contract and it
15 becomes loose So that allows water to come in at that
16 area at most windows and gets behind the wall

17 Q You didn't do any moisture concentration readings
18 when you were out there anytime did you?

19 A I don t recall us doing that

20 Q Okay And you, basically relied open Mr Flaherty's
21 report to come up with your 201,000 or \$270,000 estimate,
22 didn't you?

23 A No I mean, I relied on it partly We ve done, like
24 I said, about 300 reclads, and, for example I bought a
25 house -- a synthetic stucco house and I had a report

1 showing a certain amount of damage on it and I made an
2 offer on the house I got it for a lower price because it
3 had problems They settled They got some money, and I
4 went by the reports to see what kind of damage I could
5 expect

6 Well, after I stripped that house it was about twice
7 as much damage as to what the reports indicated, and I had
8 about three to go by So it is very often that we do
9 recloads that there is damages in a lot of areas that these
10 reports don't show out The reports are kind of a
11 crap-shoot if you're trying to find the area, but you
12 don't know what's all there until you take it off

13 Q And we talked about that in your deposition, didn't
14 we?

15 A I don't recall exactly what we talked about in the
16 deposition

17 Q I took the deposition in July of this year?

18 A I recall you taking the deposition I don't recall
19 everything we talked about It was a long deposition

20 Q All right And the Flaherty report was a basis for
21 your strip and reloaded estimate, wasn't it? It's one of
22 them?

23 A Not really a basis, no Our basis was our past
24 experience on historically we see damage below water
25 intrusion -- water intrusion damages below penetrations

0370

1 like kickouts, windows, porch connections much like what
2 Ron McCoy has in his writings

3 Q Okay And speaking about that past experience I am
4 hearing you that, basically, your repair estimate came
5 from the past experience plus the --

6 MR PHILLIPS Your Honor, he's answered this several
7 times

8 MR BLACKBURN Not this particular question

9 THE WITNESS Ask me the question again

10 THE COURT Ask the question

11 Q The question is the basis for your cost estimate that
12 you gave for the Babaees to strip and reclad the house is
13 based on your experience and partly Bill Flaherty's
14 report right?

15 A Not really Bill Flaherty's --

16 THE COURT I tell you what You tell us what it is
17 based on How about that?

18 THE WITNESS It is based on our past experience and
19 knowing that wood rot occurs below water intrusion area
20 penetrations

21 Q Okay Now, let's get back to Cooper 0096,
22 Defendant's exhibit no 9

23 A Okay I see it

24 Q You on there?

25 A Yea

0371

1 Q We're talking about you said that the grade which is
2 -- just explain to the jury what you mean

3 A The height of the ground like where the lawn is,
4 where the grass is, the ground, we call that the grade

5 Q And the grade is higher than the interior crawl
6 space, right?

7 A Yea

8 Q The ground --

9 A No The grade of -- the grade is not higher than the
10 interior crawl space The grade of the ground on the
11 outside is higher than the grade of the ground on the
12 inside Is that what you meant?

13 Q That's what I am saying

14 A Okay

15 Q Yea, because -- and, for instance let's just for the
16 jury, for the court -- This photograph under the house
17 Cooper 0096, this was taken right in this area right below
18 the window that you took out --

19 A It was taken -- yea this picture was taken It
20 spans all of the way across that wall

21 Q Okay And this vent we see in Cooper 0096 is,
22 basically, behind this bush on page 23 of Defense exhibit
23 no 1, right?

24 A Yes

25 Q Okay So you were basically, right behind that

1 area, right, taking that photograph under the house?

2 A Yes Yes

3 Q And you found that there was water seeping through
4 the cinder block, right?

5 A Yes

6 Q And in your past experience when water seeps into a
7 crawl space from the exterior doesn't that generally
8 result in damage in the subfloor and subframing structure?

9 A Certainly not, especially not when it's four blocks
10 high to the subfloor

11 Q Okay So your opinion is that when you have
12 moisture enter a crawl space it doesn't result in damage
13 to the structural members of the crawl space? The
14 framing?

15 A That's a pretty broad question If you have water
16 sitting up underneath the house and there's moisture you
17 may have moisture on the joists which I don't see these
18 joists here look pretty dry to me

19 Q Okay

20 A So, but, so, in this situation I see water entering
21 the crawl space because of the grade elevation issue, but
22 the framing is in good shape that's underneath the crawl
23 space

24 Q And my question is in your experience when water in
25 the crawl space like this it does create a condition for

0373

1 potential wood damage, doesn't it?

2 A No

3 Q Okay And in Cooper 0096 you see a -- basically, you
4 see a vapor retarder You see a black piece of plastic on
5 the ground, right?

6 A Yes

7 Q What is the purpose of that black piece of plastic?

8 A To help reduce the risk of ground moisture from
9 coming up into the crawl space

10 Q And doing what?

11 A Allowing excessive moisture in the crawl space

12 Q Resulting in what?

13 A Mold, perhaps

14 Q Damage to the subfloor?

15 A Usually mold I don't usually see wood rot due to --
16 that's a pretty big crawl space I don't recall seeing
17 damage to a crawl space because of elevated moisture I
18 have seen mold --

19 Q Okay

20 A -- but not really wood rot damage -- the joist
21 pictures

22 Q Okay The joists do look in pretty fair shape don't
23 they?

24 A Yes, they do

25 Q And do you see this line of what looks to be gravel

1 in Cooper 0096?

2 A Yes

3 Q Did you look at that and determine what it was when
4 you went under the house?

5 A No

6 Q Okay Let's flip the page to Cooper 0096?

7 A That's where we're at

8 Q Nine seven

9 A Okay

10 Q You took that photograph right?

11 A We did

12 Q What is the significance of that photograph Cooper
13 0097?

14 A I guess just a close-up of showing the water coming
15 through the ground the higher grade on the outside going
16 through the lot coming into the crawl space area

17 Q Okay And let's flip the page to Cooper 0098

18 A Okay

19 Q That's just another condition of the crawl space with
20 water coming in?

21 A Same area, different view

22 Q Okay And then Cooper -- flip the page to Cooper
23 0099, right?

24 A Yes

25 Q And look at this -- the framing members What do you

0375

1 call -- This is called the floor joists, right?

2 A Correct

3 Q Okay And the floor joists depicted in Cooper 0099,
4 they look in pretty good shape, don't they?

5 A The bottoms do The tops don't

6 Q Now, the top -- but do you see any -- Which ones
7 don't look good?

8 A I only see the top of one in this picture by the
9 direction of the picture So, the only one that you can
10 see the entirety of the joist it looks like there is water
11 stains on the top of it

12 Q Okay And what do you believe the cause of that
13 water stain on top of that joist to be?

14 A Water intrusion from the kickout

15 Q From the kickout Okay Let's flip to page to
16 Cooper -- the last page, Cooper 00101?

17 A I see it

18 Q Now, when you went under that crawl space there is --
19 Do you see pieces of insulation that are still attached to
20 the subfloor?

21 A Yes

22 Q Okay And in your general experience isn't a crawl
23 space between the floor joists insulated?

24 A Yes

25 Q But there is no insulation in this photograph is

1 there?

2 A There is remnants of insulation

3 Q Used to be there at one time, didn't it?

4 A It appears to be

5 Q Okay Do you have any idea of why it's not there
6 anymore?

7 A Because someone wanted to look at that area I would
8 imagine

9 Q Okay And do you -

10 A An inspection

11 Q Do you have any idea who that person was?

12 A I don't recall was that existing when we got there or
13 was it something that was was taken down by Mitch

14 Q Did anybody tell you why it was taken down?

15 A I don't recall anybody telling us why it was taken
16 down

17 Q Did anybody tell you who took it down?

18 MR PHILLIPS Your Honor, he said he didn't know

19 Q I said why

20 A I don't know why, who, if, or what it is down for

21 Q All right And Mr Cooper -

22 A Yes, sir

23 Q -- you primarily produce estimates for Plaintiff's
24 law firms, right?

25 A No We produce estimates to do the work

0377

1 Q Okay And when was for a defense lawyer like myself?

2 A Let me back up You're probably correct because our
3 work is usually as a result of litigation So, we're
4 asked by homeowners and sometimes attorneys -- defense and
5 plaintiffs -- to provide an estimate to do a reclad on a
6 project, but we re not selling reclad proposals Our goal
7 is to get the job

8 Q Right And when was the last time you have given an
9 estimate for a defense lawyer like myself?

10 A I don't recall

11 Q Not recently have you?

12 THE COURT He said he didn t recall

13 THE WITNESS I don t recall

14 Q How much work do you two do for Mr Babae's
15 attorneys?

16 A The Finkel Law Firm?

17 Q Yes

18 A I think that we've been involved in maybe 20 cases
19 with them -- 20 to 30 It is hard to tell

20 Q Over the last year?

21 A No, over the last several years

22 Q When --

23 A Let me answer that question Okay you asked for
24 them because we've been -- we've been, yea, on the other
25 side against them before too, I mean providing prices

1 for defense attorneys where they were the plaintiff's
2 attorneys, too

3 Q When was that?

4 THE COURT Sir, he just told you he couldn't recall

5 THE WITNESS I don't recall We'll say over the
6 last few years perhaps

7 Q And you had mentioned that EIFS has been, quote,
8 outlawed, is that right?

9 A Banned outlawed Call it what you want, yes

10 Q Where?

11 A North Carolina, South Carolina

12 Q It's been banned in South Carolina?

13 A It is a code violation

14 Q Do you have any parts of the code that would show the
15 jury that that is a true and accurate statement?

16 A Not on my person

17 Q Okay

18 THE COURT Well, show him one that's not That's
19 the way to do it

20 MR BLACKBURN I am just asking, Your Honor

21 But you say it's outlawed in South Carolina, right?

22 THE WITNESS Correct, on type six construction -

23 Q In North Carolina?

24 A -- which is wood frame like a house and in North
25 Carolina We're talking about the barrier EIFS -- not the

1 drainable system but the barrier EIFS system

2 Q Okay

3 A Actually, the drainable system, I believe, may be --
4 I'm pretty sure it is banned in New Hanover County in
5 North Carolina

6 Q And why was it banned?

7 A Because the houses are rotting down that have it

8 Q Okay And would you agree with me that the Babae
9 house here -- Mr Flaherty's report -- Does it appear to
10 be rotting down to you except in the area that we talked
11 about below the kickout and except in the area by the back
12 door? We already found one area that wasn't rotting out
13 and cut into -- well, actually two This area up here
14 below the kickout is not rotting out, is it?

15 A No, I don't -- You mean the area where we cut out?

16 Q Yea

17 A No That spot is protected by the felt paper like we
18 talked about

19 Q And that repair that had been made looked to be
20 effective in that area, didn't it?

21 A I'm sorry?

22 Q The repair that had been made in that area looked to
23 be effective, didn't it?

24 A Well it was turned from a face seal barrier system
25 into a drainable system --

0380

1 Q A drainable system?

2 A - which made it effective Yea, a drainable system
3 It has a secondary weather barrier So if water gets in,
4 it drains on the outside of the felt paper or the tyvek on
5 the house where the weather barrier is and drains down
6 So in that spot in essence, it is a drainable system
7 Below that where it terminated, it was a face sill barrier
8 system without a secondary weather barrier

9 Q And this area to the left of the window where we cut
10 that little piece out that wasn't rotten either, was
11 it?

12 MR PHILLIPS Your Honor, that's been asked and
13 answered

14 THE COURT We've been over that a number of times

15 MR BLACKBURN And I am just wrapping up

16 THE COURT No, sir That's the end of it Move on
17 to another area It's been asked and answered Objection
18 sustained

19 Q Is this area to the left of the window, has it been
20 repaired?

21 THE COURT Mr Blackburn -

22 MR PHILLIPS Yes

23 THE COURT - we've been over that a number of
24 times

25 MR BLACKBURN Okay

1 Would you agree with me in Mr Flaherty's report he
2 doesn't indicate any damage --

3 THE COURT Mr Blackburn, I am not allowing you to
4 put witnesses

5 MR BLACKBURN Okay

6 THE WITNESS You didn't allow me to answer your
7 question a while ago You asked --

8 THE COURT No, sir That's the end of that area

9 Q And this window that you claim -- you patented what
10 for this window?

11 A Nothing for that window

12 Q For the window of that type?

13 A I have a patent for a sill pan

14 Q Okay

15 A A drainable -- A thru-wall pan flashing

16 Q Did you bring that patent with you?

17 A No

18 Q Okay Are you aware of any patents that moisture
19 free has for a sill pan for windows of this type?

20 A I believe I had a conversation with someone and I
21 don't recall their name and they were talking about a
22 design and I don't think they knew they were speaking to
23 the patent-holder of the sill sentry at the time and they
24 were describing to me a pan that sounded to me as a patent
25 infringement and I believe I was sent a piece and it

1 appears it was a patent infringement, but I did nothing

2 and took no action from that point So

3 Q Are you talking about Moisture Free's patent?

4 A Some type of product that was an infringement of our
5 patent, yes

6 Q Okay Are you familiar with the window pan flashing
7 called dam seal?

8 A Yes

9 Q Okay Is that an effective pan for windows to
10 prevent moisture intrusion?

11 A You can't install that without pulling the window
12 out, but if you pull the window out and install it then a
13 dam sill may or may not last It relies on sealants
14 again, and you're adhering two products together It's
15 not one monolithic surface that has no cuts or penetration
16 on it So

17 Q That's your opinion right?

18 A Yea I've studied it quite a bit

19 Q Okay And as far as Charlie Smoak you talked about
20 him He was on the CLAPCA task force too, wasn't he?

21 A I'm not aware of a CLAPCA task force

22 Q Okay What task force are you talking about?

23 A It's the -- I think it was the New Hanover County
24 EIFS task force

25 Q Are you familiar with Mr Smoak?

1 A I am very familiar with the Mr Smoak
2 Q You know him?
3 A I do
4 Q And you know his company Ace Drywall, right?
5 A Correct
6 Q And what does Ace Drywall do?
7 A They install stucco and drywall
8 Q Okay And do they retrofit or repair stucco?
9 A They don't
10 Q They don't?
11 A They don't?
12 Q Okay
13 A He refers people to us
14 Q He refers people to you?
15 A He does
16 Q And Mr Clark -- You went out the first time with
17 Mr Clark, right?
18 A I did
19 Q Are you familiar with Mr Clark's company CK
20 Services?
21 A Vaguely, yes
22 Q Okay Do you know if Mr Clark believes that you
23 can --
24 THE COURT Sir sir, how does he know what Mr Clark
25 believes? That's pitting witnesses If you want to know

1 what Mr Clark believes, bring him in here

2 MR BLACKBURN We will, Your Honor

3 THE COURT Thank you Move along

4 Q As far as CK Services, do they do any repairs to
5 homes?

6 A I think so

7 Q Okay And those are stucco homes, right?

8 A I think so, yes

9 MR BLACKBURN I beg the court's indulgence, Your
10 Honor

11 Chris, when I took your deposition in July and asked
12 you about the repair estimate that you generated for this
13 house --

14 THE WITNESS Right

15 Q -- did you tell me that you had a vested interest in
16 stripping and recladding the house?

17 A Describe that I don't recall --

18 THE COURT Sir if we're going to use the
19 deposition ask him the question If he disagrees with
20 you, go to to the deposition just like yesterday

21 Q Your company -- it is fairly understood your company
22 would fairly make a good profit if you were to strip and
23 reclad the Babaee's house, wouldn't they?

24 A We would make a fair profit yea We're in the
25 business to make a profit like all construction companies

1 are

2 Q And the total cost to strip and re clad the Babaees
3 house given the damage we've looked at today you re going
4 to charge the Babaees how much?

5 A \$201,000 -- \$201 415 and I believe there will be an
6 additional maybe 16 000 wood rot and ancillary damages

7 Q So there could be more than that right?

8 A Could be

9 MR BLACKBURN That s all the questions I have for
10 you, Chris Thank you

11 THE WITNESS You're welcome

12 THE COURT Redirect?

13 MR PHILLIPS Briefly Your Honor

14 THE COURT Briefly Guess what? Every one of those
15 jurors did this (indicating) Do you understand what I m
16 saying?

17 MR PHILLIPS I do loud and clear Your Honor

18 THE COURT Mr Phillips, you can go to Saturday if
19 you want to

20 MR PHILLIPS Your Honor, I don't think that's
21 necessary

22 REDIRECT EXAMINATION

23 BY MR PHILLIPS

24 Q CLAPCA, the organization that you were talking about
25 with Mr Blackburn, was one of the issues that that

1 organization took up the inability of contractors to get
2 insurance --

3 A Yes

4 Q -- to do this type of work? What was their
5 recommended solution for contractors who couldn't get
6 insurance to do the work?

7 A Gosh I don't recall what their recommended solution
8 was I mean I know they were talking to several
9 different entities to try to find a way to get insurance
10 to do that type of work, but for the most part the areas
11 -- I was in Wilmington at the time I was real involved
12 with CLAPCA and we just weren't allowed to do EIFS

13 Q Was the Moisture Free Warranty ever suggested as an
14 alternative to insurance?

15 A I don't recall that being suggested at CLAPCA

16 Q You talk about Kraft face paper insulation and it was
17 on one of the pictures that you were looking at If you
18 could find that

19 A This one and the one behind it You can vaguely see
20 it

21 Q And you're a licensed contractor so you're familiar
22 with it?

23 A I am

24 Q Is insulation required in the wall cavity?

25 A Yes

0387

1 Q Is Kraft face paper required in the wall cavity?

2 A No

3 Q What is the difference in insulation? What other
4 kind of insulation can be put there?

5 A There is insulation without paper on it insulation
6 with paper Insulation with paper is paper-faced
7 insulation or some people call it Kraft face paper
8 insulation and that can be used in lieu of a plastic
9 weather vapor barrier on the inside of the wall

10 Q So that if I have a hunk of insulation --

11 A Uh-huh

12 Q -- the difference between the two types is really
13 whether there is a piece of paper stuck to one side?

14 A That's it

15 Q And that's the vapor barrier?

16 A Yes That's what they call the vapor barrier

17 Q The vapor retardant?

18 A Vapor retardant

19 Q In North Carolina, what type do they typically use on
20 construction of homes?

21 A Typically they use plastic As far as insulation
22 they'll use a lot of times paper-faced insulation and
23 plastic over the top of that, too

24 Q What about South Carolina? What do you typically
25 see?

0388

1 A The same

2 Q And that paper acts as a vapor retardant just like
3 that sheet of plastic does?

4 A Yes

5 Q Now, you said that this system was mechanically
6 attached

7 MR BLACKBURN Your Honor I am going to object
8 This is cross -- He's already been through all of this and
9 now we're opening up a whole other area

10 THE COURT It is proper redirect He can go over
11 what you went over in cross That's the rules If you
12 don't want him to go over on redirect don't ask him on
13 cross

14 Be brief with it

15 Q Defendant s 59 the first page of Cooper 64, the
16 white disks what are those?

17 A Those are windlock fasteners

18 Q How are they attached to the wood?

19 A With a screw

20 Q How do you get that out?

21 A You unscrew it

22 Q Or?

23 A Or you pry it off

24 Q So that's proper use of the crowbar you saw in the
25 picture?

0389

1 A Correct

2 Q You said from the pictures that you reviewed you saw
3 and indication of an attempt to repair this home?

4 A That's correct

5 Q Is this the type of repair that you discussed earlier
6 in your testimony that Prime South attempted and then
7 suspended doing?

8 A No We would have continued the house wrap all the
9 way down to the bottom to provided for drainage for the
10 water to come out I guess it's similar but done
11 incorrectly which I see in a lot of repairs

12 Q Well, let me ask you about that

13 A But, well, let me back up That's really not because
14 that s converting it into a drainable system where the
15 repairs that we attempted were much like Moisture Warranty
16 where we're trying to take a facial barrier system that's
17 not efficient, not done right, and turn it into a facial
18 barrier system that works like they intended it to which
19 doesn't work to begin with

20 Q Using Plaintiff's 1, the moisture barrier -

21 A Uh-huh

22 Q -- the black paper that we saw, where does it go?

23 A That would go directly in between the foam and the
24 sheathing

25 Q Okay So, in between that crack that line right

0390

1 there?

2 A That's correct

3 Q And it didn't go all the way to the bottom of the
4 wall in the Babaee house?

5 A It was shy of going to the bottom of the wall

6 Correct

7 Q But to where it was positioned it protected the wood?

8 A Yes

9 Q The new wood?

10 A As we saw in the picture

11 Q What if they had taken that all of the way down?

12 Would that have protected that entire wall?

13 A If there were a means for drainage so the water could
14 get out probably

15 Q Where would that means for moisture to get out --

16 Where would that have been?

17 A The bottom of the stucco

18 Q You see any evidence that there was a exit point for
19 that water?

20 A I don't recall seeing evidence of that

21 Q Do you believe the person that did those repairs did
22 a good job?

23 A No

24 Q Is this the lawsuit that you were afraid of coming
25 from --

0391

1 MR BLACKBURN Objection, Your Honor

2 THE COURT What is the objection?

3 MR BLACKBURN Relevance about lawsuit potential
4 speculation, irrelevant to the warranty to the repairs

5 THE COURT Sustained

6 Q Let me move on I put up Plaintiff s exhibit 22 and
7 23 Do you recognize those two pictures?

8 A I do

9 Q I am going to focus my question on a band sill the
10 board that sits at the bottom of the wall

11 A This area there and this area here

12 Q Now is the picture of 22, the outside of the board,
13 is that the picture -- Is that the inside of that same
14 board or is that a different board?

15 A That's the other side of that wall

16 Q Okay But how many boards make up that band sill?

17 A Gosh, it s either one or two I don't recall whether
18 it is one or two

19 Q So, on one side you don't recall whether it was one
20 or two?

21 A That's right

22 Q This is the crawl space side What is the condition
23 of that wood?

24 A Dry

25 Q On the outside --

1 A Solid

2 Q On the outside what is the condition of the board?

3 A Wet and soft

4 Q So in your opinion to a reasonable degree of
5 professional certainty did the moisture that rotted that
6 outer board, did it come from outside of the house or did
7 it from come from inside in the crawl space?

8 A Beyond a shadow of the doubt it came from the failed
9 kickout that allowed water to run down the wall as we saw
10 in some pictures and the rotting on the outside of the
11 house

12 Q In your opinion to a degree of professional certainty
13 is there any mechanism by which moisture from that crawl
14 space could have moved through this board -- this side of
15 the board without damaging it and done that kind of
16 damage?

17 A Magically perhaps, but I have never seen it before,
18 and we have done tons of reclad

19 Q These band sills -- let's continue in on those band
20 sills Okay The damage From your experience, not --
21 from what you've seen with your own eyes, this is the
22 picture of the back of the house that's been labeled
23 Plaintiff's 8 Do you have a marker? I want you to mark
24 where you've seen damage to the band sill

25 MR BLACKBURN Your Honor, I believe we've already

1 gone over this -- the damaged areas He's already
2 identified all of the damage on the house It is
3 repetitive testimony

4 MR PHILLIPS I believe the testimony has been kind
5 of vague, Your Honor I'd like to --

6 THE COURT Just do it very briefly

7 MR PHILLIPS Very briefly

8 THE WITNESS I believe it was this area here
9 somewhere and right around in here You can't really see
10 behind because of the --

11 MR BLACKBURN Just for the record the witness
12 marked on the exhibit

13 THE COURT I understand that You may have a seat

14 MR BLACKBURN Thank you I was trying to watch
15 him

16 Q The repair of that board is it something that can be
17 done in sections or is that a continual board?

18 A Well it's sections It is not one long board, but
19 it would appear that the wood rot probably exists all the
20 way across the back because if it's not flashed properly
21 at one point it's certainly not done the rest of the way
22 likely

23 Q And I understand that with or without your finger
24 you've seen damage in those two areas?

25 A I have

1 Q Have you seen -

2 THE COURT Mr Phillips, we ve been over it

3 ad nauseum

4 MR PHILLIPS I apologize, Your Honor

5 THE COURT Well, don't go over it anymore

6 Q In addition to that damage did you see elevated

7 moisture anywhere else along that board?

8 MR BLACKBURN Objection, Your Honor

9 THE COURT Sustained Sustained Move to another
10 area

11 MR PHILLIPS Last question, Your Honor

12 You do bids - the detailed bid that s been entered
13 as an exhibit You have a detailed bid sheet that s
14 exhibit 19?

15 MR BLACKBURN Your Honor I am going to object
16 We ve already been through his bid sheets We've been
17 through his estimates and all This is repetitive
18 testimony, Your Honor

19 MR PHILLIPS I just want to ask one question

20 THE COURT You can ask a question on redirect

21 Q The detailed bid sheet that you produced for 19 --
22 exhibit 19 -- do you have a version of that based on
23 whether the home is for a plaintiff's lawyer or for a
24 defense lawyer?

25 A No We just have a version for the home and the

1 condition it's in and the details of the house

2 Q So, regardless of who asks you to do that cost, is
3 that --

4 A The same price

5 MR PHILLIPS No further questions

6 THE COURT You may step down

7 MR SHEFTMAN May we excuse this witness Your
8 Honor?

9 MR BLACKBURN No objection

10 THE COURT Without objection Who is your next
11 witness?

12 MR PHILLIPS We have Fred Babaee Your Honor, and
13 we have a legal matter that we'd like to take up before
14 his testimony - our second motion in limine

15 THE COURT Well we haven't gotten to that in the
16 testimony yet So let's see if it becomes an issue

17 MR PHILLIPS May we approach Your Honor?

18 THE COURT Just hold on Put it up there

19 Mr Foreman, ladies and gentlemen lunch is here It
20 is about 12 15 I would say go back there and eat and
21 let's come right back out, but I used to be a lawyer I
22 guess I ought to let them eat What do y'all think? In
23 jest, fellows

24 Once you eat -- We'll start back at 2 So, once you
25 eat, feel free to go outside and get you some fresh air

1 and stretch your legs and spend some money on Main Street
2 if you want to We'll start back at 2 Please don't
3 discuss the case Don't commence your deliberations I
4 hope you enjoy your sandwiches We'll try something
5 different tomorrow

6 (Whereupon the jury exited the courtroom at 12 19)

7 THE COURT Mr Phillips?

8 MR PHILLIPS Your Honor, may it please the court
9 From our discussion last evening I believe that the court
10 wanted to rule on the issue of whether the negotiation and
11 price Mr Babae spent to purchase his house was going to
12 be excluded testimony

13 THE COURT Let the record reflect after court was
14 stopped yesterday afternoon I asked both lawyers to come
15 in chambers to discuss various aspects of today's
16 proceedings and one of those matters that we openly
17 discussed was whether or not the reduction in price that
18 the Plaintiffs received when they bought the house is
19 relevant to the issues involved in this case ie whether
20 or not if the jury finds that the Defendant has breached
21 the warranty whether or not they should consider that the
22 Plaintiffs got a reduction in sale when they purchased the
23 house and there was some real estate addendum attached to
24 it and some mention about the seller s who is now dead son
25 wanting to testify

0397

1 So, let me hear your position I mean, that s
2 basically what we re talking about, isn't it?

3 MR PHILLIPS It is Your Honor, and, again, may it
4 please the court Your Honor, the Plaintiff has brought
5 as you pointed out a breach of contract claim We ve also
6 brought claims of fraud, negligent misrepresentation, and
7 violations of the South Carolina Fair Trade Act

8 THE COURT Well, you re skating on thin ice with all
9 of those So let's just -- I think we re going to be
10 there with a breach of warranty case Let's assume that

11 MR PHILLIPS Yes Your Honor

12 THE COURT And a breach of warranty would be -- your
13 damages would be if the warranty had been maintained what
14 he was entitled to if the warranty was breached what they
15 owe you as a result of the breach and I assume it is a
16 repair of the house

17 MR PHILLIPS Well Your Honor we don t really
18 think we re on that thin of ice when it comes to --

19 THE COURT Well we're not arguing the motion for
20 directed verdict

21 MR PHILLIPS I understand I understand, but it's
22 relevant to the -- At the end of the day this was a
23 product that was offered to the Babaees

24 THE COURT The warranty

25 MR PHILLIPS The warranty The program It was

1 offered pursuant to a brochure We think it is highly
2 misrepresentative of the program

3 THE COURT Don't go there Just state why we want
4 to talk about the \$110 000 I am not arguing your motion
5 for directed verdict

6 MR PHILLIPS Well as to the purchase --

7 THE COURT How is that relevant to whether or not
8 the warranty was breached and if it was breached?

9 MR PHILLIPS We don't believe it is Your Honor,
10 because then it is --

11 THE COURT Well, then, I'll tell you what You sit
12 down How in the world is it relevant sir?

13 MR BLACKBURN Your Honor may it please the court

14 THE COURT Yes

15 MR BLACKBURN The relevance of the credit that they
16 got --

17 THE COURT It ain't a credit It is a purchase
18 price

19 MR BLACKBURN The addendum that I have given you
20 says the seller to give credit of 110 to purchaser for
21 stucco repairs or replacement at closing So, contrary to
22 the testimony, it, basically, goes to the veracity of the
23 Babaees about how they testified in their deposition about
24 how they got the house and why The testimony will show
25 that they didn't get the house for \$700,000 because of the

1 man just wanted to sell it for 700,000 The truth is they
2 got the house for \$700,000 because they held a report out
3 until about two days before -- and we have the witnesses
4 We have the realtor who is going to testify to this and
5 Mr Maoli, Your Honor, by the way, he is the seller's son
6 He will testify that he basically, handled his parents'
7 estate He was the intermediary He was the one along
8 with his mother that had the final call on what the
9 purchase price was and why they were going to give it to
10 them

11 THE COURT What the final purchase price was and it
12 all boiled down to X amount of dollars and that's where we
13 are

14 MR BLACKBURN And why they gave it to them for
15 that, Your Honor Mr Maoli testified that the health of
16 the Plaintiffs -- the Maolis his parents -- had nothing
17 to do with why they gave it to him contrary to what
18 Mr Babae said

19 THE COURT What does that got to do with the price
20 of eggs in a breach of warranty case?

21 MR BLACKBURN Because --

22 THE COURT You want to let your client argue it?

23 MR BLACKBURN No, sir

24 THE COURT He's pulling at you

25 MR BLACKBURN Hold on

0400

1 THE COURT Let him talk to you

2 MR BURTON May I speak?

3 THE COURT No Just tell your lawyer

4 (Whereupon, the attorney conferred with his client)

5 MR BLACKBURN Your Honor my client was never made
6 aware of the CK report and the realtor who, basically,
7 gave the warranty to the Babaees assumed they were going
8 to do the repairs So --

9 THE COURT How do you know that?

10 MR BLACKBURN He is going to testify to that, Your
11 Honor He is going to be a witness called and that's the
12 basis for it being entered into evidence why it s not
13 irrelevant and the realtor is my witness Buddy Lewis is
14 going to testify -- he's been a realtor for 32 years --
15 about the negotiation process and why when they had a
16 warranty bond in place that was before --

17 THE COURT How do you get a warranty bond? What
18 does your client have to do to -- Let s say I am buying a
19 house with stucco on it and I want to get that warranty
20 What does your client have to do before he will issue the
21 warranty? Doesn t he have to come out and make an
22 inspection?

23 MR BLACKBURN No, Your Honor The inspector is an
24 independent third party

25 THE COURT Okay

0401

1 MR BLACKBURN Okay? And my client had no idea who
2 was doing that inspection

3 THE COURT Well, was it done?

4 MR BLACKBURN The inspection was done

5 THE COURT Okay And then I assume the inspection
6 passed muster?

7 MR BLACKBURN Well, the inspector did not pass
8 muster to begin with It had an exclusion --

9 THE COURT Okay

10 MR BLACKBURN - and Mr Babae called and had the
11 exclusion removed which goes to his credibility about,
12 well, he breached the warranty himself by not telling the
13 warranty company about the other acts or omissions by
14 other parties that bound that warranty and otherwise my
15 client would not have issued that warranty because
16 Mr Babae had superior knowledge than my client --

17 THE COURT Didn't you client send an independent -
18 not appraiser, but whatever you called it -- an inspector
19 out to the house that your client relied on the
20 independent inspector, issued the warranty? Isn't that
21 how it works?

22 MR BLACKBURN Well, they did, and they issued the
23 warranty before the closing and they had it in place
24 before the closing

25 THE COURT Okay

1 MR BLACKBURN And after that warranty was approved
2 with the exclusion Mr Babaee came back and said, I don't
3 care about the warranty I want \$110,000 to buy the
4 house and that's what happened

5 THE COURT Seller could have said I am not going to
6 cut 110 Go buy you another house or he could say, you
7 know, I'm going to get rid of the house and I will sell it
8 for 110 less

9 MR BLACKBURN Well what Mr Babaee told the
10 sellers was -- the sellers backs were up against the wall
11 They were backed up, and he told them Look if I don't do
12 it somebody else will and that s the testimony of
13 Mr Maoli, the seller's son who handled the sale
14 Mr Babaee told the seller s son, Hey you got a problem
15 and that's when Mr Cooper was out there Mr Cooper was
16 out there and although he can t recall that s what he
17 was doing, and Mr Clark comes in and testifies to that -
18 that's what he was doing He was giving him an estimate
19 at that time and Mr Babaee used that estimate by Chris
20 Cooper Chris Cooper put himself right there at that
21 time Mr Babaee said -

22 THE COURT That's what he testified to

23 MR BLACKBURN He said he was there about four years
24 ago

25 THE COURT But he didn't say that s what he was

0403

1 doing

2 MR BLACKBURN Yea, but I said he put himself there
3 at the time So, Mr Babae comes to the Maoli's son and
4 says Look, I've got a repair estimate to fix my house
5 This is going to cost \$110,000 to fix it In spite of the
6 bond I am going to have to fix it or somebody else will,
7 and I know you're getting ready to move into a retirement
8 home, but I am not going to buy the house unless you give
9 me \$110,000 credit So the Maoli's said that's okay, if
10 we don't give it to, we'll have to give it to somebody
11 based on the representations of this contractor that we
12 still don't know who gave them the \$110,000 estimate

13 Mr Lewis is going to say some contractor did and --
14 THE COURT Who did?

15 MR BLACKBURN We don't know that person but --
16 THE COURT Well, how do you know they did?

17 MR BLACKBURN Mr Lewis said It is just like
18 Chris Cooper said, I can't recall what we talked about
19 four years ago It just like he talked -- I can't recall
20 Mr Maoli is going to say, Some man who I have never met
21 came with Mr Babae to my parents house and said, Look,
22 I've got this contractor --

23 MR SHEFTMAN That's hearsay

24 MR BLACKBURN - that I respect -- It is
25 deposition testimony Your Honor I've got the testimony

0404

1 I ve got parts of the deposition transcript

2 THE COURT So what if all of that is correct? How
3 is it relevant as to what - if there is a breach of
4 warranty and the jury finds there is a breach, I assume
5 the damages for the breach of warranty would be what the
6 warranty would have covered had it not been breached,
7 i e , the repair and what does that got to do with the
8 price of eggs as to how much the house was sold for?

9 MR BLACKBURN Your Honor the realtor who handled
10 the sale between the Maolis and the Babaees gave
11 Mr Babae the terms and conditions He signed the letter
12 of approval dated November 11, 2004 that said I have
13 reviewed the terms and conditions of the warranty, and
14 that warranty was issued by my client That warranty
15 included the provision that he had to act to tell my
16 client pursuant to that warranty about any information he
17 was aware of that related to that warranty being issued,
18 and he did not relate that to my client -- neither did the
19 realtor and neither did the seller s son because the
20 seller s son said, I am going to give you \$110,000 I
21 don't care if you re going to fix it

22 THE COURT So, if you can get into the testimony
23 that he knew the house was defective for lack of a better
24 term, and he didn t tell your client that then that may
25 be a defense to breach of warranty but as far as the

0405

1 reduction of 110,000, I don't see how that's relevant

2 MR BLACKBURN And see, Your Honor, the November 11
3 2004 - I've got a timeline right here that sets it out
4 November 11, 2004 The warranty was issued based on the
5 independent inspector Charles Strickland Upon the
6 information that Mr Strickland had, my client approved --

7 THE COURT Let me ask you this Didn't he have the
8 same house to inspect as the man who went out and
9 inspected it --

10 MR BLACKBURN Yes, he did

11 THE COURT - on the Plaintiff's side? And he
12 didn't find anything?

13 MR BLACKBURN He didn't find anything and neither
14 he did Mr Flaherty, by the way Neither did Blackburn
15 when he went out there the interim inspector He didn't
16 find anything either The only person that found
17 something --

18 THE COURT They may believe there is nothing out
19 there The jury may believe your inspector and your
20 witnesses that this was as inspected by them when they did
21 the preinspection

22 MR BLACKBURN And I agree and they may and they
23 should, but you talk about the breach of the warranty the
24 warranty was in place before they got the credit and the
25 warranty and the terms and conditions of the warranty has

0406

1 an exclusion in the warranty This warranty may be voided
2 if you do not tell us about anything that we're not aware
3 of, and Mr Babaee didn't tell us He signed a letter of
4 approval We've got it right here Your Honor if I can
5 introduce it into evidence right now

6 THE COURT Let's put that in as well as read me the
7 language of the warranty that says he is under a duty to
8 disclose anything he may have

9 Y'all are going to have a chance to argue

10 MR SHEFTMAN Okay

11 THE COURT I assume that the warranty is already in
12 evidence

13 MR BLACKBURN It is Your Honor I'm pulling a
14 copy Well the warranty is not in evidence Your Honor
15 We haven't gotten to that point

16 MR PHILLIPS Your Honor -

17 THE COURT No, no Just let -

18 MR PHILLIPS I understand

19 THE COURT Let me see a copy of the warranty It is
20 going to come into evidence, I assume, through the
21 Plaintiff

22 MR PHILLIPS That's right, Your Honor

23 THE COURT Let me see the language that the
24 homeowner is obligated to disclose any facts that he may
25 know concerning the condition of the home

1 MR PHILLIPS Your Honor I don't want to interject
2 an argument, but I think there is a fact in the procedural
3 history of this case that s relevant They moved to
4 compel arbitration based off the terms and conditions of
5 their warranty We argued in front of Judge Cooper, I
6 believe, that we didn't receive the terms and conditions
7 of the warranty that had the arbitration clause and this
8 clause that Mr Blackburn is talking about about it
9 voiding the warranty

10 We had a hearing on that We introduced evidence,
11 and Judge Cooper found that we had not received that
12 document, and he wouldn't let them compel arbitration
13 So, now here we are coming up with revising what's already
14 been established in this case We received a booklet We
15 didn't receive the terms and conditions

16 THE COURT So that's already been ruled on by the
17 circuit court?

18 MR PHILLIPS It's already been ruled on That s
19 why we're not arbitrating this case

20 MR BLACKBURN Your Honor, at that point we didn't
21 have any discovery At the time that they alleged that
22 they had not responded to our discovery We had not
23 gotten any documents We used a subpoena and we got those
24 documents We got what I am going to show you right here
25 is the letter of approval, and I am sure Mr Phillips has

1 a copy of the warranty

2 THE COURT Well, I want the warranty that was given
3 to the client

4 MR BLACKBURN What I'll show Your Honor is a letter
5 after approval that we did not have when Judge Cooper
6 ruled on the order denying arbitration Now, if Mr --

7 THE COURT Hold on one second Letter of approval

8 MR BLACKBURN Yes, sir

9 THE COURT Number 15 to it looks like Lewis
10 deposition?

11 MR BLACKBURN That's right That s the realtor
12 Buddy Lewis We didn't have the --

13 THE COURT Who is Victoria M-A-O-L-I?

14 MR BLACKBURN That s Mrs Maoli

15 THE COURT The owner of the house's son

16 MR BLACKBURN Right and her son is Eligio Maoli

17 THE COURT It says this home qualifies for a
18 Moisture Free Warranty based on the findings of a report
19 of C Strickland on 8/12/04

20 MR BLACKBURN Right And it says --

21 THE COURT They have some exclusions Level of
22 warranty, signed and returned, and it was signed by
23 Mrs Maoli, I assume

24 MR BLACKBURN Well, this is Fred Babae, Your
25 Honor, and he and his wife both signed it

0409

1 THE COURT Hold on one second C Strickland is
2 who?

3 MR BLACKBURN Is the independent inspector for
4 moisture free that did the inspection

5 THE COURT Okay Now where does it show in the -
6 Where does it show that --

7 MR BLACKBURN It says right here --

8 THE COURT Let me see it

9 MR BLACKBURN I ve got it underlined and
10 highlighted right here

11 THE COURT And now --

12 MR BLACKBURN I have read the terms and conditions

13 THE COURT Hold on This is it dated --

14 MR BLACKBURN November 11 2004

15 THE COURT It says, I have read and understood this
16 letter and the Moisture Warranty terms and conditions I
17 accept the warranty and any exclusions

18 What was he shown at that time as to the Moisture
19 Warranty terms and conditions?

20 MR BLACKBURN Contrary to what Mr Babae told you,
21 the realtor is going to say he knew exactly what was the
22 terms of his warranty He told Mr Babae you can get a
23 copy of the warranty by calling Charlotte and you're
24 familiar with it and he signed it Judge, and the law says
25 you can't claim ignorance when you sign something and you

0410

1 can read it and understand it Mr Babae and his wife
2 both signed this acknowledging the bonds in place on
3 November 11, 2004 with the exclusions

4 You asked about the exclusions I ve got a copy of
5 his warranty that was to his deposition, and if you look
6 on page 4 under the exclusions, that s the items I'm
7 talking about about his duty and who breached the
8 warranty

9 THE COURT Where does it say that he has to tell you
10 about any conditions he knows of?

11 MR BLACKBURN Right down there at the bottom, Your
12 Honor and if actions by the warrantor -- and it goes on
13 to the next page

14 THE COURT If actions by the warrantor -- that s
15 your client - on any obligations under this warranty are
16 delayed by an event beyond its control -- was there an
17 event beyond its control?

18 MR BLACKBURN Yes

19 THE COURT What?

20 MR BLACKBURN The event was the CK report The CK
21 report was an event that was used by Mr Babae to get his
22 house inspected and he s getting the warranty but he s
23 not telling the warranty company that s the event beyond
24 by my client's control

25 THE COURT Your warranty was not issued on his

0411

1 inspection It was issued on the independent --

2 MR BLACKBURN That's right, but if you keep reading
3 that exclusion --

4 THE COURT Such performance will be excused until
5 the delaying effects of the event are remedied Such
6 events include, but are not limited to acts of God, acts
7 of common enemy, war, riot, civil commission or sovereign
8 conduct or acts or omissions by you --

9 MR BLACKBURN That s right

10 THE COURT What acts or omissions has he done?

11 MR BLACKBURN He didn't tell us about the CK report
12 until a year later Your Honor and when he came back with
13 the CK report not only was it altered and redacted the
14 evidence will show that he called Mr Clark and asked him
15 to change the date of the report and then he comes back a
16 year later and tells me he says Moisture Warranty, I ve
17 got this report by CK I have noticed damage to my home

18 THE COURT But your warranty wasn't based on the CK
19 report It was based on your independent inspection

20 MR BLACKBURN That's right

21 THE COURT The jury may believe your independent
22 inspection that there ain't nothing wrong with the house
23 and there will be no breach of warranty

24 MR BLACKBURN Right but what I am arguing Your
25 Honor, is the warranty letter of approval was issued

1 before they closed and before they the reduction of price
2 through negotiation and the exclusion --

3 THE COURT What does that got to do with the price
4 of eggs, the reduction in price?

5 MR BLACKBURN Because he has an exclusion in here
6 you just read that says if actions by the warrantor or on
7 any obligation of this limited warranty are delayed by an
8 event beyond his control Delayed Delayed by an event
9 beyond his control The event was the CK report that,
10 basically, Mr Babae --

11 THE COURT How did that delay your people?

12 MR BLACKBURN -- tells us about a year later
13 Because they would have acted under the warranty If they
14 had known about the report, they would have acted on it,
15 and you'll see that they did once they found out about it

16 THE COURT So they reclud the house?

17 MR BLACKBURN No no My client would have come
18 back out and said oh, we ve got to put more exclusions on
19 it like we did on Mr Strickland's report and we don t
20 have the report right here to show us that we can do that
21 So, that was the event beyond his control -- the CK report
22 that Mr Babae knew about and it says, Such performance
23 will be excused until the delaying effects of the event
24 are remedied and the delaying effects of the remedy were
25 the CK report not being given to my client until a year

0413

1 later and when they got it, they acted

2 So, if anybody breached it Mr Babaee did because he
3 got the report --

4 THE COURT Well that s -- That may be -- That may
5 be admissible, but the fact what the purchase price was
6 ultimately narrowed down to I don't think is admissible
7 That s not relevant

8 MR BLACKBURN Well, to make it relevant, Your
9 Honor, November 11, he signed this He had the bond in
10 place with an exclusion That wasn't good enough for him
11 He went to the Maolis and said --

12 THE COURT It sounds like he is pretty smart to get
13 him to come down \$110,000

14 MR BLACKBURN Yes Your Honor with all due
15 respect, I am not sure if it is smart

16 THE COURT What is it?

17 MR BLACKBURN It is basically getting more money
18 He is double dipping right here Your Honor He is trying
19 to get \$110,000 to strip and reclad his house based on --

20 THE COURT Well, I disagree with you on that

21 MR BLACKBURN And then he comes back a year later
22 saying here is the report and now you need to step up to
23 the plate and do something about it

24 THE COURT And I assume your company sent somebody
25 else out there to do a report

0414

1 MR BLACKBURN They did

2 THE COURT And they disagree with the CK report and
3 you hadn't done anything So they re suing you for breach
4 of warranty

5 MR BLACKBURN Well, we didn't do anything because
6 we didn't realize the house was in as bad a shape as
7 Mr Babaee did

8 THE COURT Whose fault is that?

9 MR BLACKBURN Mr Babaee s because you have a
10 duty --

11 THE COURT Didn't you have it inspected?

12 MR BLACKBURN We did

13 THE COURT Maybe your inspector didn't know what he
14 was doing

15 MR BLACKBURN There is also a duty to maintain your
16 house in the warranty You have to have routine
17 maintenance So, we come out there and say you got this
18 area here but you have to maintain it so it doesn't get
19 any worse like Mr Flaherty's report So all of this
20 testimony about, you know, maintenance and lack thereof
21 and damages during the terms of the warranty and we didn't
22 do anything, well we didn't know anything was wrong with
23 the house Mr Babaee did So, coming back a year later
24 with a CK report saying --

25 THE COURT I don't disagree with you on that That

0415

1 may very well be relevant, but the fact that he got
2 \$110,000 reduction is not relevant in my opinion

3 MR BLACKBURN Even in light of six days later he
4 comes back and says that - and this is where, Your Honor,
5 he testified that he had agreed to the \$700 000 estimate
6 before the CK report I've got this pulled right out of
7 his deposition if you'd like to see it

8 THE COURT I believe you

9 MR BLACKBURN And so that was not true Now
10 why --

11 THE COURT What do you mean it wasn't true?

12 MR BLACKBURN He had the CK report before he got
13 the \$700,000 credit He had the CK report --

14 THE COURT He didn't get a \$700,000 credit

15 MR BLACKBURN I mean 110

16 THE COURT 110

17 MR BLACKBURN I'm sorry 110,000 He had the CK
18 report before he got the \$110 000 credit contrary to his
19 deposition and the reason he got the house for \$700 000
20 the truth is is because he negotiated \$110 000 price to
21 fix the house and that gets back to the point not only he
22 didn't tell us about it but my client would not have
23 issued a warranty if they had known about the condition of
24 the house or Mr Babaei saying --

25 THE COURT How can you say your client didn't know

0416

1 about the condition of the house when he is sending an
2 inspector out to do the inspection?

3 MR BLACKBURN Their inspector said it was okay
4 They issued

5 MR SHEFTMAN It is their inspector

6 THE COURT It is your inspector All right
7 Anything else?

8 MR BLACKBURN One --

9 THE COURT I am going to give y'all a chance in just
10 a second If your client has got a law degree I'll let
11 him argue it

12 MR PHILLIPS And admitted in this state, Your
13 Honor

14 THE COURT Is he a lawyer?

15 MR BLACKBURN Well, your Honor if my client had
16 known about the CK report --

17 THE COURT Okay

18 MR BLACKBURN -- they would have had the CK report
19 and an independent inspector go back out and look at it
20 and make the decision then as to whether to issue the
21 warranty or not if they had known about it, but clearly
22 they didn't know about it Mr Babaee didn't want them to
23 know about it He knew the terms and conditions of the
24 warranty, but my client had no idea about the CK report
25 So their custom is to get Mr Strickland to go back out

0417

1 with the CK -

2 THE COURT That's fine I am going to let you go
3 into all of that, but I am not going to let you go into
4 the price reduction

5 MR BLACKBURN Okay And what if -- What about this
6 line of questioning The house initially listed for
7 \$935 000 They got it for \$700,000 I can pose questions
8 like that, right?

9 THE COURT No I mean, that s just -- The bottom
10 line is what they bought the house for

11 MR BLACKBURN Exactly And Mr Phillips in his
12 opening said they've got this dream house of their dreams
13 for \$700,000 when it initially listed for 935 And
14 Mr Cooper -- My client says Mr Cooper says I bought a
15 EIFS clad home and I got it at a discount because of the
16 damage, and that's exactly what they did contrary to what
17 they said

18 THE COURT Isn't your people on notice if you got a
19 \$900 000 house for 700 that maybe their report wasn't so
20 hot?

21 MR BLACKBURN Well that's the issue with the
22 reports, and we'll be getting into all of that about the
23 reports and why and Mr Phillips -- I expect to hear
24 that -- why the protocol and the reports and the
25 inspectors you know, were susceptible, but the bottom

1 The is, Judge, we issued the warranty based on that
2 independent inspection

3 THE WITNESS Exactly

4 MR BLACKBURN And we issued it on the basis that
5 there were no other reports out there that we -- we didn't
6 have any idea of We were not in a --

7 THE COURT And I am going to let you cross examine
8 him on the other reports I am just not going to let you
9 -- The bottom line is what the house sold for and that's
10 where we're going to go

11 All right Anything else in your regards?

12 MR PHILLIPS Yes Your Honor, briefly This is the
13 document that my clients received It is the brochure
14 that you've seen blow-ups of or pages from

15 THE COURT Okay

16 MR PHILLIPS To them that s the terms and
17 conditions

18 THE COURT Okay

19 MR PHILLIPS Let s take what Mr Blackburn just
20 said about Buddy Lewis the realtor s testimony He
21 testified that he told the Babaees if they want the terms
22 and conditions they can write to Charlotte They don't
23 get the terms and conditions before you buy it You get
24 it afterwards I know -- I know we re all in -- but
25 that s the essence of our fraud claim None of that is in

1 here just like the arbitration clauses

2 THE COURT Well, then, if you want to get into all
3 of that I am going to let him open the door with all of
4 this

5 MR PHILLIPS No Well, Your Honor, this document
6 -- this undated document with the signature 11/11, the
7 closing happened a few days after that This is what they
8 believed the terms and conditions were They got the
9 actual terms and condition after they had already
10 purchased the warranty

11 MR BLACKBURN They said that when they closed on
12 November 18 --

13 THE COURT Mr Blackburn I am not precluding you
14 from going into all of that I am precluding you from
15 going into what the negotiations were in the sale The
16 ultimate sales price was X and that s what we ll deal
17 with

18 MR BLACKBURN And one point in response to
19 Mr Phillips saying that this brochure he has are the
20 terms and conditions, where does it say there that those
21 are the terms and conditions --

22 MR PHILLIPS The same place where it says --

23 THE COURT Fellows, argue to me

24 MR BLACKBURN I'm sorry, Your Honor That --

25 MR PHILLIPS Your Honor --

0420

1 THE COURT You can argue that to the jury You can
2 ask questions about it, do whatever you want to

3 MR SHEFTMAN And we can argue about the brochure

4 THE COURT Sure you can

5 MR SHEFTMAN But just the price has nothing to do
6 with anything That's right

7 THE COURT That s right The price of the house
8 hadn t got anything to do with it

9 MR BLACKBURN And I just want to renew my objection
10 for the record

11 THE COURT You've got it I think I ve let you make
12 a complete record on it

13 MR BLACKBURN Thank you Your Honor

14 THE COURT My ruling is this I am precluding any
15 testimony about the bargaining and what all went on in
16 getting the house sold It sold for X amount of dollars
17 You can go into the prior reports and them not disclosing
18 it to your client You can go into your inspector being
19 correct If you had known about the other one you would
20 would have got two of them out there You can go into all
21 of that You can go into the fact that they get anything
22 but that -- that being the little brochure as opposed to
23 the warranty terms You can go into the fact that if they
24 had asked for it you would have sent it to them

25 The only thing I am precluding is a day of getting

0421

1 into how they got the price down to where it was

2 MR BLACKBURN Okay it is okay with Your Honor to
3 say this house -- this beautiful house we have pictures of
4 initially listed for 935?

5 THE COURT And it was sold for whatever

6 MR BLACKBURN That's right Is that good?

7 THE COURT That s fine

8 MR BLACKBURN Thank you, Your Honor

9 THE COURT You know what? My farm is listed for a
10 million two, but if somebody walks in with nine hundred I
11 am going to sell it tomorrow We ll break 'til 2 o'clock

12 (Whereupon, a lunch break was taken)

13 MR BLACKBURN Your Honor, I understand your ruling
14 and I don't want to, you know say anything about it but
15 just for the record I would like to introduce and proffer
16 the exhibit that we wanted to introduce as far as
17 negotiations about the damages if that s okay with Your
18 Honor

19 THE COURT Very well And, also, if the the day
20 goes on and you think that you may have forgotten
21 something else or see that you need something else, I'll
22 let you put anything in to supplement the record

23 MR SHEFTMAN We have no objection to that for his
24 proffer

25 THE COURT I ll tell you what else I'll do I'll

1 let you put in those portions of the deposition of the
2 Plaintiff that you were representing to me that he would
3 have said so we'll have that as well

4 MR BLACKBURN Okay Thank you Your Honor I
5 appreciate that

6 THE COURT Just put his whole deposition in

7 MR BLACKBURN Whole deposition in? Thank you As
8 far as this, how do we want to mark this?

9 THE COURT Lisa, let's mark that --

10 THE COURT REPORTER Exhibit

11 THE COURT -- an exhibit on proffer It will not go
12 to the jury

13 THE COURT REPORTER Mark it not as a Court's
14 exhibit?

15 THE COURT Well you can always mark it not a
16 Court's exhibit but a Defendant's exhibit as --

17 THE COURT REPORTER I'll mark it

18 THE COURT -- a proffer

19 MR BLACKBURN Your Honor I would like to argue
20 post-trial, if necessary, that, you know, the damages can
21 be offset by the --

22 THE COURT I won't - My ruling doesn't preclude you
23 from any type of argument you want to make

24 MR BLACKBURN Thank you, Your Honor

25 MR SHEFTMAN So long as it is based on the facts

0423

1 and the law of the case, yea

2 THE COURT That s true

3 (Whereupon, Defendant's Exhibit No 62 was marked for
4 identification only as a proffer only)

5 (Whereupon the jury came into open court at
6 approximately 2 02)

7 MR PHILLIPS Your Honor, the Plaintiff calls Fred
8 Babaei

9 FARIBORZ Z BABAEE after being duly sworn,
10 testified as follows

11 THE WITNESS My name is Fred Babaei, B-A-B-A-E-E

12 DIRECT EXAMINATION

13 BY MR PHILLIPS

14 Q Thank you, sir Tell the jury how you came to live
15 in Columbia, South Carolina

16 A I came to -- actually I came to U S 1978 attended
17 Greenville Technical College for about a year Then I
18 moved to Columbia, South Carolina '79 went to USC --
19 University of South Carolina - graduated in 84 with Math
20 and Computer Science Degree

21 I was working at university for about almost 15 years
22 setting up network - small networks in the college of
23 humanities Then I moved on to larger colleges setting up
24 networks, building PC's In fact we -- there was a group
25 of four that we built the network infrastructure at the

0424

1 University of South Carolina Then I moved on after that
2 to my own business

3 Q And tell the jury how your business evolved, how it
4 started, and where it is now

5 A I started in late 80 s when a lot of professors and
6 faculties were really afraid of touching computers,
7 touching PC's and they asked me if I could help them get
8 things set up, and I did, and at some point they were
9 asking me, you know if you'd like to make some money from
10 doing this I said, No, this is just fun I have a drink
11 with you or have a dinner and that's all I need

12 As it became more than a hobby, then I decided to
13 really open my own business serving the small businesses
14 as well as government agencies building network
15 infrastructure as the PC's This includes desktops
16 notebook servers We basically a one-stop shop I
17 don't want to advertise my business but we do it from
18 bottom all of the way up to enterprise level which set up
19 the whole network of the organization

20 Q What is the name of your company?

21 A Chipco Computer Distributors

22 Q Where is Chipco located at?

23 A We are right off of Farrow Road on I-77

24 Q Where did you first live when you came to Columbia?

25 A We were renting a house, my wife and I We got

0425

1 married in 1987 Before I get there we are a family of
2 four My son is 18 My daughter is 14 He attends
3 Spring Valley High School and my daughter goes to Cardinal
4 Newman School on Forest Acres area We were in the -- Our
5 first home was right off of Satchel Ford Elementary
6 School It is a small 1300 square feet home, two bedroom

7 Q And is that the house that you moved from to move
8 into the house that's the subject of this lawsuit?

9 A No We moved to -- As my daughter was born in 1994
10 we needed extra bathroom So, we moved to the house in
11 Spring Valley, 121 Clark Ridge in Spring Valley We were
12 there for 10 years

13 Q Did the either of those houses that you rented or
14 owned did they have stucco on them?

15 A No

16 Q Tell me how you came to have an interest in
17 purchasing the house that you live in and please tell the
18 jury what the address of the current residence is

19 A We re living at 133 Beaver Dam That's in Wildewood
20 Subdivision Northeast Columbia

21 Q Take me through the process that you went through to
22 come to buy the Beaver Dam house

23 A As the family getting larger again it seems like
24 anytime we are looking for larger home -- the lack of one
25 bathroom So, we have only two and a half bathrooms and

1 my daughter and my son were sharing a bathroom So, my
2 wife said we need to have an extra bathroom perhaps, in
3 each bedroom that belongs to the kids

4 So, we started looking and that's what we found the
5 133 Beaver Dam It was a larger home, had bathroom in
6 each bedroom, and the open architect design the whole
7 mediterranean design really, really made us to purchase
8 and enjoy the house

9 Q Who was the first to discover the house?

10 A Molly, my wife

11 Q And who was selling the house?

12 A It was under the realtor Mr Buddy Lewis We were
13 just driving around In fact I was out of town and
14 Malihe said I really saw the house that I would like for
15 you to look at So she called me Once I get home -- I
16 got home we drove by and we saw an open house sign in the
17 neighborhood So, we thought that was the open house
18 sign We drove in and basically, it was a house right
19 adjacent to our house which was -- which had the open
20 house sign on it

21 So, as we were driving out Mr Maoli the son of
22 Mr late Maoli came out and said - We said, we are just
23 looking We thought it was open house We're leaving
24 now He said, No, you can come if you'd like I can ask
25 my mother if she likes to show you the house and that's

0427

1 when we found out that it was under Buddy Lewis

2 Q Were you acquainted with the Maolis prior to looking
3 at their house?

4 A Well, later I found out that my son goes to school
5 with his son at St. John Newman, and then of course then
6 to Cardinal Newman School. So we found out then that
7 kind of know each other through our children.

8 Q Take me through the process that you went through to
9 purchase the house.

10 A We enjoyed -- We really liked the house. Of course,
11 we had to place our home on the market as well. We felt
12 maybe was something that it's a huge investment for us --
13 an investment that, basically, you live with it the rest
14 of your life as far as the investment goes. So we said
15 well, it's time for us to move on.

16 My business was growing. We had a couple of good
17 contracts that was probably a three-year contract that
18 made us have a good future for the business. So we said,
19 well, we'll look into a bigger home, a larger house and
20 that's -- Of course when we looked -- We found that house
21 and put a contract on it.

22 Q Did you retain a real estate agent to represent you?

23 A Yes. At the time we had no realtor who represented
24 us to sell our home. So, when we got to know Mr. Buddy
25 Lewis we felt, well, you know, he can sell our house and

1 we already -- We can put a contract on this house So, it
2 becomes a relationship that hopefully, he can you know,
3 sell our house faster as well so we can move into this
4 house even though there was no contingency to sell our
5 home first before we moved into the new home

6 Q What did the sellers disclose to you about the
7 condition of the house before you bought it?

8 A If I can go back to the first day that Mr Maoli
9 showed it to us we had no knowledge of EIFS or stucco
10 Of course, I know a lot now I wish I knew a lot now that
11 I didn't know back then Mr Maoli explained the concept

12 THE COURT Hold on a second Who is he talking
13 about?

14 THE WITNESS Mr Maoli

15 MR PHILLIPS Maoli, Your Honor the son of the
16 sellers

17 MR BLACKBURN Just for the record Your Honor, it
18 is Eligio the son of sellers

19 THE COURT Well it might be a little hearsay too

20 MR BLACKBURN I am good right now because I plan on
21 calling Mr Maoli as a witness Your Honor If it is
22 hearsay I'll limit it

23 THE COURT Go ahead

24 Q Mr Babae were you given any documents about the
25 condition of the house prior to the purchase?

1 A We were given documents as far as the -- we were
2 given a report which was I believe it is Mr Strickland's
3 report on the stucco I can't recall when this was given
4 to us When we actually put a contract on the house when
5 we -- before we -- I can't recall the date

6 Q Did you read that report?

7 A Yes

8 Q Did it indicate there was any problems with the
9 house?

10 A No

11 Q Did the Maolis indicate that there was any problems
12 with the house?

13 A No

14 Q Did the Maolis indicate that there was any repairs
15 that had been made to the house?

16 A They did not

17 Q What was your perception just as a layman of the
18 condition of the house when you started looking at it?

19 A You know it was a huge investment for us, larger
20 than anything we had owned So we felt before we
21 actually purchase the house we will run an inspection
22 The inspection was in two phase The internal inside of
23 the house and as well as external, exterior of the house
24 So, we came to know Mr Frank Clark who I found out from
25 the yellow pages as a home inspector who also does stucco

1 inspection -- got to call him to come and do the
2 inspection

3 Q Let me ask you before you talk about the Clark
4 inspection, I mean, just as a layman looking around the
5 house, I mean, was it in great condition or was there any
6 issues that you saw looking at it?

7 MR BLACKBURN Your Honor, I'll object to that
8 leading type of question

9 THE COURT What was the house condition? How about
10 that?

11 Q What was the condition of the house?

12 A There were a lot of issues inside and outside I can
13 start from outside of the house where the soil was
14 completely dead from just looking at it In fact, once
15 you walk on the -- in the yard you could go down almost
16 6 inches So there was a lot of water that was unknown
17 where it's coming from Of course I didn't go under the
18 house to see the crawl space Then we found out there was
19 water

20 The inside had wallpaper cosmetic issues The
21 kitchen was completely old appliances There were
22 handicapped rails that needed to be removed because of the
23 old Mr Maoli's Parkinson's -- some sort of disease and
24 couldn't walk So, there were a lot of issues that they
25 point out when we looked at the house

0431

1 Q At what point in the process did you first become
2 aware of the Moisture Free Warranty Company?

3 A Moisture Free Warranty information was part of the
4 contract or part of the closing deal that was introduced
5 to us when we put a contract on the house that this is --
6 This is actually a product that will guarantee your home
7 is dry, guarantee that it keeps moisture intrusion and
8 that's when it was actually given to us by the realtor to
9 assure that the house that we're buying will stay dry or
10 we pay for it to keep it dry

11 Q Let me show you a document that's been marked for
12 identification purposes as Plaintiff's 40 and ask if you
13 can identify that document

14 A Yes that's the brochure

15 Q And for clarity of the record, there is a brochure
16 inside of a folder?

17 A Yes

18 Q Who gave you that document?

19 A This was given to us by the realtor

20 Q Buddy Lewis?

21 A Buddy Lewis, yes

22 Q When did Mr. Lewis give that to you?

23 A This was given to us when -- It had to be when, of
24 course -- when we saw the Strickland contract -- I mean,
25 inspection -- and, of course, before we placed the

1 contract on the house

2 Q Okay But you don't recall the exact date?

3 A Maybe in August, after August It had to be after
4 Sometimes maybe in October

5 MR PHILLIPS Your Honor I'd move that 40 be
6 admitted into evidence

7 MR BLACKBURN No objection, Your Honor
8 (Whereupon Plaintiff's Exhibit No 40 was admitted
9 into evidence)

10 Q Did you receive any other documents associated with
11 the Moisture Free Warranty from Mr Lewis?

12 A That's all we received and also an invoice that was
13 given to us at closing

14 Q Why did you hire Mr Clark to inspect your home?

15 A The investment of the house was extremely so large
16 for us that we felt that we got to get an inspection as
17 well as I had a roommate of mine from university who was
18 an engineer and when I talked to him he said You may want
19 to get an inspection on the stucco as well That s when I
20 really became noticed to me that I must get inspection on
21 the stucco itself

22 Q Mr Lewis had already provided you with the
23 Strickland inspection hadn't he?

24 A Yes

25 Q So why did you think you needed a second inspection?

0433

1 A When we asked Mr. Lewis about the inspection that we
2 were going to provide -- we were going to get and he said,
3 Well, there is already an inspection done on this house.
4 I said, Well, I have to do an internal inspection as well
5 as the external inspection on the stucco. He said, Well,
6 we can call Mr. Strickland. He's already done it. If you
7 want to waste your money and get another inspection, go
8 ahead. I said, Mr. Lewis, I have to get my own inspection
9 -- my own inspector. I know that Mr. Strickland has given
10 you his own inspection, but I would like to get my own in
11 order to compare the two because, again, if the inspection
12 was done -- If I hired Mr. Strickland, it would have been
13 the same. So I hired Mr. Frank Clark who did the
14 inspection on the house.

15 Q Let me show you a document that's been labeled for
16 identification purposes as Plaintiff's 48. I ask you to
17 tell me if you recognize that document.

18 A This is the phase one inspection.

19 Q Who performed that inspection?

20 A Mr. Frank Clark.

21 Q Do you recall when you received this document?

22 A November 3.

23 MR. PHILLIPS: Your Honor, I would move that this
24 exhibit be admitted into evidence.

25 MR. BLACKBURN: Your Honor, may I approach the bench?

1 (Whereupon, a bench conference was held)

2 THE COURT All right I will allow it subject to
3 your objection, Mr Blackburn, and then when we take a
4 break remind me and you can put our conference up here on
5 the record --

6 MR BLACKBURN Thank you, Your Honor

7 THE COURT -- so you can be protected

8 (Whereupon Plaintiff's Exhibit No 43 was marked for
9 identification and received into evidence)

10 Q I think it has a page number annotated as Clark 39
11 Do you recognize those handwritten notes?

12 A I don't recall I don't think I have received the
13 typed copy I may have received this I am not -

14 MR PHILLIPS Your Honor, with your permission then
15 I'll just remove those

16 THE COURT That s fine

17 MR BLACKBURN You re removing?

18 THE COURT The handwritten notes

19 MR BLACKBURN Thank you, Your Honor

20 MR PHILLIPS Your Honor, I'd move that Plaintiff's
21 43 be admitted into evidence

22 THE COURT Without objection now?

23 MR BLACKBURN Without objection

24 Q Mr Babaee, would you tell the jury the high points
25 of the findings of the Clark inspection report?

1 A The first phase of the report explains the issues
2 inside of the house as well as the crawl space, issues in
3 the front entrance, dining room, the garage door, kitchen
4 area wine cooler who actually -- pantry The hardwood
5 was, basically buckling down because of the humidity --
6 the laundry room and some minor issues with the lights and
7 electrical issues handicapped rails, and then he talked
8 about the soil being extremely wet who needed to be -- who
9 needed to be tested - or examined to see what the -- why
10 the soil is so wet

11 In the exterior he mentioned that the electrical
12 outlet right side of the front door is wired properly and
13 has GFI fuses He also said there is a spot right between
14 right garage door and the storage room that has been
15 repaired The stucco color does not match The door to
16 the storage room functioning normally There's a crack in
17 laminate under -- first in the right side there are cracks
18 in the stucco above roof I think there is another page
19 to this which you don't have

20 MR BLACKBURN Just for the record, what page are
21 you reading from?

22 THE WITNESS Page Clark 38

23 Q Let me ask you this to those documents, were those
24 issues that before you bought the house that you thought
25 would have to be resolved?

1 A Of course, yes

2 Q Have those things -- The non-stucco items, have they
3 been repaired since you moved in?

4 A No We -- Well, yes, it has Of course, we
5 presented the repairs to the realtor and seller, but we
6 have in the backyard and the frontyard we had to put a
7 french drain as well as in the crawl space of our home so
8 as our house sitting down from the street there is a
9 tremendous amount of water that comes in So we had to
10 create some sort of a drainage that could remove the water
11 out We have a lake in the backyard behind our house
12 which could drain it to the lake We put the drainage in
13 the front We put the drainage under the crawl space into
14 the backyard and of course Mr Clark did this repairs
15 for us

16 We had to put fence in the backyard for the pool
17 because we couldn't get insurance to cover the home
18 because without the fence around the pool nobody would
19 insure the house So, we had to do that and of course,
20 a lot of internal fixes that we have to do, removing the
21 handicapped rails, the wallpapers, the paint outside and
22 inside In fact, when we moved into the house I believe
23 it was six months or so where we had to paint the outside
24 of the house and of course then we made sure that the
25 caulking is done properly when they painted the house

0437

1 outside of the house So, there was a lot we did after we
2 moved in

3 Q What was the total cost of all of those repairs?

4 A It came out to be almost \$70,000

5 Q Let me ask you to see if you recognize what's been
6 marked into evidence as plaintiff s 30

7 MR BLACKBURN I'm sorry Sam Exhibit what?

8 MR PHILLIPS Plaintiff's 30

9 THE WITNESS That's the phase two of the inspection
10 This is Mr Clark's report on the stucco, basically,
11 moisture map and reading on the stucco

12 Q And I believe the Defendants have produced one page
13 of that report as Defendant's 6 Do you recognize that?

14 A Yes

15 Q Could you turn to that page of the exhibit? Let me
16 put this up for illustration

17 MR BLACKBURN No objection, Your Honor

18 THE COURT Sir?

19 MR BLACKBURN He hasn't moved to enter it into -

20 THE COURT He hasn't moved to introduce what?

21 MR PHILLIPS Your Honor, we already agreed that 30
22 is in evidence and it is so marked on the sticker

23 When it asked you what Mr Clark's recommendations
24 were regarding the EIFS and with reference to that page
25 would you tell the jury what Mr Clark recommended to you?

1 THE WITNESS Mr. Clark recommended that the
2 following area to be addressed. There are page 2, F-9,
3 G-9, H-9, G-3, G-2 which comes from the grid.

4 Q Let me stop you there. Why don't you use the exhibit
5 and show the jury what the grid is that you're talking
6 about.

7 Your Honor, with your permission?

8 THE WITNESS So we have A through H and then 1
9 through 12. So his F-9 would be F-9, this area.

10 Q So it's an identification system?

11 A Yes.

12 Q All right. You may have a seat. Thanks. And there
13 is more than one of those little pictures in this report,
14 isn't there?

15 A Yes.

16 Q There are different places of the house?

17 A Yes.

18 Q So what was Mr. Clark's recommendation with regard
19 to the areas that he's identified using this grid method?

20 A He recommended test cut to be done on the areas that
21 he feels there are suspicious moisture behind the wall.

22 Q Okay. What was your understanding then when you
23 received the Clark report of what a test cut was?

24 A Well, we thought that we knew what it means by
25 cutting into the stucco. We really didn't know what he

1 meant by, well, you need to make a cut in order to see
2 what is there, what is behind this moisture, how is the
3 moisture getting inside of the wall -- to do more
4 investigation to find out where it s coming from, how is
5 it getting wet, where is the moisture coming from

6 Q Okay And when you say a test cut are you referring
7 to this sentence here that reads, "A test cut should be
8 done by stucco applicator repair person before removing
9 cladding in those areas?"

10 A Yes

11 Q Other than the written representation of Mr Clark
12 did he recommend any other thing be done to the stucco
13 house?

14 A As far as repair?

15 Q Repair or further testing?

16 A Yes

17 Q Did he make any other recommendations to you other
18 than what appears in this document?

19 A He recommended that we make a cut to see what is
20 behind as well as -- I have to remember go back Just
21 make the cut

22 Q Okay And in here he says, quote, It is generally
23 accepted that wood when removed from the kiln has a
24 19 percent moisture cut Any intrusive moisture reading
25 with 20 percent above reading corrective action should be

1 done

2 When you received this report, did you have any idea
3 what an invasive cut was or what a moisture percentage
4 was?

5 A We did not

6 Q After you received Mr Clark's report, what did you
7 do next?

8 A On November 8 we received Mr Clark's report This
9 is not complete We have the inside of the house
10 inspected We have outside of the house inspected There
11 were -- If I can go back, there were multiple copies we
12 received Because the closing of the house was on
13 November 15 we had to let the seller know that -- our
14 findings

15 So we send the report to the seller, Mr and
16 Mrs Maoli We send it to the realtor and after
17 discovery we found out that the realtor actually has given
18 the report to Mr Strickland who is the certified
19 inspector of moisture free warranty

20 Q Let me show you a copy of the document that's been
21 marked into evidence as Plaintiff's 25 and ask if you can
22 identify that document

23 A This is a faxed document came to us on November 11,
24 number one new termite bond

25 THE COURT Who is it from?

0441

1 THE WITNESS It is from Buddy Lewis, Russell and
2 Jeffcoat realtor

3 Q Do you recognize the handwriting on the first page of
4 that exhibit?

5 A Yes

6 Q Whose is that?

7 A Mr Buddy Lewis

8 Q And what does Mr Lewis say to you in this fax?

9 A So and then on number two moisture free warranty
10 bond okay with one exclusion which is window in the back
11 which is to be fixed Their inspector Charles Strickland
12 who did the measurement himself did not find any other -
13 did not find other three areas to be problem So he is
14 pointing to three areas to be a problem

15 Q Do you know what those three areas are?

16 A I assume the three areas or I could say the three
17 areas are the areas that Mr Clark had shared or his
18 report has been shared with Mr Strickland about the three
19 areas that had high moisture reading and then he says this
20 is why bond was okay with only one repair area

21 Q Now, Mr Babaei, were any of the test cuts -- the
22 invasive test cuts that Mr Clark recommended, were were
23 any of those performed?

24 A We asked the realtor and the seller to make these
25 cuts so we can see what s behind this -- what is behind

1 the wall Why are there these -- what is behind the
2 humidity? What is behind the moisture that he is pay much
3 -- most areas out of the house

4 Q What was the Maoli's response to your request?

5 A They said we do not want to make the cuts We cannot
6 allow to have any cuts made in the house We actually
7 talked to Mr Clark I said, What's your recommendation?
8 What needs to be done? This is things that need to be
9 done Do you not want to make a cut? We walked -- We
10 basically, walked away We walked away from purchasing
11 the house

12 Q But you changed your mind?

13 A We changed the mind -

14 Q To purchase it?

15 A -- simply because they came back to us and said this
16 house is under warranty -- This house has a Moisture Free
17 Warranty They showed us the brochure that in their
18 mission statement says --

19 Q Let me show you that That s Plaintiff's exhibit
20 no 3 that s already been admitted into evidence Is this
21 what you're referring to?

22 A We protect your stucco from moisture intrusion
23 We'll keep your house dry as long as you own the house
24 So we felt -- and even Mr Clark himself explained that
25 You have warranty on this house You don't have to worry

1 about any other thing You have warranties So, the
2 warranty will to -- The warranty corporation will be able
3 to repair anything that is damaged to the house So, you
4 don't have to feel bad You know, if you like this house
5 that much, you have the warranty

6 Q What about Mr Clark, your realtor? I'm sorry
7 Mr Lewis, your realtor, what did he say about the
8 moisture free warranty?

9 A Mr Lewis said I own a stucco home I have sold
10 many stucco homes with the Moisture Free Warranty

11 MR BLACKBURN Your Honor, this is typical,
12 objection

13 THE COURT Well make an objection

14 MR BLACKBURN I am

15 THE COURT You've been letting it go and go

16 Sustained

17 MR BLACKBURN Thank you Your Honor

18 Q Mr Babaee tell me, what is the significance of the
19 mission statement on the brochure to you?

20 A I own a company as well My mission statement -- The
21 first line on my website explains who we are, what we do,
22 what type organization we are A lot of our customers
23 sign up with us because of our mission statement and we
24 stand behind our mission statement because it's something
25 that you have to prove as a business owner to your

1 customers that this is your -- basically a foundation of
2 your business

3 So, when I saw the mission statement coming from the
4 moisture free warranty that will keep your house from
5 moisture intrusion I felt honestly that this is a product
6 we need on this house, you know, to keep our house dry,
7 and that's what we purchased at the closing

8 Q Did you depend on Moisture Free Warranty to uphold
9 that mission statement?

10 A I'm sorry?

11 MR. BLACKBURN Your Honor, I object to that leading
12 question In the mind of the warranty company

13 THE COURT It doesn't have anything to do with the
14 mind of the warranty company It asks what was he
15 depending on Overruled

16 Q You can answer the question or I can ask it again
17 Did you depend on this mission statement?

18 A Yes I did

19 Q Now, the brochure -- Did you study that brochure
20 prior to purchasing your home?

21 A We looked at the brochure In fact, my wife and I
22 looked at it We looked at -- Again, it was very
23 important to me -- the mission statement We looked at
24 inside Everything that's in the catalog proves to us
25 that we'll make sure your house is dry or we'll pay to

1 keep it dry which is in their catalog That s all we got

2 Based on this catalog, we purchased the house

3 Q So, let me make reference to Plaintiff's exhibit 4

4 that s already be admitted into evidence Are you

5 referencing the statement that I'll read, quote, From our

6 years of experience we know what steps to take to assure

7 homeowners that their home is dry and we guarantee their

8 home will remain dry during the term of the warranty or

9 we'll pay to get it dry?

10 A Yes

11 Q Did you expect Moisture Free Warranty to live up to

12 that commitment?

13 A Yes

14 Q Is that part of your decision to purchase this house?

15 A Yes

16 Q Do you think they have lived up to that?

17 A No

18 Q Mr Babae also in that section they talk about

19 realtors - what a realtor and a home seller should know

20 Did you read that section of the document?

21 A Yes

22 Q And what conclusions did you draw after reading that?

23 A The conclusion I feel now is in order to move stucco

24 homes they have came up with this product who -- we'll

25 make your house to be sold or purchased faster, quicker --

1 for the product that -- at least product that didn't work
2 in our house

3 Q When you read that brochure what was your
4 understanding of what a dry home was?

5 A We thought a dry home means if there are moisture
6 intrusions there are things that the company -- the
7 warranty company will do to keep the house dry or to keep
8 the house from moisture getting in That's what we
9 thought it meant

10 Q Did you have any idea that dryness was a percentage
11 of a wood moisture content?

12 A We did not know that any percentage, but we knew that
13 high moisture reading means there are things that need to
14 be taken care of

15 Q And your understanding of moisture content, where did
16 that come from prior to purchasing this house?

17 A It came from Mr Strickland's report and Mr Clark

18 Q Let me ask you to turn to this page of the brochure
19 It's been already marked as Plaintiff's exhibit no 5
20 What significance if any did you give to this section of
21 the brochure?

22 A The main thing was of course, the Moisture Free
23 Warranty protection Moisture Free warranties are
24 available in one, three and five years Warranty
25 protection ranges from 10, 20, 50,000, trusted by the

1 courts contractors, and homeowners nationwide If you
2 are worried about problems and want to protect the value
3 of your largest investment, call us, and this was our
4 largest investment in our you know, life and still is and
5 that's why we really dependent on the company Moisture
6 Free Warranty to stand behind the promise which is stated
7 in their catalog to keep our house dry

8 Q You didn't -- the Maolis purchased this warranty for
9 you didn't they?

10 A Yes

11 Q And you received a three-year warranty, is that
12 correct?

13 A Yes

14 Q Did you make any inquiries of Moisture Free Warranty
15 about changing the term of the warranty?

16 A Yes I called to make sure if it's transferable and
17 if it's -- if the length of the warranty can be more than
18 three years which -- That's what I asked

19 Q Okay Did you get a response?

20 A Yes

21 Q What was that response?

22 A The response was yes, you can have -- we can
23 increase your length of the coverage and I think that's --

24 Q Why were you interested in increasing the length of
25 the coverage?

1 A Well, we felt we are going into the largest
2 investment in our life We wanted to make sure that we
3 are covered not only three years five years, and maybe
4 more and make sure that our house is dry

5 Q Mr Babae, let me read you a statement on exhibit 5
6 that's in the brochure you have Quote, the professionals
7 at Moisture Warranty Corporation were selected to oversee
8 the inspections and repairs mandated by the class action
9 settlement Do you recall reading that in the brochure?

10 A I may have

11 Q Do you remember what significance, if any, it had to
12 you if you read it?

13 MR BLACKBURN Your Honor he said he may have

14 THE COURT What was the second question?

15 Q I said do you remember what significance if any it
16 may have had to you?

17 THE COURT That's all right

18 THE WITNESS I remember -- The inspections and
19 repairs mandated by the class action settlement Really
20 I know that it was -- I know that it was a level of peace
21 of mind that it is something that -- It's a product that
22 will -- It's a product that is designed to work for stucco
23 homes, I believe It is a product that makes sure that
24 your stucco is dry So, it is another piece of mind or
25 another level of support that we'll give to the home

1 buyers that you purchase this warranty, then we'll have
2 the support of as long as you have the warranty you'll
3 have the support to keep your house dry

4 Q Let me ask you to look at one last page of the
5 brochure. This has already been entered into evidence as
6 Plaintiff's 6. Had you read the three steps of the
7 Moisture Warranty process?

8 A Yes

9 Q What was your understanding of those three steps?

10 A We felt if there are issues -- Of course, all issues
11 with the house there would be an inspection done on the
12 house. Then there would be repair recommended repair
13 done. Again, inspect the house and then warranty the
14 house.

15 Q You said step one inspection. Is that this section
16 that I just marked on the brochure?

17 A Yes

18 Q And in your mind who -- Had that first step of the
19 inspection been performed on your house?

20 A Before we purchased or after?

21 Q At any time. In your mind what was the first step
22 Moisture Warranty took in issuing the warranty for your
23 house?

24 A When the inspection was done with Mr. Strickland

25 Q What about the second step in your mind? What was

1 the second step in the issuance of your warranty from
2 Moisture Warranty?

3 A They come in and review, recommend Basically, they
4 recommend any sort of repairs or any sort of things that
5 need to be done in order to issue the warranty

6 Q That's this second step here that I'll mark with a
7 double circle?

8 A Yes

9 Q Who was the they that was going to review the
10 inspection in your mind?

11 A Moisture Free Warranty

12 Q Do you know whether that review was accomplished?

13 A I am not sure I don't -- You know, based on what I
14 have seen From the certificate that what we received
15 from Moisture Free Warranty one with the exclusion and
16 one without the exclusion we don't know if there was any
17 repair was done to the issue the certification

18 Q At the time though, did you think there had been
19 some action taken to remove the exclusion that you just
20 mentioned?

21 A Yes

22 Q Do you know what that was? Do you recall what that
23 was or what you thought it was?

24 A When we purchased the house there was an exclusion
25 according to Mr Strickland's report Again,

1 Mr Strickland's report -- The first report -- The first
2 inspection that he did on the house was spotless There
3 was nothing wrong with the house After --

4 MR BLACKBURN Your Honor, I am not sure if
5 Mr Strickland's report -- the first one he is referring
6 to -- has been marked into evidence I believe the second
7 one has, but I don't believe the first --

8 MR PHILLIPS He is just testifying as to his
9 recollection of the process Your Honor, and not the
10 specifics of the report

11 THE COURT Very well

12 Q I'm sorry, sir Can you continue or I can ask the
13 question again

14 A And then later on when he saw Mr Clark s report came
15 up with another inspection that showed one exclusion
16 That's the certification we got

17 Q Let me show you a document that's been premarked into
18 evidence as Plaintiff s 27 I ask if you recognize that
19 document I apologize I've handed you the wrong one
20 Can I have that back?

21 Your Honor, I move to withdraw 27 I apologize I
22 am going to hand you Plaintiff s 28 that's been premarked
23 into evidence and ask you if you recognize that document

24 A Yes

25 Q When did you receive Plaintiff's 28?

1 A After the closing It was sometime in January of
2 05, 2005

3 Q You purchased the home when?

4 A November of 2004

5 Q So, a month or so later?

6 A Yes

7 Q After the holidays?

8 A And I had to call to get that

9 Q Would you read for the jury what the exclusion said?

10 A The following areas are excluded The areas can be
11 considered for warranty once additional remediation is
12 completed and reviewed by the MWC Remediation must meet
13 MWC's standard of repair, page 11, kickout location and
14 area below 30 percent readings

15 Q So when you received this document in January what
16 did you do next?

17 A When we received the document we showed -- we were
18 concerned So we said what needs to be done in order to
19 remove the exclusion? We called Moisture Free Warranty
20 for their recommendation What needs to be done in order
21 to remove this? We called them I believe someone came
22 by at some point, looked at it The next thing we know we
23 received another certification that removed the exclusion

24 Q I'll ask you to look at now Plaintiff's 27 that's
25 already been entered into evidence and ask if you

1 recognize that document

2 A Yes

3 Q That appears to be the same document as Plaintiff's
4 28 with one exception. Could you tell the jury what that
5 exception is?

6 A No exclusions apply

7 Q You say someone from Moisture Free Warranty came to
8 your house?

9 A Yes

10 Q Were you there?

11 A I wasn't there. I think my wife may have been --
12 Malihe might have been there but we don't -- We know for
13 a fact there was no repair done because we would have
14 known. We would have known that somebody came and made
15 some repairs or subcontractors came. There was no calls
16 or anything to us that we are coming to fix your house or
17 repair. So this itself raised a flag for me that I am --
18 I purchased the warranty that I'm not sure what really
19 it's being done as far as step one through three applies
20 to have this warranty on my house.

21 So, I really start thinking that what type of product
22 is this, and as we got farther when we saw the dark stains
23 and problems and we discovered that they ignore you. They
24 will have to make multiple calls to make them to come and
25 look at your house and that's what happened.

0454

1 Q Well, before we get into your subsequent contact with
2 Moisture Warranty, tell me about what you mean you saw
3 dark stains and discoloration Tell the jury what that
4 was and when it occurred

5 A Later in the year of 2005 we saw dark stains on the
6 outside of our house in the stucco area in the front side
7 of our home So we felt there are some attention that
8 needs to be done on it So we contacted Buddy Lewis, I
9 believe -- said What do you recommend? What are your
10 recommendations? What needs to be done? I think I went
11 back to look at the original builder of the house and got
12 some names of original architect and talked to them about
13 it

14 Then Mr Lewis said, you know, you have a warranty
15 Call your Moisture Free Warranty and see what they would
16 like to do because that is an area that is covered by
17 warranty

18 Q So what did you do?

19 A We called them sometimes in October or November of
20 '05 We did not hear anything I sent him a letter In
21 fact, I sent it UPS Red so I know it would get to the
22 hand Multiple calls later I think it was January or
23 February -- January before we heard something back from
24 there

25 Q What did you hear?

0455

1 A Basically, they were asking me, What is the issue?
2 What type of problems you have, and I explained to them
3 the dark stains we have on the stucco I believe
4 sometimes in February it was that they send Mr Frank
5 Guidera who is one of their certified inspector to come
6 take a look at the house

7 Q Did any document come out of Mr Guidera's visit?

8 A Sometimes later, yes

9 Q I ask you to look at this document that's been
10 identified for identification purposes as Plaintiff's 39
11 Can you tell me what that is?

12 A That's a proposal coming from Performance Exterior

13 Q And Performance Exteriors -- who is that?

14 A At the time we really did not know who they were but
15 it is now known as they are are certified inspector by
16 Moisture Free Warranty and I guess they also do repairs

17 Q When you met Frank Guidera for the first time did you
18 know what his association was with Moisture Free Warranty?

19 MR BLACKBURN I object to that leading question I
20 am not sure if he says he ever met Mr Guidera

21 THE COURT Well, he did state he met him He asked
22 him did he know what their relationship was That's not
23 leading Overruled

24 Are you going to introduce that into evidence?

25 MR PHILLIPS Yes Your Honor I was just laying a

1 little bit more foundation I'll be happy to do it now

2 I'd like to move Plaintiff's 39 into evidence

3 THE COURT Any objection?

4 MR BLACKBURN Thirty-nine?

5 MR PHILLIPS Thirty-nine

6 MR BLACKBURN No objection

7 THE COURT I can't hear you What?

8 MR PHILLIPS I believe he said no objection, Your
9 Honor

10 MR BLACKBURN I said no objection

11 (Whereupon Plaintiff's Exhibit No 39 was admitted
12 into evidence)

13 Q Mr Babaei, could you -- well you follow along and
14 read those The Plaintiff's proposal was to caulk the
15 flat tops of all of the trim on the perimeter of the house
16 grade for a price of \$575 When you received this, did
17 you have any idea what that meant?

18 A Caulking?

19 Q What was supposed to be caulked?

20 A Just caulking the exterior of the home I guess

21 Q What about the second item? It says caulk behind two
22 kickout locations for a price of \$172 At the time you
23 received this document or when you talked to Mr Guidera
24 did you know what a kickout was?

25 A We did not know

1 Q By painful experience you know now, though, right?

2 A Yes

3 Q What about the third item? Investigate the potential
4 for damage as per page A price \$230? Do you know what
5 they're referring to page A?

6 A No Page A? It could be Frank Clark's report That
7 may be what they saw yea

8 Q What about the next sentence? If damage is present
9 and the wall needs to be opened for repair the price of
10 repair -- the price to repair that wall with all of the
11 trims and return it to an as-new condition is additional
12 \$5,193?

13 A Yes

14 Q And then there are other items -- repair items
15 also that appear on this list, correct?

16 A Yes

17 Q Has Moisture Free Warranty ever offered you 5 230
18 whatever this adds up to -- I think almost -- There is
19 also an item in here to open up and investigate for damage
20 pursuant to the report and if additional damage is found
21 it ll be repaired for a cost of \$3 243 I guess all total
22 this adds up to about \$10,000?

23 A Yes

24 Q Has Moisture Free Warranty ever offered to pay you to
25 perform the repairs set forth in Mr Guidera's estimate

1 here?

2 A They offered \$750

3 Q Did you accept that?

4 A No

5 Q What did you do?

6 A I explained to them that at the time I had sent them
7 the Frank -- Mr. Clark's report -- explained to them from
8 the report you're offering me \$750 where there are really
9 not much there is -- not much repair, if any, you can do
10 with the \$750. I went back and forth with them. I
11 explained that your recommendation of caulking is like
12 placing a bandaid on something that is going to go bad
13 again in short period of time. I went back and said you
14 know, if I don't get a solid answer from you, I must
15 contact my attorney.

16 Q Did they send you another document from Moisture Free
17 Warranty?

18 A Yes

19 Q I ask you to look at what's been marked as
20 Plaintiff's exhibit 41 for identification purposes.

21 A At that time, again, this is --

22 Q Well, let me -- If you could, just tell the court and
23 the jury whether you recognize that document, and, if so,
24 what it is and how you came to know what it is.

25 A This --

1 THE COURT Please show Mr Blackburn a copy

2 MR PHILLIPS I apologize your honor

3 THE COURT Well, show him that one

4 MR PHILLIPS Your Honor, for the record I don't

5 know if it was audible, but Mr Blackburn said no

6 objection So we would ask that 41 be moved into

7 evidence

8 THE COURT Thank you

9 (Whereupon, Plaintiff's Exhibit No 41 was admitted

10 into evidence)

11 Q Tell me when you received exhibit no 41 Mr Babae

12 A We received this with the letter that came from

13 Mr Tim McClain, I believe That's the person I was

14 talking to at Moisture Free Warranty explaining their

15 terms and conditions First time we saw the terms and

16 conditions After my repeatedly -- after contacting them

17 multiple times, sending them multiple letters they send

18 me a letter They send me a letter explaining this is

19 what our terms and condition is and this is what we can

20 offer you -- \$750

21 Q Did you receive Plaintiff's 41, the terms and

22 conditions, before or after they made the offer of \$750

23 under the warranty?

24 A After

25 Q Let me ask you to take a look at a document that's

1 been -- I apologize Mr. Blackburn. I don't have a copy
2 of this either.

3 MR. BLACKBURN: No objection, Your Honor, to 42.

4 MR. PHILLIPS: Without objection then, Your Honor,
5 Plaintiff's 42 has been moved into evidence.

6 (Whereupon, Plaintiff's Exhibit No. 42 was admitted
7 into evidence.)

8 Q: Take a look at it and tell me what that document is.

9 A: This is the letter I sent to Moisture Free Warranty
10 including Mr. Frank Clark's report -- one of the versions
11 that I got from Mr. Frank -- Mr. Frank's report.

12 Q: Okay. Is that letter dated?

13 A: Yes.

14 Q: What is that date, sir?

15 A: January 11, 2006.

16 Q: Let me -- Before I ask you about Plaintiff's 42, do
17 you recall whether you received the Moisture Free Warranty
18 that's been marked as Plaintiff's 41 before you sent that
19 letter?

20 A: No. We did not receive that before I sent the
21 letter.

22 Q: Okay. So do you recall a date when you received
23 Plaintiff's 41?

24 A: April of 2006.

25 Q: April of 2006?

1 A Yes

2 Q And then you recall Plaintiff s 42 You mailed that
3 January of 2006?

4 A Yes

5 Q Well now I believe you testified April of 2006, but
6 the letter is dated January of 2006 and you think you sent
7 that after this? So could you be mistaken? Could it be
8 April of 2005?

9 A The letter was sent to them

10 Q Before or after you received the terms and conditions
11 of the warranty, exhibit 41?

12 A This is after we send them the letter we got their
13 terms and conditions

14 Q Okay I apologize So, you sent 42 in January of
15 2006 and sometime after that you received Plaintiff s 41?

16 A Yes

17 Q But you don t recall when?

18 A I don't recall

19 MR BLACKBURN Your Honor, I thought he testified
20 that he received in it in April --

21 THE COURT Well you can cross examine him on that

22 Q What did you do after you sent the Clark report to
23 Moisture Free Warranty? Did you talk to anybody else
24 besides Moisture Free Warranty about the problems with
25 your house?

1 A I talked to the original applicator of the stucco on
2 the house which was Mr Charles Smoak I talked to
3 Charles Bufano who was another inspector recommended by
4 Mr Clark I asked him, What does it take? What does it
5 take to repair this stucco? What does it take to keep the
6 moisture from getting in?

7 Q Let me ask you, did Mr Smoak repair your home?

8 A Nope

9 Q What about Mr Bufano?

10 A They could not touch the house

11 Q Did they tell you why?

12 A They could not touch EIFS home because of insurance
13 issues that they could not get insurance to touch EIFS
14 homes

15 MR BLACKBURN Your Honor I am going to object to
16 this line of questions

17 THE COURT Well you need to object when he asks
18 those kinds of questions

19 MR BLACKBURN Yes sir

20 THE COURT Strike that, ladies and gentlemen
21 That s hearsay That s not proper So, disregard that
22 testimony

23 Don't ask him anymore questions about what people
24 say, please

25 MR PHILLIPS I apologize

1 THE COURT And if he does, please object

2 MR BLACKBURN I will, Your Honor

3 THE COURT Just ask him as a result of so and so
4 what happened

5 Is that what you told him, Mr Sheftman?

6 MR SHEFTMAN Yes, sir

7 Q Well, there is no surprise in this question but as a
8 result what did you do? As a result of the response you
9 got from Moisture Free Warranty what steps did you take
10 next?

11 A As a result of receiving the Moisture Free Warranty?

12 THE COURT As a result of those people saying they
13 couldn't repair the house, what did you do?

14 THE WITNESS Okay We called Moisture Free Warranty
15 to explain to them -- In fact, I even sent them a couple
16 of letters explaining the cost of repairs are a lot more
17 than \$750 -- explained to them that we have received
18 verbal and some written proposals that the costs may be
19 even 24 to \$25,000

20 Q That's the cost of repairing the stucco that's on the
21 house?

22 A Cost of the repair

23 Q Had you talked to anyone at that point about removing
24 the stucco?

25 A No

1 Q What was Moisture Free's response?

2 A Moisture Free Response was that --

3 MR BLACKBURN Your Honor objection hearsay

4 THE COURT Now Moisture Free is your client

5 MR BLACKBURN Right I know

6 THE COURT That ain't hearsay Come on, fellas

7 Didn't y'all go to law school?

8 MR BLACKBURN Who he talked to, Your Honor, the
9 person he talked to

10 THE COURT Well, he is a representative of your
11 client Hearsay doesn't apply to your client

12 Q I'm sorry sir Could you answer the question?

13 A I talked Mr Tim McClain who represents I guess,
14 Moisture Free Warranty

15 Q What did he say?

16 A He said that there is one area of your house that has
17 moisture and we pay \$500 per area of problem

18 Q Is that the 750?

19 A That's you know how they came up with \$750 but it
20 was supposed to be 500 per spot or per moisture according
21 to him

22 Q So, why did you file this lawsuit?

23 A As a result of not getting any response from Moisture
24 Free Warranty, repeated calls letters sending the report
25 that clearly explained there are issues with this house

0465

1 I felt I am not getting anywhere with this -- with this
2 organization I said in one of my letters that if I don't
3 get a response in 10 days I must contact my attorney
4 Once I sent that letter they sent me a check for \$2,500
5 Once they saw the letter that I am going to go forward
6 with this, they send me a check for \$2,500

7 Q Now, Mr Babaei, let me ask you, like the jury you've
8 sat through all of this Unlike the jury, you've paid for
9 some of these experts to be here today

10 A Yes

11 THE COURT That's not a proper question

12 MR PHILLIPS I apologize, Your Honor

13 THE COURT Just ask the question

14 Q What do you think it is going to take to make your
15 home dry, Mr Babaei?

16 A From what I know now -- Of course, I wish I knew what
17 I know now back in 2004 We would not have purchased this
18 house I think it's going to cost tremendous amount of
19 money to strip and reclad, and that that's the only way
20 that we feel this house can get fixed in my opinion I
21 guess there are experts opinions, also, that --

22 THE COURT No, sir Just testify about what you
23 think it would take to put -- to make you whole

24 THE WITNESS My opinion is to strip and reclad the
25 house is the only way to make sure that my family is

1 properly safe at my house

2 Q Now, you were present when synthetic stucco was
3 removed from your house --

4 A Yes

5 Q - which is contained in this bag I am not going to
6 open it It's been premarked as exhibit 38 You were
7 there when 37, 36, 35 33 34 --

8 A Yes

9 Q - were removed? At any time prior to removal of
10 that EIFS panel and that wood pulled out, did you have any
11 idea that your walls were rotting inside?

12 A No

13 Q Do you think that the Moisture Free Warranty program
14 that you purchased could ever make your home dry and
15 correct that problem?

16 A No

17 Q Have you asked them to do that?

18 A We went through many process of conversations, calls
19 letters asking them repeatedly about their mission
20 statement, asking about their brochure We keep your
21 house dry or we'll pay to keep it dry Did not happen to
22 our house

23 Q What do you think it is is going to cost to fix your
24 home?

25 THE COURT You've already asked him that three

1 times

2 MR PHILLIPS I apologize, your honor Your honor,
3 I don't -

4 THE COURT He didn't answer it though, but you've
5 asked it three times You want to ask it one more time?

6 MR PHILLIPS With the Court's indulgence

7 Mr Babae, how much money do you think it will cost
8 to fix your home?

9 THE WITNESS In excess of \$220,000

10 MR PHILLIPS Please answer questions that

11 Mr Blackburn has

12 Thank you Your Honor

13 THE COURT All right Let's take -- I've got a
14 little quick 10-minute hearing with a lawyer waiting for
15 me right here Let's go ahead and take our afternoon
16 break We'll start back in about 15 minutes I'll try to
17 be right on time We're going to go to five Don't
18 deliberate Don't discuss

19 Madam Clerk, why don't you go back there and see what
20 they would like for morning breakfast?

21 (Whereupon, the jury exited the courtroom and a break
22 was taken)

23 (Whereupon, the jury came into open court at
24 approximately 3:45)

25 THE COURT I got a question from the jury trying to

1 get some ideas for scheduling Can I answer that in the
2 the morning?

3 THE FOREPERSON Yes, sir

4 THE COURT The last time I tried a case in this
5 courtroom it was a three-week trial This one will not
6 certainly be anything like that, but I'll know more in the
7 morning I got a note one day from the jurors and I read
8 it and I started giggling One of the ladies on the jury
9 said, Dear Judge Early my Daddy has a big garden He
10 loves turnip greens and collards May I bring you some?
11 The next morning I had two big old bags

12 All right, sir Cross

13 MR BLACKBURN Thank you Your Honor

14 CROSS-EXAMINATION

15 BY MR BLACKBURN

16 Q How are you doing Mr Babaei?

17 A Fine Thank you

18 Q Good to see you again You mentioned several times
19 that this home that you bought is a large investment for
20 you, right?

21 A Yes

22 Q And how much did you pay for that large investment?

23 A We paid \$700,000

24 Q Okay You paid \$700 000 What I'd like to do is
25 hand you what's been previously agreed upon Defendant's

1 exhibit no 36 and ask you if you can identify that
2 document

3 MR PHILLIPS Your Honor, may I approach?

4 THE COURT Yes Mr Blackburn you may want to come
5 up here

6 MR BLACKBURN Yes, I'm coming

7 (Whereupon, a bench conference was held)

8 MR BLACKBURN This is Plaintiff's exhibit no 36

9 MR PHILLIPS Defendant s

10 THE COURT What have we got down here on your
11 screen?

12 MR BLACKBURN Your Honor if we need to I've put
13 the exhibits up I ve got them on CD to flash up here for
14 the jury I believe we'll be able to go through it

15 THE COURT That s fine I don t have any problem
16 with that I just want to make sure it wasn't a movie
17 that we re going to play

18 MR PHILLIPS Your Honor if I might pose an
19 objection, we ve got the exhibits in paperwork form

20 THE COURT He can do that You presented yours like
21 you wanted to I ll let him present his like he wants to

22 Q So, Mr Babae, Defendant's exhibit no 36, that's
23 your home isn t it? That s a picture of your home
24 right?

25 A Yes

1 Q And tell me what that document that I handed you is

2 A It's a marketing material from Russell and Jeffcoat

3 Q Okay And did you see that document when you bought
4 your house?

5 A Yes

6 Q And who gave you that document?

7 A This original document was presented at the house
8 when we looked at it

9 Q Okay Who gave you that document?

10 A Mr Buddy Lewis

11 Q Mr Buddy Lewis And on the second page of that
12 document it has a listing price up there doesn't it?

13 A Yes sir

14 Q What is that listing price?

15 A \$935 000 That's the listing price

16 Q That's the listing price

17 A When we start the contract it started at 860,000

18 Q And you bought it for \$700 000 right?

19 A Yes This is again \$120 -- \$127 per square foot
20 Our house -- We sold our house for \$87 a square foot and
21 it was a pretty nice home in Spring Valley

22 Q And I'll ask you if you recognize Defendant's exhibit
23 no 23?

24 A Yes

25 Q What is Defendant's exhibit no 23?

1 A This is the closing documents we received at the
2 attorney s office

3 Q Right It is a settlement statement, isn't it?

4 A Yes, sir

5 Q The settlement statement reflects the amount that you
6 paid for the house, right?

7 A \$700,000 Yes, sir

8 Q And I am going to hand you Defendant's exhibit
9 no 10 You said it was listing originally at what?

10 A Eight hundred sixty

11 Q And exhibit no 10 is what?

12 A Contract of sale

13 Q Contract of sale And it has a price of 810 on it -
14 \$860 000, right?

15 A Eight sixty, yes

16 Q Okay And who prepared this Russell and Jeffcoat
17 contract of sale for your home?

18 A This was done -- This is the first time I ve seen
19 this by the way -- not the first time, but I've seen it
20 in the discovery

21 THE COURT If you know who prepared it

22 THE WITNESS I don't know I assume it is Buddy
23 Lewis but I don't know We have - There were multiple
24 versions of the contracts This is the first we've seen
25 this

1 Q And on the back page of it, is that not your wife's
2 signature?

3 A Yes

4 Q But it doesn't have your signature, right?

5 A No

6 Q Why didn't you sign this contract of sale to offer a
7 price on the home?

8 A Mr Blackburn there were a lot of papers that came
9 to us between the time -- I was not -- Maybe I wasn't
10 here

11 Q Okay

12 A My wife signed some of it I signed some of it
13 Mr Buddy Lewis rushing to our house hopes up as a realtor
14 tell me to sign this, sign that, this is this That's my
15 wife's signature We signed it

16 Q Considering this is going to be the largest
17 investment of your life, wouldn't you want to see the
18 contract of sale to offer on the home? Wouldn't that be
19 reasonable?

20 A Of course

21 Q And it has \$650,000 to the left there that's kind of
22 struck through right?

23 A Correct

24 Q Was that your initial offer?

25 A Yes, sir which goes back to comparing to our old

1 home -- a little bit more than what we were selling our
2 house about \$100 -- a little over \$100 per square foot

3 Q All right So, your first offer is 650 and they were
4 at 860?

5 MR PHILLIPS Your Honor I object Asked and
6 answered

7 THE COURT Well --

8 MR BLACKBURN I am just clarifying it

9 THE COURT But don't we get to the bottom line what
10 it sold for?

11 THE WITNESS \$700 000

12 Q Okay In this contract - I am going to ask if you
13 identify Defendant's exhibit no 11

14 THE COURT Hold on a second Ladies, are you okay?

15 THE JUROR Yea

16 THE COURT Can you hear everything?

17 THE JUROR Yes

18 THE COURT Need anything?

19 THE JUROR No

20 Q So exhibit no 10, Defendant s exhibit no 10,

21 Mr Babaee, what is this document?

22 A What is it?

23 Q Yes What is it?

24 A Contract of sale

25 Q Who prepared this contract of sale?

1 A I am not sure by Buddy Lewis or by Mr Maoli I am
2 not sure It was given to us by Buddy Lewis

3 Q This contract was given to you by Buddy Lewis?

4 A Yes

5 Q And that's your signature on the back sheet, right?

6 A Yes

7 Q And the price on this contract, by the way, exhibit
8 no 10, now purchase price is what?

9 A Mr Blackburn we purchased the house for \$700,000

10 Q I am asking you the purchase price on this contract
11 of sale?

12 A 650, 810, 875 The bottom line is \$700,000 we paid
13 for the house which is over \$100 per square foot Would
14 you like for me to answer it anymore than what was the
15 cost of the house? We paid over \$100 per square feet
16 which was a lot more than what we sold our house

17 Q Okay

18 A And all the repairs we have to do

19 Q And the repairs that you referenced for \$70 000 that
20 you made, was that before or after the closing of the
21 house?

22 A After

23 Q After And how did you pay for those repairs to the
24 house?

25 A How did I pay?

1 Q Yes Out of your own bank account? Did you take
2 \$70,000 of your own money and pay to have those issues
3 underneath the house, backyard, fence?

4 A Of course

5 Q Out of your own money?

6 A Yes

7 Q And that money wasn't given to you by anybody?

8 A No We paid out of our - How else could we have
9 paid for it?

10 Q I am going to hand you Defendant's exhibit no 12 and
11 ask if you identified that document?

12 A Yes

13 Q What is that document?

14 A This is a letter we sent to Mr Buddy Lewis Our
15 contract was -- We had two weeks to do an inspection By
16 November 4 we have to give something to the seller
17 Mr Maoli and the realtor Mr Buddy Lewis --

18 Q Right

19 A -- what type of finding we discover with the
20 inspection The first phase of our inspection was done on
21 November 3 November 3 we discovered exterior Please
22 review the inspection on the exterior Crawl space
23 Please review the inspection on the crawl space Interior
24 french doors not closing properly Outside cover hang
25 soft this is a faxed copy I can't -- needs painting

1 around the house Under note and inspection there are
2 some area where damaged stucco have been reported for
3 repair It looks like there has been some repair done I
4 am not very pleased with the inspection I am not
5 satisfied so please review and contact me

6 Q So, you're saying in the last sentence I am not
7 very pleased with this inspection What inspection are
8 you referring to? Is it Defendant's exhibit no 13 which
9 has been previously marked or at least part of it? What
10 is the date of that inspection Mr Babaei?

11 A November 3

12 Q It's the same date that you wrote the letter saying
13 you're not very pleased with the inspection, right?

14 A Yes

15 Q Okay And that inspection dated November 3 we've
16 have marked it previously as Plaintiff's - We've marked
17 it previously as Plaintiff's exhibit no 48 and if you
18 could pull up Plaintiff's exhibit no 48

19 THE COURT Who?

20 MR BLACKBURN I believe -- I was asking him to look
21 at it

22 THE COURT You may have to show it to him He's got
23 a thousand of them up there

24 MR BLACKBURN I'm trying

25 THE COURT Do you have it on this screen?

1 Do you have it?

2 MR PHILLIPS It is up here

3 MR BLACKBURN It's Plaintiff's exhibit 48 That s
4 the one You mentioned 48 and it's 43

5 THE COURT No, sir You said 48 It doesn t
6 matter It is 43 Let's move

7 MR BLACKBURN Your Honor, he gave me the copy with
8 the handwritten notes If you don't object I can just
9 take them off right?

10 THE COURT Now wait a minute

11 MR PHILLIPS Your honor, That is my -- just for the
12 record these aren t exhibits This is my copy of the
13 exhibit that's up there

14 THE COURT Well, if you looking for 43 you might
15 find it Forty-eight is not in existence

16 THE WITNESS Forty-three is here

17 MR BLACKBURN I couldn't read my own handwriting
18 So, is Plaintiff's exhibit 43 the same document that
19 I marked as Defendant's exhibit no 13?

20 THE WITNESS I m sorry?

21 Q Is Plaintiff's exhibit 43, does it have all of the
22 pages that we ve marked in Defendant s exhibit 13?

23 THE COURT Mr Blackburn, are you just comparing
24 exhibits? I don't understand what you're doing

25 MR BLACKBURN All right Let s go like this

1 You have a copy of Defendant's exhibit 13 in front of
2 you right, Mr Babaei?

3 THE WITNESS Number 13, yes

4 Q Number 13

5 A Yes

6 Q And if you look on page two of Defendant's exhibit 13
7 it tells you that the hardwood floors are buckling because
8 of humidity in the crawl space Is that what this
9 document says?

10 A Where does it say that, Mr Blackburn?

11 Q If you can read where it says, the wine cooler

12 A Yes

13 Q Hardwood floors are buckling because of humidity in
14 the crawl space Do you see that?

15 A Yes

16 Q If you could tell me --

17 A That's the wine room That's the room they had air
18 conditioning -- small air conditioning in the room to keep
19 the wine humid

20 Q And that wine room on your house, is it behind this
21 window -- this black window, the 23 percent?

22 A That's our dining room

23 Q Okay Is there a wine cooler in this area behind
24 that wall?

25 A It's on the other side

1 Q On this side?

2 A That side

3 Q When you say, "that side " are you talking about to
4 the right here in this area?

5 A Mr Blackburn, I cannot tell exactly where We call
6 it the pantry We converted it into the pantry

7 Q So you --

8 A I can go tonight and see, but I'm not exactly -- I
9 cannot put the --

10 Q So you converted the wine cooler into a pantry,
11 right?

12 A Right

13 Q And that s where the hardwood floors were buckling
14 when you bought the house is that right?

15 A According to the report yes

16 Q And you would agree with the report, right?

17 A Yes

18 Q Now, are the hardwood floors still buckling in that
19 area of your home?

20 A Yes

21 Q Now, let s look -- -

22 A But it s dry

23 Q What s that?

24 A It s dry

25 Q It's dry?

1 A It is dry. There is no --

2 Q Look -- Flip over to the fourth page of this
3 document, Plaintiff's - Defense exhibit no 13 -- and you
4 see where it talks about the exterior right here? And
5 that's what you've already read about in Plaintiff's
6 exhibit 43, right, where all of the stucco damage that
7 you're aware of, is that right?

8 A He did not inspect the stucco until after November 3.
9 This is something he just, basically, visually looked at
10 it and said I have to do my report on November 8 to find
11 out more about.

12 Q And the report -- This is a home inspection, right?
13 This is not a moisture map and survey, right?

14 A Exactly.

15 Q But you would agree with me on the exterior portion
16 of this report it talks about the quions of second corner
17 bottom have breaks in the lamina, right?

18 A Yes.

19 Q There is a spot right between the right garage door
20 and storage room that has been repaired, right?

21 A There is a spot right -- between right garage door
22 and the storage room that has been repaired. The spot -
23 There's a spot right between, okay?

24 Q And the stucco color does not match, right?

25 A Yes.

1 Q And there is a crack in the stucco left of the rear
2 patio behind the HVAC unit, right?

3 A Correct

4 Q And there is a crack in the lamina --

5 A It says there is a crack The only thing I see crack
6 is it says there is a crack in lamina under first window,
7 right side

8 Q Okay If you turn the next page, what were you
9 talking about the exterior -- and those were related to
10 the stucco, right?

11 A Yes, sir

12 Q Turn the page where it talks about the crawl space
13 And you would agree with me that the crawl space isn't
14 referenced in Plaintiff's exhibit 43 is it? It is four
15 pages in Plaintiff's exhibit no 43 It doesn't talk
16 about the crawl space, does it?

17 A Four pages yes

18 Q And how many pages is Defendant's exhibit no 13?

19 A Eight pages

20 Q And if you look at -- If you look at the fifth
21 page -- It is eight pages Look on the fifth page It's
22 not a part of Plaintiff's exhibit no 43 and this home
23 inspection talks about the crawl space doesn't it?

24 A Yes crawl space

25 Q And it says right here and, basically the third line

1 -- the end of the third line. There is evidence that water
2 enters crawl space through drops in poured footings and
3 through block walls, right?

4 A Correct. That's would be correct, yes.

5 Q What area of the house to your understanding is this
6 report talking about where there is water entering the
7 crawl space of the poured footings?

8 A There are two areas of our home that there's a lot of
9 water accumulation from the rain. There are two areas
10 One on the left and one on the right. That's where we
11 installed the french drain on both sides that goes under
12 the crawl space and comes into the backyard into the lake.
13 We got that corrected.

14 Q And one of the areas you had the french drain
15 installed by Mr. Clark you testified earlier is in this
16 area right under the 23 and 40 identified on exhibit --

17 A No.

18 Q That's not where you have it?

19 A It's about 10 feet to the left of it.

20 Q This way?

21 A Right behind the window. In fact, exactly behind the
22 the window where our dining room is.

23 Q Right here?

24 A Yes.

25 Q Okay. In this general location, right? That's where

1 the soil was extremely wet and you had the french drain
2 put in, right?

3 A No The soil was extremely wet in the backyard

4 Q Okay

5 A And the front of our home That part continues to
6 grab water, and that's why we put the french drain in

7 Q What part is that?

8 A The both side of our house

9 Q In the crawl space right? Underneath your house?

10 A It's not underneath the house It is above from
11 there It's on the ground level

12 Q Did Mr. Clark find in your crawl space that the soil
13 is extremely wet?

14 A Yes

15 Q And this report, Defendant's exhibit 13 is the
16 reason you generated your letter of November 3 right?

17 A To Buddy Lewis

18 Q To Buddy Lewis, right?

19 A Yes

20 Q And what was done? You said, I'm not very pleased
21 with this inspection, not satisfied So please review
22 and contact me at anytime What happened then? Did
23 Mr. Lewis contact you like you asked him to?

24 A He put together - He, basically, spelled out in
25 letter to us saying that Mr. Babaee you need to put a

1 letter together that explains to the Maolis that you're
2 not happy with the inspection and the closing may not take
3 -- I m not sure if he said that the closing may not take
4 on November 15 because that's when we were supposed to
5 close on the 15th, but he spelled out in letter to us and
6 said write this letter based on what I am telling you to
7 write and so we can -- we can address this -- this repairs
8 or this -- try to correct or find out what is the fact
9 behind it -- how can we fix it

10 Q Who did he tell you to prepare that letter for to
11 send to?

12 A Mr and Mrs Maoli the sellers

13 Q I am going to hand you Defendant's exhibit no 14 and
14 ask you if that's the letter that you sent to the Maolis
15 dated November 4, 2004?

16 A Yes

17 Q It is? And this letter -- the second paragraph says,
18 At this time the stucco inspection reveals, and at that
19 time November 4 had the stucco moisture mapping survey
20 been done?

21 A No

22 Q Okay At this time the stucco inspection reveals
23 areas -- what stucco inspection are you talking about?

24 A You have to ask Mr Lewis We did not write this
25 letter

1 Q Okay But, no, you wrote this letter, right?

2 A It was spelled out to us

3 Q It was spelled out to you?

4 A Yes

5 Q Mr Lewis wrote the letter for you?

6 A Yes

7 Q Okay And the letter says --

8 A We had --

9 Q -- At this time the stucco inspection reveals areas
10 that must be corrected prior to the Moisture Bond Warranty
11 being offered is that right?

12 A Yes

13 Q And how did you know at that time because your
14 testimony is you only saw the brochure we talked about
15 right and part of it is Plaintiff's exhibit no 3 -- How
16 did you know at that time what conditions must be
17 satisfied before the Moisture Bond Warranty was going to
18 be authorized?

19 A The stucco inspection was not done until November 8
20 I assume and I can only assume the writing that is done by
21 Mr Buddy Lewis is going back to page number four that we
22 looked at from his first phase inspection that there are
23 issues with the exterior that need to be addressed and
24 that's why he came up with this paragraph number two which
25 explains at this time the stucco inspection reveals area

1 that must be corrected prior to the Moisture Bond Warranty
2 being authorized Again, we had no knowledge of Moisture
3 Free Warranty corporation

4 Q You had no knowledge --

5 A The only knowledge that was given to us was the
6 brochure and that's what we looked at

7 Q So, you had the brochure

8 A He was the point of contact between, I guess us, the
9 seller, and the moisture free warranty

10 Q Okay And it is your testimony that Mr Lewis
11 prepared the letter for you and you did not prepare this
12 letter?

13 A I did not

14 Q Even though it has your address at the top right
15 corner where you were living before you moved into the
16 Babae's house 121 Clark Ridge Road Columbia South
17 Carolina 29223, dated November 4, 2004 Mr Lewis prepared
18 this letter for you?

19 A Yes, sir

20 Q And the last paragraph we up there on the board -- I
21 am not sure that the jurors can see -- also in order for
22 the termite company to agree to install a termite repair
23 bond quoins of some corners must be removed and the area
24 under them must be sealed

25 A That was recommended by Mr Clark

1 Q Do you still have a bond in your home with Mr. Clark?

2 A Yes

3 Q You do? And what areas are you talking about that
4 have to be removed before the termite bond will be at
5 issue? Are they right there by the garage?

6 A There were two or three areas in the garage and a
7 couple of areas in the front of our house

8 Q When you talk about the garage -- this right here
9 right?

10 A Yes

11 Q And this is Mr. Flaherty's report I'm looking at,
12 Defendant's exhibit 3, page 27 and the bottoms of these
13 EIFS details -- Are those the areas that was suggested to
14 be removed?

15 A Yes

16 Q And who removed them?

17 A Mr. Clark

18 Q And he removed them after you moved into the house,
19 right?

20 A Yes That's the only way he could place a termite
21 bond on our house was to remove those EIFS stucco from the
22 place that they are touching with the ground

23 Q And the last sentence of this letter, it says,
24 Hopefully, we all can agree on necessary repairs and close
25 as agreed, right?

1 A Yes

2 Q And at this time what was the purchase price of the
3 home that you had agreed to?

4 A We purchased the house for \$700 000

5 Q No but it says right here, Hopefully we can all
6 agree on necessary repairs and close as agreed The first
7 question is, what do you mean by close as agreed? What
8 was the original closing date?

9 A Mr Blackburn, you have to ask this from Mr Lewis
10 If you look at my writing, english is my second language
11 I don t write as well as this written letter in this
12 document

13 Q You don t --

14 A You have to ask that from Mr Lewis

15 Q You don't write as well as this letter is written?

16 A I don t You can look at some of my letters

17 Q And you run a very successful computer operation -

18 A Yes

19 Q -- generating about \$10 million a year, don t you?

20 A Yes, I do

21 Q But you can't write a simple letter --

22 THE COURT He didn't say he couldn't write a simple
23 letter Come on Mr Blackburn

24 MR BLACKBURN Okay I'm sorry

25 And you never signed this letter?

1 THE WITNESS Mr Blackburn, I signed the letter, but
2 truth is the letter was spelled to us by Mr Lewis

3 Q So, you did sign the letter, didn't you?

4 A I did sign it

5 Q And it's the same letter we just reviewed isn't it?

6 A Yes

7 Q Okay Now, I am going to hand you Defendant's
8 exhibit no 15 I am asking you if you identified

9 Defendant s exhibit no 15

10 A That's my writing

11 Q Is that your writing?

12 A Yes That's November 8

13 Q And you wrote that letter right?

14 A Yes

15 Q And you signed that letter, didn t you?

16 A Yes

17 Q What is the date of that letter?

18 A November 8

19 Q November 8, 2004, right?

20 A Yes

21 Q And you prepared this letter yourself didn t you?

22 A Yes

23 Q Why did you prepare this letter?

24 A I have to report -- I have to send the report Our
25 closing was November 15, I believe

1 Q Okay November 15 right?

2 A I had to give Buddy Lewis and the seller finding of
3 our inspections

4 Q Okay

5 A This completed our inspection which was the phase one
6 interior, phase two stucco

7 Q Okay Now, you prepared Defendant's exhibit --

8 THE COURT Mr Blackburn, he's already said he did
9 it twice

10 Q Let's review this The Monday, November 8 2004 is
11 the date of the letter, right?

12 A Yes sir

13 Q And it says Here is the list of things that needed
14 to be corrected before closing on November 15, 2004,
15 right?

16 A Correct

17 Q It says, one, exterior paint and pressure wash Is
18 that what you wanted to be done before you closed?

19 A Exterior paint, yes

20 Q Okay And you also wanted the outlet at the right of
21 the stairwell leading to dining room has no -- has an open
22 ground You wanted that repaired too, right?

23 A Yes

24 Q And number three the dining room door adjustment, you
25 wanted that fixed, too, right?

1 A Yes

2 Q And in number four we're talking about the hardwood
3 floor in the wine room You wanted that the fixed, too,
4 right?

5 A Correct

6 Q Number five, pocket doors in foyer to dining area
7 meet at bottom leaving a gap, right?

8 A Correct

9 Q You wanted that fixed and then the library door at
10 left binds at top You wanted that fixed, right?

11 A Yes

12 Q Number seven, the cover plate for the cable TV is
13 broken in the bedroom upstairs And that cover plate
14 you're talking about in the bedroom of your \$700,000 house
15 is one of those that cover up the outlet where the cable
16 comes out, is that right?

17 MR SHEFTMAN Your Honor --

18 THE COURT Mr Blackburn, look up here

19 (Whereupon a bench conference was held)

20 Q And you talk about -- number ten Let's just talk
21 about what happens with the stucco Quions at second
22 corner bottom have breaks in the lamina There is a spot
23 right between the garage door and storage room that has
24 been repaired but the stucco color does not match Right?
25 You wanted that done?

1 A Again everything came from the inspection that was
2 done by Mr Clark

3 Q November --

4 A None of this is my findings It's the findings of --
5 THE COURT Just answer the questions, please, sir

6 Q They came from the November 3 Clark report, right?

7 A Yes

8 Q And you wanted them fixed right?

9 A Yes

10 Q But this list is a little longer than the list that
11 you initially prepared isn't it? It includes a lot of
12 other things like the light bulb in the attic needs to be
13 repaired too right?

14 MR PHILLIPS Your Honor, I believe he testified
15 that Mr Lewis prepared that list

16 THE COURT Well it doesn't matter who prepared it
17 We're talking about stucco and lightbulbs in the attic
18 hadn't got anything to do with this lawsuit

19 I am asking you as nice as I know how to stick with
20 relevant material If you can't then I can ask you in a
21 different kind of way

22 MR BLACKBURN I understand, Your Honor I'll move
23 on

24 Number 11, for instance, that's related to stucco
25 isn't it? There is a crack in the stucco left of the rear