

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A Early III, Circuit Court Judge

Case No 2006-CP-40-7215

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S.C. Supreme Court

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 II

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In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A Early 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 Warrant is
Respondent/Appellant

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1 patio behind the HVAC We talked about that in the Clark
2 report, didn't we?

3 A Yes

4 Q Number 12 there is a small hole in the reveal around
5 the garage door near the bottom That's another stucco
6 related issue isn't it?

7 A Yes

8 Q Okay Number 13 there are spots above the last door
9 on the back of the house that have been repaired Stucco
10 does not match

11 Now, what area are you talking about? There is small
12 hole - There are spots above the last door on the back of
13 the house Are you talking about the backside of the
14 house identified on page 25 of exhibit no 2? This is -

15 A No Mr Blackburn there is a small maybe a two
16 diameter circle all the way to the den area that's a
17 little bit different color than the rest of the stucco and
18 that's what that meant

19 Q Is that identified on this report?

20 A No, it's not I don't see the picture there

21 Q You don't see it on this report?

22 A No

23 Q All right Number 13 there are spots above the last
24 door on back of the house We talked about that

25 Fourteen, there is a crack in the foundation under vents

- 1 on left end of house facing house there are cracks in
2 foundation left and right at front steps There are some
3 cracks in the tile joints at front steps and steps on left
4 on left of patio Now that wasn't in the letter
5 Mr Lewis prepared for you either was it?
6 A This is the complete inspection after the second
7 inspection was done No it was not
8 Q Number 15, you're talking about the backyard needs
9 strip drain in multiple areas where the soil is wet and
10 boggy That's in the backyard, right? And those were
11 repairs part of \$70,000 that you paid?
12 A Yes
13 Q Number 16 the Moisture Bond Warranty and termite
14 bond must be received and reviewed before the closing
15 That was in the other letter dated November 3 wasn't it
16 that Mr Lewis prepared for you?
17 A Correct
18 Q Now, again on November 8 you're asking to see the
19 terms of the Moisture Bond Warranty must be received and
20 reviewed before closing, aren't you?
21 A Moisture Bond Warranty and termite bond must be
22 received yes
23 Q Did you ever get that?
24 A No We got it at the closing
25 Q You got it at the closing

1 A Not -- We got the Moisture Bond warranty invoice at
2 the closing and the termite invoice but everything was
3 mailed to us after we closed the house This includes the
4 termite In fact, the quions did not get removed until
5 sometimes in February

6 Q And that's the only thing you got at closing was the
7 invoice, is that right?

8 A Invoice and maybe a cover letter from Moisture Free
9 Warranty

10 Q Does that cover letter look similar to the part of
11 Plaintiff's exhibit no 6 where the three easy steps for
12 Moisture Free Warranty --

13 A No, the brochure we got before that

14 Q Before that? Okay And then number 17 all stucco
15 repair must be approved by either Fred Babaee and
16 warranty right?

17 A Yes

18 Q And was all stucco repair approved by either Fred
19 Babaee and warranty before the closing?

20 A No, because they put a warranty on the house

21 Q But it says you and warranty, right?

22 A Yea

23 Q Did you ever approve it before the closing? You
24 yourself?

25 A Mr Lewis came to us with the brochure with the

1 recommendation of what Moisture Free Warranty will do for
2 us if it's covered - if we purchase the house with the
3 Moisture Free Warranty which will make our house dry as
4 long as we have the warranty on the house That s how it
5 was sold to us That's how it was presented to us when we
6 purchased the house That's what it means by the
7 warranty

8 Q All right When you say it was sold to you when you
9 purchased the house if you can pull out this Russell and
10 Jeffcoat contract, exhibit no 10, which your wife signed
11 and look at the third page

12 A Yes

13 Q This document is dated August 29, 2004 right?

14 A Yes

15 Q And it includes the seller to pay \$4 095 - the
16 seller at closing for moisture bond warranty, right?

17 A Correct

18 Q So, you knew at that time August 29 2004 that you
19 were going to get a moisture free bond, right?

20 A Correct

21 Q Let's look at Plaintiff's exhibit no 30 Right
22 here We've already talked about Plaintiff s exhibit
23 no 30 When did you receive Plaintiff's no 30?

24 THE COURT What is it?

25 MR BLACKBURN It's the November 8 2004 CK report

1 that we previously marked

2 THE COURT The question is when did he first get it?

3 MR BLACKBURN Yes, sir

4 THE WITNESS November 8, 2004 If I remember back

5 the moisture report was given to us during that time I

6 believe Yes

7 Q So you received it as early as November 8 2004

8 right?

9 A That's correct

10 Q In the first sentence of this report says, At your

11 request we performed a moisture mapping survey on the

12 above-mentioned property on November 2, 3 and 5 of 2004,

13 right?

14 A Correct

15 Q And then it goes in a litany of, you know, the first

16 page Some of the items have not been done on this

17 residence making it a non-conforming installation, is that

18 right? First page?

19 A Yes

20 Q And it talks about all of these issues that Mr Clark

21 felt was wrong with your house, right?

22 A Yes

23 Q And it continued on the second page

24 A I am not sure if it s issues He is saying some of

25 the items have not been done on this residence making it a

1 non-conforming installation He's saying, number one,
2 step and kickout flashing where roof and vertical wall
3 meet He is saying he did not check that Flashing at
4 chimney rickets (phonetic), and dormers, he did not check
5 that

6 Q He didn't check it, but he believes there were
7 concerns didn't he?

8 A I don't know

9 Q When you were asked the question by Mr Phillips on
10 the third page it is generally accepted that wood rot when
11 removed from a kiln has a 19 percent moisture content
12 Any intrusive moisture readings of 20 percent or above
13 readings corrective action should be done right?

14 A Correct

15 Q And you looked at this report didn't you?

16 A Yes

17 Q And are there areas with 20 percent or above?

18 A Yes

19 Q Okay And what did you do after you got this report?
20 You gave it to Mr Lewis right?

21 A I presented it to Mr Lewis, the seller and Charles
22 Strickland --

23 Q Okay

24 A -- who was the Moisture Free Warranty inspector

25 Q And Mr Strickland took this report to Mr Clark and

1 he went back out to the house and looked at it again,
2 didn't he?

3 A Correct

4 Q And he found one area with elevated moisture that
5 resulted in that authorization certificate with an
6 exclusion, didn't he?

7 A Correct

8 Q And he put that on as exclusion based on his
9 inspection after he was given this report?

10 A After

11 Q By Mr. Lewis, right?

12 A Yes

13 Q Okay. Now, you got a signature block on page six of
14 this report and if you could turn to it I believe --

15 A Which one?

16 Q The document that you have in front of you,
17 Mr. Babaee, Plaintiff's exhibit no. 30. It is right there
18 hanging up behind you on the wall.

19 A Yes

20 Q And you said Mr. Clark issued several reports, right?

21 A Let me get the right page here.

22 THE COURT Well, you asked him about the signature
23 page, and then you asked him about issued --

24 MR. BLACKBURN Right. I am trying to get --

25 THE COURT No wonder he is confused.

1 Q Just turn to page six

2 A This one?

3 Q Can I hold it? This is page six

4 THE COURT What is up on the wall? What page?

5 Q Page six of the CK report, does that look like what s
6 hanging on the wall marked Defendant's exhibit no 6? Is
7 that an accurate depiction? That s Mr Clark signature on
8 the report?

9 A Yes

10 Q And what you're looking at on page 6 of Plaintiff's
11 exhibit no 30 is the same -- is a blow-up of page 6,
12 right?

13 A Yes

14 Q Okay Now let me ask you about this document

15 THE COURT What is it?

16 Q This is Defendant s exhibit no 7 and can you tell
17 me have you ever seen this document?

18 A Mr Blackburn, I am not sure the relevant of the two
19 We received multiple copies of inspection

20 Q Okay

21 A The first phase was a fax that was faxed to us It
22 has one header on one page and the rest of it had no
23 headers in it We had to -- We had to make immediate
24 respond to the seller and the realtor Buddy Lewis that
25 November 4 is the deadline We had to give him our

0501

1 finding of what is the inspection was So I had multiple
2 things that was faxed, e-mailed -- I'm sorry, not
3 e-mailed but faxed to us I faxed the first phase of
4 inspection and I may have faxed the second phase of
5 inspection which was the stucco I am not sure what is
6 the relevance or what is the importance or significance of
7 showing these two documents

8 THE COURT Just answer the question Have you ever
9 seen the one he's got up there on the board? That's a
10 simple question

11 THE WITNESS I have seen this report I have seen
12 this report yes

13 Q You've seen that report?

14 A I have not seen that report

15 Q And have you not seen a page like this?

16 A No

17 Q And the difference between what I've got --

18 A It is the same -- I'm sorry Go ahead

19 Q And the difference between what I've got on
20 Defendant's exhibit no 7 and what's up on the wall --
21 Defendant's exhibit no 6 -- there is a difference in
22 these two documents aren't there?

23 THE COURT Well, what is the difference?

24 MR. BLACKBURN That's what I'm asking Mr. Babaee

25 THE COURT You can lead him Just say is it

1 different this way?

2 Q There is no header up here with your name and date on
3 Defendant's exhibit no 7, is there?

4 A Correct

5 Q Okay But there is on this copy, right? And that s
6 Defendant's exhibit no 6 There is a header with the
7 date of November 8, 2004, and that s page three of
8 Mr Clark's report right?

9 A Correct

10 Q And there is no header with your name --

11 THE COURT You've established that

12 Q Okay And you're telling me that the jury -- that
13 Mr Clark issued a report to you with a page three of his
14 report that looks like this exhibit no 7?

15 A Mr Blackburn I brought a faxed copy of the report
16 that was sent to me by Mr Clark If you'd like I can
17 show it to you I have no header on the second, third,
18 fourth, fifth and sixth page

19 Q Okay We'll get to that report we're talking about
20 What I am asking you is did Mr Clark ever give you a
21 report out of the multiple reports that he gave you that
22 didn't have header?

23 MR PHILLIPS Your honor, I believe he just --

24 THE COURT He just said he did when you were showing
25 the fax I mean, I don't know how else can he answer it

1 MR BLACKBURN Yes or no that he did or didn't

2 THE COURT Well, he just did

3 MR BLACKBURN He said - Well I'm not sure if I
4 understood the response

5 THE COURT Well ask your question again

6 Q Didn't Mr Clark you say -- Let's just start with
7 this Mr Clark gave you multiple reports, you say
8 right? That was November 3 home inspection and a
9 November 8 stucco?

10 MR PHILLIPS Your honor we're going back over the
11 same thing

12 THE COURT Can you ask a very simple question?

13 MR BLACKBURN Yea I am just asking if he gave him
14 two reports

15 THE COURT I know but it is not simple

16 MR BLACKBURN Okay

17 THE COURT Did you get serial reports from the guy?

18 THE WITNESS Yes

19 Q Okay And one of those reports you got wouldn't have
20 had a header like that, right?

21 A I received multiple reports, Mr Blackburn

22 Q Okay

23 A It could be that one of them didn't have header

24 Q Okay And at this time November 8 when the CK report
25 was issued the purchase price of the home was what?

1 A We purchased the house for \$700 000

2 Q But my question is at the time the CK report was
3 issued on November 8 --

4 THE COURT Do you know on November 8 where you stood
5 on the negotiations with the seller as to what the
6 purchase price was on November 8?

7 THE WITNESS Yes, sir, Your Honor The negotiation
8 went from 860,000 to \$700 000

9 THE COURT Do you know where it was in that range?

10 A It could have been between 810,000 range

11 Q And that would be -- That would be consistent with
12 Defendant's exhibit no 16 right? I am going to ask you
13 if you can identify Defendant s exhibit no 16

14 A Yes

15 Q And Defendant s exhibit no 16 is what?

16 A I'm sorry?

17 THE COURT What is it?

18 THE WITNESS It's the contract of sale

19 Q All right And the first --

20 A And the attorney -- Mr Buddy Lewis called us, said
21 the closing on November 15 Everything was getting ready
22 to go to the attorney for closing He said you need to
23 send the contract to the closing attorney That's what I
24 did

25 Q Okay And this document Defendant s exhibit no 10

1 is dated November 8 2004, right?

2 A Correct

3 Q And that's the same date you got the CK report
4 November 8, 2004 isn't it?

5 A It was November -- It had to be, yes

6 Q Okay

7 A It couldn't be any later than that, yes

8 Q And you say this is a contract of sale Defendant's
9 exhibit no 10 and on the second page the purchase price
10 is \$810,000, right?

11 A Correct

12 Q Okay And you remember when I took your deposition
13 right?

14 THE COURT Has he answered something different than
15 what was in the deposition?

16 MR BLACKBURN Yes he has Your Honor

17 THE COURT Well then impeach him

18 Q Okay Had you agreed to \$700,000 --

19 THE COURT Where is the deposition?

20 MR BLACKBURN Okay

21 THE COURT Mr Blackburn, please keep in mind my
22 ruling You're getting close

23 MR BLACKBURN Okay I'll try to speed this thing
24 along Your Honor

25 THE COURT No sir Remember what my ruling is on

0506

1 the motion in limine

2 MR BLACKBURN Yes, sir

3 THE COURT Do you?

4 MR BLACKBURN What we agreed, I believe, Your
5 Honor --

6 THE COURT No, sir Just remember my ruling Don't
7 violate it

8 (Whereupon, a bench conference was held)

9 THE COURT Hand him the original

10 Q I am going to hand you a copy of your original
11 deposition that I took on July 17 2008 I am going to
12 ask you to turn to page 218

13 THE COURT Find it?

14 THE WITNESS Last page of the deposition Yes

15 Q Your deposition page 218 Are you on the right page?

16 A Yes, I am

17 Q And now line 6, if you can read that for the jury

18 THE COURT Is line 6 a question or answer?

19 Q Question on line 6, if you can read that for the
20 jury Question

21 THE COURT Read line 6 for us

22 THE WITNESS Line six, When you had -- Had You
23 agreed to the \$700 000 before you got the Clark report or
24 after you got the Clark report?

25 Q And your answer was what?

0507

1 A Our first offer was 650 They came back with 890

2 We went up to 700 They came up to 810 Then we stayed

3 at 700 until we got the Clark report

4 Q Until you got the Clark report -- and then on line 13
5 my question was what?

6 A So you had already agreed to \$700,000 before you got
7 the Clark report?

8 Q And your answer was what?

9 A Yes

10 Q Now, as of November 8 when you got the Clark report
11 as reflected --

12 MR PHILLIPS Your Honor I would object Which
13 Clark - There are two Clark reports I would just ask --

14 THE COURT Just which one?

15 MR BLACKBURN I said November 8

16 THE COURT You said as of November 8 --

17 MR BLACKBURN Okay

18 THE COURT -- you go the Clark report referring to
19 which report?

20 THE WITNESS Mr Blackburn, can I explain here?

21 THE COURT Let him ask his question

22 Q As of November 8 reflected in Defendant's exhibit
23 no 10 the purchase price was still \$810,000 right?

24 A Correct

25 Q And you had the Clark report, didn't you?

1 A We had it, yes

2 Q So, it wasn't \$700,000 before you got the Clark
3 report, was it?

4 A No

5 Q It was about \$110,000 difference between 700,000 and
6 the eight-hundred-ten, right?

7 THE COURT No sir, it's not about It is exactly

8 THE WITNESS Mr Blackburn, the deposition you had
9 me -- I think it was started at 2 or 3 o'clock We
10 finished like 8 o'clock or so It was the last question
11 you asked me in the deposition It was the last page of
12 your deposition that you asked me I have two contracts
13 here August 29 and October 3 Mr Phillips asked me to
14 look at my closing documents and remember what happened
15 four years ago or three years ago based on the closing
16 based on the numbers or based on the price of the house
17 My contract says October 3 \$700,000 That was before
18 Mr Clark's report

19 Q And --

20 A And that's what I remember So, I misspoke I'm
21 sorry

22 Q You misspoke Now, and you got the house for
23 \$700,000 because of the Maolis' health, right?

24 A I am not sure how you getting that conclusion

25 MR PHILLIPS I object Your Honor I think

1 Mr Babae has testified over and over how

2 THE COURT He has It's been negotiated from here
3 to here and met somewhere there

4 Q And then the reason you got it for \$700,000 was
5 because --

6 MR PHILLIPS Your Honor, I would object pursuant to
7 your earlier ruling

8 (Whereupon a bench conference was held)

9 Q And I am going to ask you to look at Plaintiff's
10 exhibit no 25 That s the document that references
11 Moisture Free bond It is dated November 11 2004, right?

12 A Yes

13 Q And the moisture bond warranty was, basically okay
14 is what Mr Lewis is saying right? November 11 2004

15 A I m sorry What was the question again?

16 Q This fax from Mr Lewis who was your realtor to you
17 on November 11 2004 tells you that the Moisture Free
18 Warranty bond was authorized once right?

19 A With one exception yes

20 Q I am going to hand you Defense exhibit no 19 and ask
21 you if that is the letter of approval dated November 11,
22 2004 where it says that the moisture bond has been okayed
23 with one exclusion?

24 A Yes

25 Q Okay And if you read for me this -- Let me show it

1 to you - this part right here, Mr Babae

2 THE COURT Is that a question to ask him to read it?

3 MR BLACKBURN Yea

4 I am going to read to you It includes, I have read
5 and understand this letter of approval dated November 11,
6 2004 and the Moisture Warranty terms and conditions I
7 accept the warranty and any exclusions listed for the home
8 at 133 Beaver Dam Road

9 A Mr Blackburn this document was produced to original
10 seller of the house which was Mr and Mrs Maoli This
11 was given to us at the closing to sign and we signed
12 multiple papers

13 Q And that's your signature isn't it?

14 A Of course it is

15 Q And that's your wife's signature?

16 A Yes

17 Q And it was given to you at closing right?

18 A Yes

19 Q And the closing now was taking place when?

20 A November 18

21 Q Okay November 18?

22 A But there was no terms and conditions of the Moisture
23 Free Warranty contract with this letter

24 Q Why did the closing change from November 15 to
25 November 18?

1 A There were questions about the inspection

2 Q Really?

3 A There were questions about the repairs There were
4 questions about --

5 THE COURT What was his answer?

6 Q What were the questions about the inspections? What
7 were those questions that made the change --

8 A The November 8 --

9 Q Let me finish my question

10 A I m sorry

11 Q What were the questions that made the closing change
12 from November 15 to November 18? What came up to make
13 this purchase change three days?

14 THE COURT Not the purchase the closing

15 Q Well the purchase of the house at closing The
16 closing changed from november 15 -- What questions came
17 up?

18 A I really -- I may have been -- I may was -- Maybe I
19 was out of town The attorney didn t have the time

20 THE COURT Don't guess If you know sir Don t
21 speculate

22 THE WITNESS I do not know

23 Q You don't know? And you said that you received an
24 authorization certificate in January That was the next
25 correspondence that you received from my client is that

1 right?

2 A Correct We called after the closing to transfer the
3 ownership In my experience with the business we are in
4 most cases warranty doesn't transfer So I called to
5 show my concern that is this warranty transferable

6 Q Okay

7 A They said, yes, and we are going to send you the
8 certification

9 Q And you got it, right?

10 A The warranty And that's what we got, yes

11 Q The authorization certificate And then you started
12 noticing some stains in the house around October 2005 is
13 that right?

14 A In that neighborhood

15 Q And you contacted my client --

16 A That was before I'm sorry Go ahead

17 Q Yea You contacted -- You contacted them to see if
18 you could get the warranty changed from three years to
19 five years, right?

20 A And also contacted them about this exclusion

21 Q Exclusion Okay

22 A We wanted to know what needed to be done

23 Q And you got the exclusion removed, didn't you, by
24 calling my client right?

25 A It was removed with no repairs of anything being done

1 in the house

2 Q And they responded and removed the exclusion right?

3 A Correct

4 Q Okay And then the next contact you had with my

5 client was around October of 2005, wasn't it?

6 A I think so I'm not --

7 Q Because you started noticing some stains on the front
8 and back of your house right?

9 A On the front yes

10 Q On the front And the stains that you began noticing
11 on the front of your house were in this area, right?

12 A Correct

13 Q Did you notice any stains on the back side of your
14 house?

15 A No

16 Q So, you contacted my client and said what? You were
17 concerned?

18 A I believe I called them, showed my concern explained
19 that -- I m sorry I contacted - Before I contacted
20 Moisture Free Warranty I contacted our realtor Buddy
21 Lewis

22 Q Okay

23 A Asked his recommendation He said call Moisture Free
24 Warranty You have warranty on the house Give them a
25 call Give them your concern Show them your concern

1 That s when I called Moisture Free Warranty I didn't get
2 any response back In fact I had to send a letter in
3 order to get a response

4 Q Okay And you sent them this letter I am going to
5 hand you marked Defendant s exhibit no 24, didn t you?

6 A Yes

7 Q What is the date of this Defendant's exhibit no 24?

8 A January 3

9 Q January 3 And you say to my client Please note
10 that we have performed a moisture mapping survey from
11 Clark s Home Inspection Corporation and discovered the
12 following problems in the stucco that needs to be
13 addressed Please review the enclosed documentation Our
14 account certification number is 411014 Sincerely Fred
15 Babaee, right?

16 A Correct

17 Q But you really didn't just find out about the stucco
18 problems identified in the Clark report You already knew
19 about them in November of 2004, didn t you?

20 A We didn t have dark stain on the house in
21 November 2004

22 Q But you knew about the Clark report in 2004 didn't
23 you?

24 A The Clark report yes

25 Q And this letter you're telling my client says, Please

1 note that we have performed a moisture mapping survey from
2 Clark s home inspection and discovered the following
3 problems right?

4 A That's the only report I had in my hand That is
5 correct That s the Clark report

6 Q And this letter is dated January 3, 2006, isn t it?

7 A Correct

8 Q Okay Did you get a response from my client?

9 A After second letter yes I think I wrote another
10 letter November -- I m sorry, January 11

11 Q You re talking about this letter I got right here,
12 Defense exhibit no 26, right? I'll ask you if Defense
13 exhibit no 26 is the second letter that you wrote to my
14 client?

15 A Yes

16 Q Okay And in this letter January 11 2006 it says,
17 Dear Moisture Warranty Corporation Here is the
18 information you have requested So, obviously, someone
19 contacted you between January 3, 2006 and January 11 2006
20 so that -- and wanted some information from you, didn't
21 they?

22 A Correct

23 Q They were fairly responsive wouldn't you agree?

24 A Correct

25 Q Okay

1 A But I thought that according to their brochure they
2 were supposed to send an inspector

3 Q Okay We'll get to that

4 A Twelve to sixteen months we saw nobody coming to
5 inspect the house

6 Q I promise you we'll get to that And then the second
7 sentence it says, Enclosed is the color copy of the
8 moisture report, right?

9 A Yes

10 Q Okay Also closed is Mr Clark's information and
11 certification If you need to contact Mr Clark his
12 phone number is (803)781-4991 or you can reach me at
13 (803)608-2743 Please note moisture meters used for this
14 investigation was non-intrusive meter and intrusive meter
15 Please review these documents and let me know the results
16 ASAP, okay? Is that what you said?

17 A Correct

18 Q Now, the second page of this document is -- These are
19 Mr Clark's qualifications, right?

20 A Correct

21 Q Did you contact Mr Clark anytime between January 3
22 and January 11?

23 A Okay

24 Q Did you?

25 A Mr Clark is our client I talk to him -- We manage

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1 their network

2 Q Okay

3 A I talk to him perhaps, maybe I am not sure, but I
4 asked him about the report yes

5 Q You asked him about the report Did you ask him to
6 change the date of the report?

7 A Of course

8 Q You did?

9 A Sure

10 Q You asked him to change the date of the report?

11 A I asked him if it's if the report needed to be
12 done again

13 A Okay

14 Q I asked him, Mr Clark, I have to send something to
15 Moisture Free Warranty in order to get any response from
16 him I am only getting phonecalls which I have to make a
17 call in order to receive a call

18 Q Did Mr Clark tell you he was not going to change the
19 date of the report, right?

20 A Mr Clark said that the date is only -- The date of
21 the report is only the date that the report is done I
22 thanked him and that was the end of it

23 THE COURT Gentlemen, how about y'all look up here
24 (Whereupon, a bench conference was held)

25 THE COURT We're going to go about five more

1 minutes It'll be 5 o'clock like I told you

2 Q We'll just finish this with this report that you sent
3 this January 11 letter to my client and in the second page
4 are Mr. Clark's qualifications right?

5 A Yes

6 Q And on the third page -- The third page of this
7 exhibit looks like Defendant's exhibit no. 7 doesn't it?

8 A Yes

9 Q This document doesn't have a date on it, does it?
10 Defendant's exhibit no. 7, right?

11 A Yes

12 Q But the report that you had in 2004 does. That
13 letterhead up there, right? I'm talking about --

14 A Yes

15 Q I'm talking about Defendant's exhibit no. 6, right?

16 A It depends on which copies you're talking about, yes.

17 Q And Mr. Clark said he wasn't going to change the date
18 of the report, didn't he?

19 A Correct.

20 Q So you sent my client, basically the third page and
21 when you say "Here is a color copy of the moisture report,"
22 you only sent my client the third page with the header
23 taken off, didn't you?

24 A Mr. Blackburn, this is what I sent to --

25 Q Right.

1 A -- Moisture Free Warranty

2 Q And it's not the entire report?

3 A I am not sure what the header - what is the
4 significance of the header

5 THE COURT Well, don't worry about what the
6 significance -- Was the header on it or not?

7 THE WITNESS No This is what I sent to Moisture
8 Free Warranty

9 Q Yea but it's not the entire report is it?

10 THE COURT Well, that s obvious

11 MR BLACKBURN Okay

12 THE COURT It is one page as opposed to rest of the
13 pages

14 Q It is missing the first two pages, isn't it? And
15 then but you do include -- If you turn to the fourth page
16 you include 2 of 15 with the date - Look at page -- Look
17 at page 4 Now would you agree with me on this exhibit
18 that s been previously marked as Defendant s exhibit
19 no 26 that it doesn't have the first page of the Clark
20 report, right? The first page of the color photos that
21 you said you sent them right? And the first page of the
22 Clark report -- The first page --

23 MR PHILLIPS (indicating)

24 THE COURT All right I am going to sustain that
25 objection I don't understand that question Please

1 start back and do it piece meal to we can all understand
2 you

3 MR BLACKBURN Gotcha

4 The color copies that you referenced you sent - The
5 color copies of the moisture report had 15 pages didn't
6 they?

7 THE WITNESS I am not sure, Mr Blackburn

8 Q You're not sure?

9 A I didn't count

10 THE COURT Well it had more than the two or three

11 Q Right And the Defendant's exhibit no --

12 Plaintiff's exhibit no 30 has a 1 of 15, doesn't it?

13 A This is what I have

14 Q And it doesn't have --

15 A I have 2 of 15

16 Q And it has -- But what you -

17 A What is page number 1? Mr Blackburn I gave this
18 information So many things in my closing I asked my
19 secretary, I said, Send this report to Moisture Free
20 Warranty She could have found multiple reports and since
21 we -- You know, she picked one and sent it to you I am
22 not sure what is the page 1 What is the page 1?

23 Q Well, you didn't include page 1 of 15

24 A Which is what?

25 Q Which is the picture of the house -- your house --

1 with a date of November 2, 3 and 5, 2004 You didn't
2 include that 1 of 15 when you sent what you told my client
3 was a color copy of the moisture report on January 11
4 did you?

5 A That is Mr Clark s report That's the only report
6 we have That's what we sent to them It doesn't matter
7 if it was -- I asked Mr Clark Would you please run
8 another moisture survey on my house? He said, Fred, Why
9 do you want to waste your money to run another report? I
10 have given you a report If you want to send something to
11 Moisture Free Warranty go ahead and send it to them and
12 that s what I did

13 Q And what you sent to him was a third page of the
14 report without header or date right?

15 A I'm sorry Maybe I sent page 3, but what is the
16 importance of --

17 Q It's not a complete copy of the report

18 THE COURT He's admitted he didn t send a complete
19 copy of the report

20 Q And it s an incomplete copy of the report as it
21 doesn t include page 1 of 15 of the color copy

22 MR PHILLIPS I object, Your Honor

23 MR BLACKBURN One of fifteen and --

24 THE COURT Hold on Make your objection

25 MR PHILLIPS I object, Your Honor We've gone over

1 the same thing over and over

2 THE COURT We have He s admitted it

3 MR BLACKBURN All right Well Your Honor it s
4 5 o'clock

5 THE COURT I know what it time it is You let me
6 run the courtroom

7 MR BLACKBURN I will I believe I am at a good
8 stopping point right now if you want to stop

9 THE COURT How much longer you got?

10 MR BLACKBURN I don't want to put the jury to
11 sleep Your Honor I really don't I probably got 15
12 minutes

13 THE COURT I think your 15 minutes - They re ready
14 to go home You want to go 15 more or are you ready to
15 stop and come back tomorrow? I ll leave it up to ya ll

16 THE JUROR Fifteen more

17 MR BLACKBURN Fifteen more? Okay All right
18 Let s go

19 THE COURT Now now the deal is you have to conclude
20 it in 15 because --

21 MR BLACKBURN Okay

22 THE COURT Or if you don't think you can, tell us
23 now Be honest with us We won t fuss We ll go home
24 now I don't want to box you

25 MR BLACKBURN You know what? I don t want to be

1 boxed

2 THE COURT I don't want to box your client in
3 Let's quit right now

4 MR BLACKBURN Let s quit I appreciate it

5 THE COURT You can go home and get you some more
6 energy and go for two hours tomorrow if you want to

7 All right, ladies and gentlemen Is 9 30 okay?

8 Don t discuss Don't deliberate I'll have you breakfast
9 here in the morning Be here a little earlier I ll ask
10 these guys tonight I ll try to get some idea as to what
11 we're going to do tomorrow

12 Yes sir?

13 THE BAILIFF Your Honor, may I approach?

14 THE COURT You certainly may Watch those steps

15 (Whereupon the Bailiff speaks with The Court)

16 THE COURT You know what he just told me? The Clerk
17 of Court doesn t have enough money to buy y'all sausage
18 biscuits I ll have you some I ll buy them out of my
19 pocket That s ridiculous That does make me mad

20 Y'all have a pleasant evening I ll see you in the
21 morning Thank you

22 (Whereupon the jury exited the courtroom at 5 02)

23 THE COURT Anything for the record before we break
24 for the evening?

25 MR PHILLIPS Your Honor, may my witness be excused?

1 THE COURT No He s got to come back in the
2 morning He doesn't have to sit there all night

3 MR PHILLIPS For the evening, Your Honor

4 THE COURT You want to talk to his wife She might
5 want him to stay up here

6 THE WITNESS I snore a lot at night

7 THE COURT You're in the middle of your testimony
8 So don t discuss it with your lawyer I can t tell you
9 what to talk to about with your wife Or anybody else
10 okay? Thank you

11 Y'all have a very pleasant evening We'll start back
12 at 9 30 in the morning Let me see you guys in chambers,
13 please

14 (Whereupon, the proceedings were concluded for the
15 day and were reconvened on November 19, 2008 as
16 follows)

17 MR PHILLIPS Your Honor Mr Blackburn has
18 identified an exhibit 64 for identification purposes If
19 I might approach Again it contains the language that
20 quote, seller agreed to \$110,000 stucco possible repair
21 replacement if closed Thursday unquote I believe your
22 ruling on that is clear I thought you might want to take
23 that this up outside of the presence of the jury

24 THE COURT He's already put that in evidence

25 MR PHILLIPS He marked it for identification this

1 morning Your Honor I think that your ruling is right on
2 point that that evidence is excluded

3 MR BLACKBURN Your Honor I would respectfully
4 disagree with that This document is -- Since Mr Babaee
5 says he can't recall why the closing date was changed,
6 this document references the closing date -- hope to close
7 no later than Thursday November 18

8 THE COURT I can read

9 MR BLACKBURN Then number two says why

10 THE COURT Well, that's a backdoor way to try to get
11 around my ruling

12 MR BLACKBURN Well yes, Your Honor and I
13 wouldn't --

14 THE COURT You agree with that?

15 MR BLACKBURN I was not trying to backdoor you at
16 all Your Honor What I was saying is that I believe for
17 the rule of completeness since Mr Babaee testified he
18 can't recall --

19 THE COURT Well, redact out number two

20 MR BLACKBURN Excuse me?

21 THE COURT Redact Do you know what redact means?

22 MR BLACKBURN Yea

23 THE COURT Take it out

24 MR BLACKBURN Okay And also 64, Your Honor -- 65
25 is another document I intend to mark, and it's

1 November 17, 2004, and it says first page contract for
2 Babaees, \$700 000 There is no objection to that, is
3 there?

4 MR PHILLIPS No objection And if you get a black
5 marker we can go ahead and redact number two

6 MR BLACKBURN With all due respect, your honor, I
7 was going to talk to you about that

8 THE COURT I believe you I m not fussing at you

9 Mr Phillips please at the first break remind me to
10 discuss with y'all the co-Defendant in default

11 MR PHILLIPS Yes Your Honor

12 (Whereupon, the jury came into open court at
13 approximately 9 32)

14 THE COURT We got the biscuits anyway and the county
15 paid for them

16 THE JURORS Thank you

17 THE COURT Just a little bit of miscommunication

18 Ma am, we have an extra blanket this morning if you
19 need it

20 THE JUROR Thank you

21 THE COURT I will answer y'all's questions you posed
22 to me yesterday afternoon at about 10 30 when we take that
23 first break

24 Mr Plaintiff, Mr Babaee, will you please come back
25 to the witness stand? I ll remind you that you re still

1 under oath

2 THE WITNESS Yes, sir

3 THE COURT Mr Blackburn, you may continue

4 MR BLACKBURN Thank you, Your Honor

5 CONTINUED CROSS-EXAMINATION

6 BY MR BLACKBURN

7 Q Good morning, Mr Babee

8 A Good morning

9 Q We left off with Defendant's exhibit no 26 the
10 January 11 2006 report you sent to my client, right?

11 I'll hand you Defense exhibit no 26

12 A Yes sir

13 Q And that document Defense exhibit no 26 is dated
14 January 11 2006 right?

15 A Correct

16 Q When was the next time that my client or a
17 representative of my client came to your house?

18 A After the letter was sent I believe Mr Frank Guidera
19 maybe came to our house in February, sometimes in
20 February

21 Q Were you there when he came?

22 A No, I was not there

23 Q How do you know Mr Guidera came to your house?

24 A From the discovery that we have seen Someone came
25 and we think it was Mr Frank Guidera

1 Q But you re not sure, right?

2 A I am not sure

3 Q What discovery are you talking about that you've
4 seen?

5 A Just by looking at the different files in our folders
6 and I believe he had given us a repair --

7 Q The repair estimate we talked about?

8 A -- quote Yes

9 Q Now, the document I just handed you -- Defendant's
10 exhibit no 27 -- Do you recognize Defendant s exhibit no
11 27?

12 A Twenty-seven Who is this prepared by?

13 Q The document refers to a Report Maker Pro Stucco
14 Inspector right?

15 A Correct

16 Q And that's your house on the front of it right?

17 A Correct

18 Q And it's report prepared for home of Fred Babae 132
19 Beaver Dam road, right?

20 A Correct

21 Q Flip to page 2 The report is dated February 21,
22 2006 right?

23 A Yes

24 Q And it says the inspector is David Blackburn?

25 A Correct

1 Q No relation to me And present at the inspection he
2 says is you, right? Present at inspection is Mr Babaee?

3 A Okay So, Mr Blackburn, this is, I guess, the
4 person who came with his dog and his family to our house
5 Is that him?

6 Q I don't know You were there right?

7 A I guess that s s the person, yes That's one of the
8 inspectors

9 Q Okay

10 A One of your client's inspectors

11 Q He was one of my client's inspectors and what was he
12 there at your house for?

13 A He was -- he came to inspect the house I believe,
14 because of what we had sent to them We had to get a
15 ladder from our neighbor actually, to - We had to borrow
16 the ladder He didn t have the tools to actually inspect
17 the home but, fortunately my neighbor had a ladder for
18 him to use because he had to get up and do some testing,
19 but that's him yes

20 Q He just asked the borrow the ladder right?

21 A Yes

22 Q And this document again is dated February 21, 2006
23 which is a little over a month after the letter that you
24 sent to my client with the CK report, right?

25 A I started my complaint from October of 2005 So,

1 October, November December, January This is four months
2 later, yes

3 Q But you don't have a letter from October of 2005 to
4 my client do you?

5 A I called them and I believe there was a letter sent
6 to them before January 11

7 Q Do you have a copy of that letter with you?

8 A January 3 I sent them a letter

9 Q Yea No letter before that right?

10 A I don t recall

11 Q You --

12 A I don t recall I have to go back I may have sent
13 him a letter In fact I may have sent it UPS So I
14 should have record of that

15 Q And we ve seen the UPS labels I won t get into it,
16 but there was no letter attached with the UPS label and
17 it sounds like you just called them didn t you?

18 A I called them and if I remember I also sent them a
19 letter

20 Q And then you sent them a letter on January 3, 2006
21 and they responded before January 11, 2006 wanting a copy
22 of the CK report that you sent them, right?

23 A Correct I believe I sent them a letter also before
24 January 3

25 Q We don't have that in evidence do we? And then this

1 report is dated February 21, 2006 which is about a month
2 after you sent them what they wanted to evaluate your home
3 because your concerns with the CK report, right?

4 A Concern with the stains we had in the front of our
5 home. It wasn't because of the CK report. We had issues
6 We had -- Just like any other homeowners when there are
7 are issues with the house and when you have a warranty
8 with your home you call the company who has issued the
9 warranty and try to see what the problem is, what the
10 issues are, how to resolve it.

11 Q And --

12 A And -- I'm sorry. They asked for the report and we
13 sent them the CK report.

14 Q Because the CK report to you like we looked at the
15 letters yesterday kind of like you said -- and I don't
16 want to go back into what we took yesterday but that kind
17 of gave you an idea of what was going on with your house
18 right at that time? The CK report identified those areas
19 of concern for you right?

20 A CK report gave us an idea that as far as what
21 moistures are on our house, yes.

22 Q And Defendant's exhibit no. 24 we talked about
23 yesterday said Please note we have performed a moisture
24 mapping survey from Clark's Home Inspection Corporation
25 and discovered the following problems. This document is

1 dated January 3, 2006 and the stucco needs to be
2 addressed Is that your testimony?

3 A That's one of them, yes

4 Q And then the January 11 letter that you sent down
5 with the CK report because my client wanted to see it,
6 right, and you sent it to them they had a guy come out
7 there --

8 MR PHILLIPS Your Honor I d like to object We
9 beat all of this to death yesterday

10 MR BLACKBURN No we re --

11 THE COURT Hold on, gentleman Finish your
12 objection

13 MR PHILLIPS Your Honor we're going back over
14 objections that Mr Babaee answered questions about
15 extensively yesterday I mean, I think it's been asked
16 and answered several times

17 MR BLACKBURN I am moving on, Your Honor I just
18 wanted to clarify his testimony since he was kind of --

19 THE COURT Well you tried to clarify it all
20 afternoon yesterday You promised me a about 15 more
21 minutes and I graciously allowed you the evening, but I'm
22 not going to go back and let you completely rehash your
23 cross from yesterday

24 MR BLACKBURN I don't intend to Your Honor

25 THE COURT Well, I know you don't intend to, but

1 perhaps you're doing something you don't intend to do
2 Please -- and I promised y'all this morning my patience is
3 going to be better today

4 MR BLACKBURN Thank you

5 THE COURT I am smiling and asking you please

6 MR BLACKBURN As far as Defendant s exhibit 27, any
7 objection to entering this into evidence?

8 MR PHILLIPS No objection

9 MR BLACKBURN I'd ask Defendant's exhibit no 27 to
10 be entered as in evidence

11 (Whereupon, Defendant s Exhibit No 27 was admitted
12 into evidence)

13 Q Now Mr Babaee, I am going to hand you Defendant's
14 exhibit no 29 and ask you if you recognize Defendant s
15 exhibit no 29?

16 A Yes, I do

17 Q Okay And Defendant's 29 is dated April 17, 2006,
18 isn't it?

19 A Correct

20 Q And it says, Dear Mr Babaee, In response to your fax
21 dated April 17, 2006 I am sending you a copy of the terms
22 and limitations of the Moisture Free Warranty for your
23 perusal with certain areas highlighted to clarify some of
24 the points that we ve discussed over the phone Is that
25 right?

1 A Correct

2 Q We will certainly attempt to satisfy the terms of the
3 warranty as they apply to your home based on the evidence
4 we have received Once you have forwarded to me the
5 detailed estimate by Ace Drywall, we will continue to work
6 towards a settlement of this claim

7 That s an accurate reading of this letter, isn't it?

8 A Correct

9 Q And it says Thanks Tim McClain You testified you
10 never received an estimate -- a detailed written estimate
11 from Ace Drywall, did you?

12 A No That's Charles Smoak yes I mean no

13 Q So you never did get one, but my client wanted to
14 see one, didn't they? That's what the letter says?

15 A Correct

16 Q And this document is dated April 17 and it is in
17 response to your fax to them of April 17, is that right?

18 A I believe so I'm not sure which fax they are
19 pointing to

20 MR BLACKBURN I beg the Court's indulgence Your
21 Honor

22 Mr Babaei, we'll look at that letter but you
23 obviously, had faxed according to my client an April 17
24 fax to Moisture Free, hadn't you?

25 THE WITNESS I'm sorry?

1 Q You did fax a letter that we'll find or maybe not
2 need to find to Moisture Free dated April 17 2006, would
3 you agree?

4 A Correct

5 Q Okay And in response to that fax -

6 THE COURT Hold on a second

7 MR BLACKBURN Defendant's exhibit no 28 Can you
8 identify Defendant's exhibit no 28?

9 THE WITNESS Yes

10 Q What is Defendant's exhibit number 28?

11 A It is the fax coversheet

12 Q It is the fax from you to my client, right?

13 A Yes

14 Q And in response to that fax -- I'd like to enter
15 exhibit no 28 into evidence

16 MR PHILLIPS Without objection Your Honor
17 (Whereupon Defendant's Exhibit No 28 was admitted
18 into evidence)

19 Q In response to that fax my client sent you the terms
20 and conditions of that warranty, didn't they?

21 A Correct

22 Q Okay We talked about the letter of approval
23 yesterday dated November 11, 2004 and you how you signed
24 it and how you agreed to the terms of the warranty, didn't
25 we?

1 A Which one? I m sorry

2 Q The letter of approval that you signed at closing
3 dated November 11, 2004 that you signed saying you were
4 familiar with the terms and conditions of the warranty

5 A The letter was signed to original owner

6 MR PHILLIPS Your honor --

7 THE COURT Hold on

8 MR PHILLIPS Again, this is - We re going back to
9 yesterday and this letter of approval that was asked and
10 answered

11 THE COURT Umpteen dozen times yesterday, but I am
12 being patient

13 MR BLACKBURN Thank you

14 THE COURT Mr Blackburn why do we have to go back
15 over this?

16 MR BLACKBURN I am moving on I just wanted to ask
17 him --

18 THE COURT You didn't answer my question Why are
19 we having to rehash this? I was as nice as I could be
20 last night and let you have the evening but not to go
21 back over everything

22 MR BLACKBURN I apologize, Your Honor I am just
23 trying to get him to, basically, admit that --

24 THE COURT You tried to yesterday and I can't let
25 you cross twice, three, four, five times on the same

1 subject
2 MR BLACKBURN Okay
3 THE COURT Very respectfully -
4 MR BLACKBURN Yes, sir
5 THE COURT -- please move forward
6 Q Now, the terms and conditions of the warranty,
7 Mr Babae were also set forth to you in the
8 authorization certificate that you received?
9 MR PHILLIPS Your Honor I hate --
10 THE COURT Mr Blackburn -
11 MR BLACKBURN Okay We've talked about that
12 Let s move on to --
13 THE COURT Thank you There you go
14 MR BLACKBURN -- defendant s exhibit 29 This is
15 the terms and conditions of the warranty, right? We're
16 looking at Defendant s exhibit no 29
17 I do hope to be through within 30 minutes, Your
18 Honor
19 THE COURT Well, now, I gave you 15 yesterday It s
20 already 15 Now you re asking for 45 Fifteen and thirty
21 is forty-five
22 MR BLACKBURN With due respect, I said I might not
23 finish in 15 minutes, but I hope --
24 THE COURT I agree, but the first 15 minutes has
25 been used up doing what what we did yesterday

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1 MR BLACKBURN I should be through in 15 minutes

2 Now let's look at the terms and conditions of the
3 warranty Mr Babae The terms and conditions of the
4 warranty require you to perform maintenance on your home,
5 right?

6 A Yes, sir

7 Q Okay And on page 5 -- page 4 going into page 5 of
8 the warranty --

9 A Yes

10 Q -- there are certain exclusions and special
11 provisions related to this warranty aren't they?

12 A I assume I --

13 Q Well, let's read number 5 so we can move on Number
14 5 says under exclusions -

15 A Which page are you on? I m sorry Which page?

16 Q Page four area C where it says exclusions and
17 special provisions number five If actions by the
18 warrantor, which is my client, under any obligations under
19 this limited warranty are delayed by an event beyond its
20 control such performance will be excused until the
21 delaying effects of the event are remedied Such events
22 include but are not limited to acts of God acts of the
23 common enemy, war riot, civil commotion or sovereign
24 conduct or acts or omissions by you or any other person
25 not a party of this limited warranty

1 Did I read that correctly?

2 MR PHILLIPS Your Honor I have to object to the
3 relevancy of acts of war in this exclusion

4 MR BLACKBURN I am just reading the whole
5 exclusion

6 THE COURT Go ahead, please

7 Q Now, the operative language in this one is or acts or
8 omissions by you or any other person not a party of this
9 limited warranty Now, you didn't produce - You
10 personally did not produce a copy of the CK report to my
11 client until January 11, 2006, did you?

12 A I did not produce the report

13 Q That's good

14 A The report was done by Mr Clark

15 Q But you did not produce it yourself to my client
16 until January 11 2006?

17 MR PHILLIPS Asked and answered today and
18 yesterday, Your Honor I would have to object

19 THE COURT Mr Blackburn one more time and I am
20 going to send the jury out and we're going to have a word
21 of prayer

22 MR BLACKBURN Thank you, Your Honor

23 THE COURT Well you keep saying thanks, but you
24 keep ignoring me

25 MR BLACKBURN I'm sorry I didn't mean to ignore

1 Your Honor I do -- with all due respect, I don't mean to
2 ignore you

3 THE COURT Please move forward

4 Q I am going to hand you Defendant's exhibit no 33 and
5 ask if you can identify exhibit no 33?

6 A Yes, I do

7 Q It's a letter to you from my client saying, Enclosed
8 is a check for \$2,500 issued by Moisture Warranty
9 Corporation in settlement of the claim against the
10 warranty on the property listed above. This amount
11 reflects a maximum amount allowed under the terms of the
12 warranty based on the inspection completed on February 21
13 2006 which we talked about -- the Blackburn report -- and
14 submitted to MWC by a certified stucco inspector

15 Is that correct? Is that the correct reading of this
16 letter?

17 A Yes sir

18 Q Okay And the last paragraph says If you feel this
19 action is unsatisfactory you may pursue arbitration Is
20 that right?

21 A Correct

22 Q Because arbitration is in the warranty right?

23 A I am not sure

24 Q You're not sure? Well, it refers you to -- The
25 letter goes on to say, Details of this procedure are

1 included in the terms and limitations of the moisture
2 warranty section 2 F through G It tells you right where
3 the arbitration provision is in the warranty in this
4 letter doesn't it?

5 A It does say in the letter, but I did not - I mean,
6 the terms and conditions to see if it exists

7 Q But you already had the warranty, didn't you, at this
8 time?

9 A Yes

10 Q Because the check is dated July 31, 2006 right?

11 A Correct

12 Q And you had terms and conditions of the warranty at
13 least by April 2006 right?

14 A Yes

15 Q And when you get this letter and it says here is
16 your money and we are trying to settle the claim with you
17 but if you don't agree with it, please refer to your
18 warranty - the terms of the warranty and pursue
19 arbitration right?

20 A Correct

21 Q But you didn't do that did you? You didn't pursue
22 arbitration?

23 A Mr Blackburn there was quotes that came from your
24 own inspector which was over \$10,000

25 Q Right

1 A And they send me a check for \$2,500 to repair an area
2 which -- That's the time I said you know the warranty
3 that was purchased for us is not doing what it's supposed
4 to do and that's when I contacted my attorney

5 MR PHILLIPS Your Honor, if I might We discussed
6 yesterday the arbitration provision has been litigated and
7 excluded and found to not be applicable to this case

8 THE COURT By the other judge who was handling this
9 case before I came on board

10 MR PHILLIPS That's correct, Your Honor

11 MR BLACKBURN May we approach the bench, Your
12 Honor, and talk to you?

13 THE COURT You may

14 (Whereupon a bench conference was held)

15 THE COURT Y'all step out, please

16 (Whereupon, the jury exited the courtroom at 9 53)

17 THE COURT All right We're now going into an area
18 where the Defense Counsel is asking the Plaintiff about
19 the terms of arbitration contained in the warranty clause
20 When I read the pretrial documents submitted by both
21 sides -- the briefs, it was mentioned in there that
22 the Defendant had moved to compel arbitration at an
23 earlier point from this trial and that -- I forgot which
24 judge heard it, but he had ruled denying or did not make
25 the Plaintiff submit to arbitration because of some legal

1 precedent Am I not correct?

2 MR PHILLIPS That's correct, Your Honor

3 THE COURT Who has got a copy of the order?

4 MR PHILLIPS It was judge Tommy Cooper

5 THE COURT It appears my friend Judge G Thomas

6 Cooper who was the presiding Judge here in the Fifth

7 Circuit, Richland County heard this matter on July 31,

8 2007 Present at that time were Mr Phillips and

9 Mr Levody who was Blackburn's co-counsel

10 Judge Cooper cited the factual background and held
11 that the Defendant Moisture Warranty Corporation's motions
12 to stay the proceedings and compel arbitration is denied

13 Mr Blackburn why in the world is it now relevant
14 when you've already been before another judge? I can't
15 overrule another judge

16 MR BLACKBURN Your Honor we're -- At this time the
17 order is dated September 27 2007 We had not taken one
18 deposition We had not exchanged one bit of discovery at
19 that time During the discovery process we learned that
20 Mr Babae - For instance, if you'll look at page two of
21 the report where the order says that Sam Phillips prepared
22 and we agreed at that time it says Sometime after the
23 purchase of the warranty the Plaintiffs received a
24 Moisture Free Warranty Authorization Certificate -- and
25 that's true -- from Moisture Warranty Corporation and

1 there is specific reference and information and booklet
2 entitled the terms and conditions of the moisture
3 warranty

4 THE COURT Mr Blackburn you had the warranty in
5 your hand all the time, haven't you?

6 MR BLACKBURN And we gave it to him, Your Honor,
7 That s what the testimony is going to say

8 THE COURT Didn t you tell the Judge that you gave
9 it to him?

10 MR BLACKBURN Well not at that time We did, but
11 he said he claimed he never got it, Your Honor And we
12 attached it to the order Would you like to see the
13 order?

14 THE COURT I just read the order

15 MR BLACKBURN No the order compelling arbitration
16 Would you like to see that order? I can get that for you,
17 Your Honor

18 THE COURT There is no order compelling arbitration

19 MR BLACKBURN Yes, Your Honor Moisture Free
20 Warranty memorandum in support of it s motion --

21 MR PHILLIPS Proposed

22 MR BLACKBURN And it is filed right here Your
23 Honor

24 THE COURT That's not the order though

25 MR BLACKBURN And we said in the -- Well that's

1 the motion and what the Judge said was because he
2 didn't --

3 THE COURT I just read what he said

4 MR. BLACKBURN Because he didn't receive this -- He
5 said he didn't receive this - it wasn't subject to
6 arbitration and that's why he ruled the way he did. And
7 we did say he received the terms and conditions of the
8 warranty which my client will say he did and Mr. Babaee
9 says he didn't, but he, obviously, did and also he
10 received the whole warranty and the authorization
11 certificate which he -- At that time we didn't have a
12 signed copy. I don't believe

13 THE COURT When did you learn he did receive it?

14 MR. BLACKBURN During the course of discovery. Your
15 Honor.

16 THE COURT Did you move to reconsider the order of
17 Judge Cooper?

18 MR. BLACKBURN We didn't because we were already in
19 litigation. Your Honor. At that time, I mean right here
20 we attached the authorization certificate which he got.
21 He got it in January. It was filed January 4, 2005, which
22 says, Read terms of conditions of warranty, interim
23 inspection, require normal maintenance independent MWC
24 protocol inspection, limited warranty.

25 He not only received the terms and conditions at

1 closing shortly before closing which he claims he didn't
2 he also received the authorization certificate and he also
3 had a letter of approval that said he read the terms and
4 conditions of the warranty and we didn't have it at that
5 time in our possession So, we could have moved to --

6 THE COURT Hold on a second

7 MR PHILLIPS I m sorry your Honor I was just
8 looking for a defense exhibit

9 THE COURT So Your Honor, we did raise this issue

10 THE COURT And you got ruled against

11 MR BLACKBURN Yes, but we did --

12 THE COURT What else -- I can't help that he ruled
13 against you

14 MR BLACKBURN Yea

15 THE COURT Mr Blackburn, this issue has been
16 decided by Judge Cooper under his order I deem it
17 irrelevant in the trial of this case and move forward
18 Any more mention of arbitration I am going to hold you in
19 contempt

20 MR PHILLIPS Your Honor just for the record Judge
21 Cooper's order on page 3 states, quote, Defendant has
22 failed to produce competent evidence that Plaintiff
23 entered into or even was aware of an arbitration agreement
24 when they purchased the warranty period closed quote
25 Your Honor the evidence that has been proffered by

1 Mr Blackburn that they received it is the letter of
2 intent dated 11/11/2004, I believe, and that's the
3 document I was looking for -- I believe that's Defense
4 exhibit no --

5 MR BLACKBURN But the --

6 THE COURT Gentlemen --

7 MR PHILLIPS But all that document says -

8 THE COURT I've ruled Mr Phillips You made your
9 record Now, any more mention of it, I am going to fine
10 you

11 MR BLACKBURN Yes, Your Honor

12 THE COURT If you mention it again, I'm going to do
13 more than that

14 MR BLACKBURN I'm fine but just to clarify my
15 client wants to testify about it because he said he sent
16 it to them -- the terms and conditions of the warranty --
17 and that's contained in the terms and conditions of the
18 warranty I won't talk about it, Your Honor

19 THE COURT Your client better not talk about it
20 either

21 MR BLACKBURN My client can't talk about it?

22 THE COURT The judge has ruled on arbitration It
23 is not applicable in this case I'm sorry That's my
24 ruling Do not go into it

25 Mr Blackburn, I have tried to be patient with you

1 MR BLACKBURN Yes, sir

2 THE COURT I have never had a lawyer in the five
3 years I've been on the bench that's tried my patience as
4 much as you have I hate to say that

5 That's my ruling Don't argue with me You know
6 what the rules are

7 MR BLACKBURN Thank you, Your Honor

8 THE COURT You know where Columbia is up town
9 Bring them back in
10 I didn't make that ruling Judge Cooper did
11 (Whereupon the jury came into open court at
12 approximately 10 o'clock)

13 THE COURT The issue of arbitration is not relevant
14 in the trial of this case That issue was decided in
15 pretrial matters by Judge Cooper who made a ruling that
16 in essence said that arbitration will not be an issue in
17 this case I have instructed Mr Blackburn not to mention
18 that again I don't think he will

19 Move forward

20 Q Mr Babaei, it is your testimony that you wished you
21 knew then when you bought the house what you know now, is
22 that right?

23 A Correct

24 Q And you wish -- So, at that time when you purchased
25 the house on November 18, 2004 you didn't know the

1 condition of the stucco as you know it now?

2 A We did not know, no

3 Q And you didn't believe the condition of the stucco
4 would lend itself to completely stripping it and
5 recladding it?

6 A We did not know, no

7 MR BLACKBURN That's all I have, Your Honor

8 MR PHILLIPS Brief redirect, Your Honor

9 THE COURT You may

10 REDIRECT EXAMINATION

11 BY MR PHILLIPS

12 Q Mr Babae, I want to go back to yesterday and
13 briefly hit on some of your cross examination First the
14 wine slash pantry that's a small room in your house,
15 isn't it?

16 A Yes

17 Q When you purchased it from the Maolis it had a
18 refrigeration unit of some kind in it?

19 A Correct It had some sort of AC to keep the room
20 temperature to keep the wines

21 Q And when you looked at the house the hardwood floors
22 in that little pantry areas had buckled, hadn't they?

23 A Yes

24 Q When you moved in you disconnected the HVAC?

25 A Yes

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1 Q Did that correct the problem?
2 A Yes
3 Q The Clark report that you've testified about
4 identified wet soil around the house?
5 A Yes
6 Q And wet soil underneath the house?
7 A Correct
8 Q What did you do to remedy those problems after you
9 purchased it?
10 A We -- By the recommendation of the inspector we
11 installed french drain in the front of the yard under the
12 crawl space and the backyard and the french drain moved in
13 to -- All the water was draining into the lake behind the
14 house
15 Q And who did you hire to do that work? To fix the
16 yard?
17 A Mr. Clark
18 Q And who did you hire to fix the problem underneath
19 the house?
20 A Also, Mr. Clark
21 Q And then you needed a termite bond for this house
22 correct?
23 A Yes
24 Q Who did you hire to do the termite bond on the house?
25 A Mr. Clark

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1 Q So every recommendation that you received from
2 Mr Clark --
3 A Correct
4 Q -- when you purchased this house you followed after
5 you brought it didn't you?
6 A Correct
7 Q When you provided the Clark report to Moisture Free
8 Warranty did you give them Mr Clark's contact
9 information?
10 A Yes, I did
11 Q Did you give them his resume?
12 A Correct Yes
13 Q Did you discuss who he was and that you were okay
14 with contacting him?
15 A Of course yes, sir
16 Q Now today you have -- You mentioned the Moisture
17 Free Warranty inspector showed up without the ladder?
18 A Yes
19 Q Did you say something about a dog?
20 A Yes
21 Q Did he show up with a dog?
22 A We had to keep his dog, actually while he was doing
23 his inspection That's the honest truth
24 Q Do you recall his name?
25 A I guess it s Mr David Blackburn, but -- I think

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1 that's who it is, yes

2 Q So, for caring for this dog you spoke with

3 Mr Blackburn during this inspection?

4 A Just briefly He asked me for the ladder and I

5 didn't have it Our neighbors put in roofs So, he asked

6 them to see if they can borrow the ladder from them

7 Q And he showed up after you sent Moisture Free

8 Warranty the Clark report?

9 A Correct

10 Q Did he have a copy of the Clark report with him?

11 A I did not see

12 Q Did he ask you any questions about the Clark report?

13 A No

14 Q Did he ask you anything about Mr Clark or the work

15 he had done on your house?

16 A No

17 Q And how long after you provided Moisture Free

18 Warranty with the Clark report did Moisture Free Warranty

19 send Mr Blackburn and his dog to your house?

20 A It had to be a month or so maybe 40 days, in that

21 neighborhood

22 Q Forty days?

23 A Yes

24 Q Sir, if I might approach, Defendant's 27 -- And if

25 you don't mind Your Honor I am going to look over his

0553

1 shoulder My copy -- The highlight portions don't --

2 THE COURT Move along

3 Q Do you have Defendant's 28 also?

4 MR BLACKBURN Your Honor, I am going to object to
5 this We've already been through these, too, Your Honor,
6 27 and 28 We have already talked about them yesterday
7 and tried to talk about them today He's going to talk
8 about them again I believe that we already covered this,
9 Your Honor

10 THE COURT You've covered it, but he has the right
11 on redirect to go back over

12 MR PHILLIPS Your Honor, I apologize I misspoke
13 It is Defendant's 29 I couldn't read my handwriting

14 THE COURT Move along

15 Q Mr Babaei, let me have you look at Defendant's 29

16 A Okay

17 Q What is the date of that letter from Moisture Free
18 Warranty to to you?

19 A April 17, 2006

20 Q And attached -- Describe the document that's attached
21 to it

22 A It's the Moisture Free Warranty free unlimited
23 warranty, sample of terms and limitations

24 Q Prior to receiving this document in April of 2006 had
25 you ever seen this document before?

1 A No

2 Q Let me ask you - Let me refer to -- Mr Blackburn
3 indicated there were highlighted terms on this document
4 Do you see any highlighted terms?

5 A No

6 Q So were you familiar on page 3 where it says, A
7 moisture location? Could you read that to the jury?

8 MR BLACKBURN Your Honor, I am going to object to
9 the question He is mischaracterizing exhibit no 29 It
10 says -- It doesn't say he's highlighted areas on the
11 report He says I am highlighting areas with certain
12 areas highlighted of the terms and conditions
13 Defendant's exhibit no 29 says, I am sending you a copy
14 of the terms and limitations of the moisture free warranty
15 for your perusal with certain areas of the warranty
16 highlighted to clarify some of the points that we
17 discussed over the phone

18 That doesn't say that he has highlighted the report
19 of Blackburn It says that he's highlighted areas in the
20 terms and conditions of the warranty Your Honor

21 MR PHILLIPS I possibly asked it wrong, Your Honor
22 That's my question I just wanted to see what terms and
23 conditions of this document exhibit 29 are highlighted and
24 I don't see one

25 THE COURT Overruled

0555

1 Do you see anything highlighted Mr Plaintiff?

2 THE WITNESS No, sir

3 Q So Mr Babaei, let me ask you then -- Read 14 to the
4 jury what it says

5 A Moisture location The location is any area equal to
6 or less than 36-inch in diameter which contains a moisture
7 reading which is equal to or in excess of 25 percent

8 Q Had you seen any document from Moisture Free Warranty
9 prior to receiving this document in April of 2006 that
10 talked to you about 25 percent moisture content?

11 A No

12 Q Please read for the jury number 7 which appears on
13 page 5 of the document

14 A This warranty specifically covers area affected by
15 high moisture behind the exterior cladding of the home,
16 but does not cover damage caused by moisture in this area

17 Q Thank you, sir Prior to receiving that document in
18 April of 2006 had anybody told you that the moisture free
19 warranty didn't cover damage from moisture intrusion?

20 A No sir

21 MR PHILLIPS Thank you very much No further
22 questions, Your Honor

23 THE COURT You may step down

24 MR BLACKBURN Your honor if I may just questioning
25 him about terms and conditions of the warranty one

1 question

2 THE COURT No, sir Recross is discretionary I
3 don't allow it I will not allow Mr Phillips to recross
4 when you have your witnesses up

5 MR PHILLIPS I understand Your Honor

6 THE COURT Next witness, please

7 MR PHILLIPS Your Honor, the Plaintiff would like
8 to call Christopher Burton pursuant to rule 611(C)

9 THE COURT Come around please

10 CHRISTOPHER A BURTON, after being duly sworn
11 testified as follows

12 THE CLERK Please have a seat in the witness stand
13 and state your full name for the record

14 THE WITNESS Christopher Allen Burton

15 DIRECT EXAMINATION

16 BY MR PHILLIPS:

17 Q Mr Burton tell the jury your association with
18 Moisture Free Warranty

19 A I started a company called Stucco Pro in 1996 that
20 specialized in testing synthetic stucco homes Moisture
21 Warranty was a company that was developed in the year of
22 2000 that was based on a data that was collected by Stucco
23 Pro

24 Q Stucco Pro was essentially an inspection company
25 wasn't it?

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1 A It started out

2 Q That's a yes or no question sir

3 THE COURT No, sir Now, you're not going to be
4 ugly to him either

5 MR PHILLIPS All right

6 THE COURT Yes or no and you may explain

7 THE WITNESS Stucco Pro started testing homes in
8 1996 I owned a home - actually, an office that had EIFS
9 on it, and at that time there was a lot of awareness that
10 was coming out about synthetic stucco especially in North
11 Carolina the Wilmington area, and I had this office that
12 had synthetic stucco on it and I knew as little as
13 anybody about synthetic stucco

14 THE COURT Hold on Mr Burton I said you could
15 explain it I --

16 THE WITNESS Okay

17 THE COURT -- didn't mean we need a five-day history
18 of your company Ask the question again

19 Q Stucco Pro was essentially an EIFS inspection
20 company wasn't it?

21 A It was started as an EIFS inspection company, yes

22 Q And you developed the Stucco Pro inspection protocol
23 by talking to people in the EIFS industry, didn't you?

24 A That's correct

25 Q One of the persons you talked to was Bob Thomas of

1 Dryvit?

2 A Bob Thomas was an independent expert in EIFS and I
3 think he was with Dryvit at one time

4 Q And that's the same Bob Thomas that Bill Flaherty
5 testified to two days ago?

6 A Yes He was one of many people we consulted

7 Q But Bob Thomas is the author of the moisture vapor
8 retarder study that Mr Flaherty referred to in his
9 testimony, isn't he?

10 A I believe he is

11 Q And you're familiar with EIFS Industry Manufacturer
12 Association, the EIMA organization that Mr Flaherty
13 testified about?

14 A We're members of it yes

15 Q And you're familiar with the standard details that
16 they created that's a part of Mr Flaherty's first report?

17 A I am

18 Q Now, Moisture Free Warranty doesn't follow or draw
19 upon those EIMA guidelines, do they?

20 A We do to some extent

21 Q Well, let me -- Your Honor, I have Mr Burton's
22 deposition I'd like to open it

23 THE COURT You may

24 Q Mr Burton, this is a copy of the deposition that you
25 gave up in Charlotte I apologize for rattling it Let

1 me ask you to open to page 30 Mr Burton, you're
2 familiar with a deposition - the format that each line of
3 the deposition is numbered to -

4 THE COURT No sir We don't need to go through
5 that

6 THE WITNESS Yes, I am

7 MR PHILLIPS I'm sorry Your Honor

8 THE COURT Just refer him to line and page

9 MR PHILLIPS Thank you, Your Honor

10 Mr Burton let me refer you to line 6 on page 30 I
11 asked the question, quote And that they have a -- I'm
12 sure you're aware of their efforts in creating standard
13 details that sort of thing Over the years --

14 A I'm sorry I got to stop you, Sam I don't see that
15 at all Page 30?

16 Q Page 30 line 6 The numbers are to the left

17 A I'm looking at that but I am not seeing what you're
18 reading

19 MR PHILLIPS I apologize Your Honor this is an
20 affidavit in another case I apologize

21 THE COURT Well now I am getting ready to get on
22 you

23 MR PHILLIPS Your Honor you don't know how much I
24 don't want you to do that I apologize

25 THE COURT Well you're skating on thin ice

1 Q I apologize to you, Mr Burton Yours doesn't even
2 want to come open Sir again, let me refer you on page
3 30

4 A Page 30 6 I got it

5 Q Let me pick up where I left off I asked you a
6 question, Over the years who have you worked at at EIMA
7 when it comes to developing both the inspection protocol
8 and repair protocol that Moisture Free Warranty uses and
9 please read lines 13 to 15

10 A The only ones we that we have I have met with several
11 times is Steve Clampkey The lady got it wrong So we
12 didn't draw a lot of resources from EIMA

13 Q So you didn't use EIMA?

14 A We didn't draw a lot of resources from EIMA We did
15 use EIMA

16 Q EIMA calls, for example, a caulk joint around a
17 window that's created by terminating the EIFS prior to
18 touching the window correct?

19 A No, that's not correct

20 Q That's not what Mr Flaherty testified to in his
21 report?

22 A Mr Flaherty was wrong They have standards that
23 call for that to be installed when the home is built new
24 but to correct problems on a home they do not recommend
25 that it be retrofited on the home

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1 Q Let me ask you this EIMA has standards and details
2 for the original application of EIFS, correct?

3 A They do

4 Q Moisture Free Warranty has a different set of
5 standards that doesn't follow what an original
6 manufacturer should have done, does it?

7 A Our standards don't apply to the new application of
8 EIFS at all

9 Q So they're different? That's all

10 A They're not relative

11 Q Moisture Free Warranty standards are different than
12 the original application of EIFS standards?

13 A They are different in that they are not relative -

14 THE COURT Hold on What is your objection?

15 MR BLACKBURN Objection He's asked and answered
16 his question twice in my opinion

17 THE COURT Move along

18 MR PHILLIPS Yes sir

19 THE COURT I'm glad you set that standard Mr
20 Blackburn Now the second time a question is asked I'm
21 going to -- Okay?

22 MR BLACKBURN Thank you, Your Honor

23 MR PHILLIPS Thank you, Your Honor

24 THE COURT Thank you I appreciate that It makes
25 my job easier now

1 MR BLACKBURN Yes, sir

2 Q In fact, the standards that you developed for
3 Moisture Free Warranty you developed after talking to
4 people in the EIFS industry You yourself have never
5 applied EIFS, have you?

6 A Yea, actually, I have but not -- I mean for the
7 purpose of learning how to apply it I have and it was not
8 developed from people specifically in the EIFS industry
9 It was developed from hundreds of contractors across the
10 country that were attempting to make modifications to EIFS
11 homes in different ways We selected the best details
12 from those

13 Q So you created these details by talking to hundreds
14 of people?

15 A Yes

16 Q But then you selected which one of the hundred
17 opinions that you had what you were going to use in your
18 protocol?

19 A I selected them -- We selected them based on
20 statistics We looked at what worked and what didn't on a
21 statistical basis and selected them We also evaluate
22 cost benefit -- relative cost benefit

23 Q Well, let me direct your attention to page 104 of
24 your deposition lines 18 to 25

25 A Okay

1 Q And I asked you, quote, And I guess as I ask
2 questions about this and I am not trying to put you on the
3 spot I take it from your testimony that Moisture Free
4 Warranty protocol is basically Chris Burton's creation
5 through consultation with others which you made the final
6 call on what is in it?

7 A As president of the company yes I did make --

8 Q What did you say when I asked you this question?

9 A Yes

10 Q So, in your opinion the vast majority of moisture
11 intrusion problems associated with EIFS are associated
12 with the miter joints of windows -- Let me -- So the jury
13 knows what I am speaking about let me put up Plaintiff's
14 13 Is what I'm talking about - Is that a miter joint?

15 A That is a miter joint of a window

16 Q In your opinion leaks in this area of windows are the
17 primary cause of problems with EIFS homes aren't they?

18 A Problems with windows in general are the primary
19 cause of leaks in all homes

20 Q Well, let's go to page 35 of your deposition I will
21 refer you to lines 2 to 7 Could you read -- When I asked
22 you that same question read your answer beginning on line
23 2

24 A Well, the vast majority of failures we deal with are
25 in windows The vast majority of those failures are

1 associated with the miter joints -- the windows and that
2 is exactly where it leaked and failed at those panel
3 locations

4 Q So, it's the miter You told me when you testified
5 under oath that that joint is the primary cause of
6 problems with EIFS?

7 A I said the primary cause was windows and within the
8 windows that joint was the major problem

9 Q You testified, quote exactly where it would leak and
10 fail at those panel locations Now let me ask you
11 Mr Burton --

12 A Well, let me just say well the vast majority of
13 failures we deal with are in windows I went on to say
14 that the -- Those are concentrated to miter joints
15 primarily I'll concede that, Sam Go with miter joints

16 Q Moisture Free Warranty is patented a pan essentially
17 that sits underneath those windows

18 A You're pointing at this window that you're showing
19 the jury It is a window from the Babae s home They
20 have 49 windows There is one window like this on their
21 home The rest are not like that

22 Q You've heard Mr Flaherty testify --

23 THE COURT Don't put witnesses

24 MR PHILLIPS I'm sorry, Your Honor

25 Q Mr Burton you've been to the Babae house correct?

1 A Yes

2 Q You've had an opportunity to look at it as long as
3 you wanted to?

4 A I have

5 Q You had your expert Mr McClure there with you,
6 didn't you?

7 A I did

8 Q Okay The Babaees have also produced this photo
9 brochure of their home and you have it We produced it to
10 your lawyer Have you looked at it? Please

11 THE COURT What is the question? He said that's the
12 only window that looks like that

13 MR PHILLIPS I am going to show him many pictures
14 of windows that have exactly that condition Your Honor

15 THE WITNESS Oh, do, please

16 MR BLACKBURN Which one are you looking at Sam?

17 MR PHILLIPS We're looking at Babaee, page 84

18 There are three miter joints in that window Do you see
19 any evidence of caulk on any of those three miter joints?

20 A That particular window and in training we explain
21 this

22 Q Sir, please answer my question

23 THE COURT All right Gentleman

24 THE WITNESS It's important

25 THE COURT -- Mr Phillips --

1 MR PHILLIPS Yes, Your Honor

2 THE COURT -- quit badgering him

3 MR PHILLIPS I apologize, Your Honor

4 THE COURT Ask him a question and let him answer

5 Mr Blackburn, have a seat at counsel table

6 MR BLACKBURN Thank you, Your Honor I am just

7 trying to figure out --

8 THE COURT I know what you're trying to do

9 MR BLACKBURN Thank you Your Honor

10 THE COURT You're getting too close together

11 Q All right On Babae 84 sir how many miter joints
12 do you see in that window?

13 A I see two, three

14 THE COURT Hold on one second Do you have a copy
15 of that so Defense Counsel can look at it?

16 MR PHILLIPS Your Honor, we produced it to them

17 THE COURT All right You stand up there I don't
18 want any interactions between the two of you Stand up
19 there and look and don't say anything

20 THE WITNESS Just for the record, I --

21 THE COURT Just hold on

22 MR BLACKBURN Can I get my copy if I have it?

23 THE COURT I thought that's why you had to come up
24 here and look If you have a copy look at yours and don't
25 come up here

0567

1 MR BLACKBURN Let me make sure I got what he is
2 saying he has

3 THE WITNESS Your Honor I have never seen these
4 photos but I have seen other photos I don't know if
5 it's relative These are just different photos

6 Q You've seen the house, correct?

7 A Yes

8 MR BLACKBURN Your Honor --

9 THE COURT Sir?

10 MR BLACKBURN -- these are the documents that
11 Mr Phillips has produced to me These are the only ones
12 in my possession he's produced to me

13 THE COURT I don't know what you're talking about

14 MR BLACKBURN And I don't see what he's talking
15 about

16 MR PHILLIPS It is on a CD Mr Blackburn You
17 wanted them on CD rather than paying for color copies of
18 700 pictures

19 MR BLACKBURN I never got a CD

20 THE COURT Gentlemen Ask your questions Come up
21 here and watch

22 Q Simple question How many miter joints in that
23 picture?

24 A There are three

25 Q Are they sealed?

1 A They aren't sealed They aren't sealed because we
2 may not want them sealed

3 Q They aren't sealed The exhibit that I showed you,
4 number 13, you testified that was the only miter joint on
5 the house that was in that condition, didn't you,
6 unsealed?

7 A No

8 Q Well let's go back Let me show you 85 How many
9 miter joints appear in that picture?

10 A That looks like it is the left side of that window
11 and there are three miter joints in this photo

12 Q Any of those three joints sealed?

13 A They're not

14 Q I show you 93 Is there a miter joint in that window
15 picture?

16 A That's -- It looks like a screen on the window I
17 can't tell

18 Q Can't tell?

19 MR BLACKBURN And Your Honor just for the record,
20 I have never seen those documents before, and I am more
21 than happy to sit here and look at them but I have never
22 seen them

23 THE COURT Hold on

24 MR PHILLIPS How many miter joints --

25 THE COURT Hold on Sir you don't understand what

1 hold on means?

2 MR PHILLIPS I apologize

3 THE COURT Y'all step out for one second Let me
4 handle this

5 (Whereupon the jury exited the courtroom at 10 27)

6 THE COURT Mr Witness you're not to talk to your
7 lawyer while you re in the middle of your testimony,
8 please

9 THE WITNESS Sorry

10 THE COURT All right Let the record reflect that
11 Mr Phillips has got a notebook full of pictures He is
12 trying to cross examine the Defendant's representative
13 Mr Blackburn says he s never gotten those in discovery
14 The witness says he s never seen them If it hadn't been
15 produced in discovery, I am not going to allow you to
16 cross examine him

17 MR PHILLIPS Your Honor my paralegal is here She
18 produced it I mean, she could testify

19 MR BLACKBURN Does she have any record of producing
20 them to me?

21 THE COURT I don't know Did you get them
22 Mr Blackburn?

23 MR BLACKBURN No sir I did not

24 THE COURT As an officer of the court you're telling
25 me you did not receive them?

0570

1 MR BLACKBURN I did not, Your Honor

2 THE COURT You got a certificate of mailing showing
3 what you sent, everything?

4 THE COURT She s saying no The paralegal is saying
5 no

6 MR PHILLIPS Your Honor, I will also say as an
7 officer of the court that we have made these available at
8 the deposition of every one of my clients I do a lot of
9 construction litigation We have a photo brochure for
10 every house

11 THE COURT I understand

12 MR PHILLIPS And we make them available at every
13 deposition

14 THE COURT Go confer with your paralegal

15 Mr Phillips, all I need is -

16 MR PHILLIPS Your Honor, we did not produce a
17 certificate of service Again we produced this document
18 as a courtesy We put it on a CD, and we give it to the
19 attorneys

20 THE COURT You don't have a certificate of mailing
21 per your paralegal I saw her shaking her head no

22 MR PHILLIPS We do not have one

23 THE COURT All right Let's take about a
24 five-minute break I am not going to allow cross
25 examination on it

1 MR BLACKBURN Thank you Your Honor

2 (Whereupon a break was taken)

3 MR PHILLIPS Your Honor if I might, Mr Blackburn
4 and I have discussed some photographs that he acknowledges
5 receiving I have marked them as 48 to show the witness

6 MR BLACKBURN No objection, Your Honor Those were
7 from Chris Cooper's file

8 THE COURT Okay

9 (Whereupon, Plaintiff's Exhibit No 48 was admitted
10 into evidence)

11 THE COURT Bring the jury in please

12 (Whereupon the jury came into open court at
13 approximately 10 40)

14 THE COURT Thank you Mr Foreman ladies and
15 gentlemen, I apologize We got a little off track Back
16 on the track and running smoothly We're going to break
17 again in about 20 or 30 minutes so you can - I am going
18 to buy your lunch today and you can make your lunch
19 orders Is that fine?

20 Move along sir

21 MR PHILLIPS Thank you, Your Honor I d like to
22 enter into evidence Plaintiff's 48

23 THE COURT Without objection

24 Q Sir, that's three pictures of windows isn't it on
25 the Babae house?

1 A Upside down, but, yes, they're --

2 THE COURT What's upside down?

3 THE WITNESS The pictures, sir

4 THE COURT Well then turn them over Then they
5 won't be upside down

6 THE WITNESS Okay

7 Q Do you recognize those windows from your site visit
8 to the Babaee house?

9 A They look similar to the ones I've seen

10 Q They all three have miter joints in them, don't they?

11 A They do

12 Q There is no sealant on any of them?

13 A There isn't

14 Q And they're similar to plaintiff's 11?

15 A They're similar to that picture, dissimilar to most
16 of the windows on the home

17 Q Let me ask you this I believe one of those pictures
18 is 13, isn't it?

19 A It may be

20 Q And, sir, let me just clarify You said you were the
21 president I know we talked about Stucco Pro and
22 Moisture Warranty You're the president of Moisture
23 Warranty Corporation?

24 A Correct

25 Q And Moisture Warranty Corporation's product is the

1 Moisture Free Warranty?

2 A It is

3 Q Under certain circumstances Moisture Free Warranty
4 requires what is called a dam sill -- basically, a pan that
5 you put under a window, doesn't it?

6 A Only when they're failing

7 Q So, under some circumstances on a failing window you
8 require a pan to be placed underneath?

9 A That's correct

10 Q Under other circumstances you require this miter
11 joint to be sealed with caulk?

12 A Again if the window is failing in that condition we
13 would seal it We would have to seal it, yes

14 Q Were any pan sills -- Did you see any evidence of pan
15 sills at the Babaee house?

16 A No these weren't failing

17 Q And exhibit 48 -- There is no evidence of caulk on
18 those windows either is there?

19 A No there is not

20 Q All right You recognize the brochure -- Plaintiff's
21 40 -- and the accompanying folder that was put into the
22 record don't you?

23 A I do

24 Q And that's a marketing material of Moisture Free
25 Warranty?

1 A It's elements of what we would include in this
2 packet

3 Q And that was something that your company used back in
4 2004 when the Babaee s purchased -- the Moisture Free
5 Warranty was purchased for the Babaees?

6 A Yes

7 Q And we ve made some blow ups of that, and you
8 recognize Plaintiff's exhibit 6 as a page from that
9 brochure don t you?

10 A I do

11 Q And it outlines a process?

12 A Yes

13 Q Is that an accurate representation of the process
14 Moisture Free Warranty goes through in issuing one of its
15 warranties?

16 A It is one of the processes that's potential but if
17 we're starting with a client from the very beginning and
18 the home has not been remediated, then that would be the
19 process For the Babaee home it wasn't because the home
20 had already been remediated

21 Q But the only process that appears in that brochure is
22 the process that is represented on this blow-up --
23 Plaintiff's exhibit 6 -- the one two three process?

24 A That's correct

25 Q You were in the courtroom when Mr Babaee testified

1 that he relied on that?

2 A Yes

3 Q Isn't it the intent of the Moisture Free Warranty
4 Company for potential clients to rely on this brochure?

5 A It is among items that they could -- It's for the
6 purpose of marketing, yes

7 THE COURT Wait a minute now Hold on Hold on
8 It is for the purpose of marketing? Is that correct?

9 THE WITNESS Yes, sir

10 THE COURT What was your question?

11 Q Is it the intent of Moisture Free Warranty to have
12 its potential clients rely on the representations in the
13 brochure?

14 A Well, if they're trying to decide whether they're
15 interested in a warranty, yes they should be relied on as
16 an element of the warranty itself

17 Q And isn't it the intent of Moisture Free Warranty to
18 rely not only on the brochure but to specifically rely on
19 and -- and to gauge their conduct by the one two three
20 step process that you laid out on exhibit 6?

21 A Only if it's relative to their home

22 Q Well, you want potential clients that you may want to
23 put a moisture free warranty on their home -- You want
24 them to get a home inspector, someone who is certified by
25 Moisture Free Warranty in its inspection protocol just

1 Like the brochure said?

2 A That would be a preference

3 Q That s why you put it in the brochure That's what
4 you want people to do?

5 A That's the first step of any warranty yes

6 Q And then the second step is that initial inspection
7 is reviewed by Moisture Free Warranty staff employees?

8 A Yes

9 Q Repair recommendations such as whether to use the pan
10 sill or to caulk the windows are generated by your
11 company?

12 A If necessary

13 Q If necessary, sure And then that work is done and
14 then a second inspection is done to make sure the work is
15 done properly?

16 A If necessary

17 Q And that's an accurate reflection of this exhibit
18 no 6?

19 A Yes

20 Q Now, in the Babaee s case those three steps weren t
21 followed?

22 A The Babaee's case doesn t apply to all three steps
23 because the home had already been remediated

24 Q So, the warranty was issued for the Babaee house and
25 it did not comport with the steps set forth in your

1 brochure?

2 A It did There was not a need for the repairs and
3 review because the home had been remediated previously
4 Most of the homes we deal with have never been repaired
5 So they do fall in the three steps This home had been
6 repaired before and we qualified the warranty without
7 additional repairs with one exclusion

8 Q Now, let me put it back up The first step on
9 exhibit 6 is inspection Second step is review by your
10 company, correct?

11 A Yes

12 MR PHILLIPS Your Honor, I'd like to offer into
13 evidence Plaintiff's exhibit 44

14 MR BLACKBURN No objection, Your Honor

15 THE COURT Without objection

16 (Whereupon Plaintiff's Exhibit No 44 was admitted
17 into evidence)

18 Q Do you recognize that e-mail?

19 A Yes, I do

20 Q That's an e-mail from Claire Hammett She's an
21 employee of yours, isn't she?

22 A She was

23 Q She was? At the time?

24 A Uh-huh

25 Q And on November 11 2004 she wrote to Charles

1 Strickland, quote, Need report ASAP, 133 Beaver Dam Road,
2 Columbia South Carolina for Mr Maoli/Buddy Lewis is
3 closing this home next week and needs a warranty?

4 A That's correct

5 Q She sent that message at 9 40 on November 11?

6 A That s correct

7 Q And Mr Strickland replies at 10 30 the same day,
8 quote, I made some changes from their received report
9 Some moisture was found at a rear door after original
10 inspection Have them correct this one area

11 He told Mrs Hammett that November 11, 2004 at 10 30?

12 A That s correct, and that's why it was excluded

13 Q And the discovery he s talking about is the CK Clark
14 report?

15 A I don't know if that s what it is but it s
16 reasonable to assume it was, yes I know Mr Strickland
17 went back out to the house to verify that area and
18 determined it did have a high moisture reading and
19 reported that The only report we ever saw was one report
20 from Charles Strickland that included that area as having
21 issues

22 Q You don't have any personal knowledge that
23 Mr Strickland went back to the house He could have just
24 relied on the CK report?

25 A I believe in Buddy Lewis' deposition he referred to

1 Charles going back out

2 Q I appreciate that sir I know you ve stated -

3 THE COURT Do you have any personal knowledge
4 yourself?

5 THE WITNESS I do not

6 THE COURT Thank you Move along

7 MR PHILLIPS I offer into evidence Plaintiff's 45

8 MR BLACKBURN No objection, Your Honor

9 (Whereupon Plaintiff's Exhibit No 45 was admitted
10 into evidence)

11 Q Now this is a fax again from Claire Hammett this time
12 to Buddy Lewis the realtor?

13 A Yes

14 Q It is dated 11/11 at 2 30 In that she says she
15 encloses an invoice -- a bill -- and a letter of approval
16 for the Moisture Free Warranty?

17 A Correct

18 Q She didn t see the CK report She didn't see any
19 second Charles Strickland report She approved the
20 warranty the same day that Mr Strickland just sent her an
21 e-mail and said, I found some additional moisture, didn t
22 she?

23 A No She saw Mr Strickland's report reviewed it,
24 and determined that we could offer a warranty with the
25 exclusion We wouldn't approve a warranty of any type

1 without an inspection

2 Q How do you know this sir?

3 A We -- because I run the business I would never let
4 that happen We would be crazy to write a warranty on a
5 home without an inspection to tell us what's going on

6 Q Well, you would agree with me looking at Plaintiff's
7 44 that as of November 11, 2004 Ms Hammett didn't have a
8 report from Charles Strickland In fact, she says, quote,
9 Need report ASAP Isn't that an acronym for as soon as
10 possible?

11 A Yes

12 Q And then -- and she sent that by e-mail?

13 A She did

14 Q Mr Strickland replies by e-mail within an hour

15 A Uh-huh

16 Q There is no attachment to that e-mail is there?

17 A That's not the way reports come in to us We have a
18 server that the software that they use they upload the
19 reports to our server She would have gone to our server
20 and got the report there

21 Q When I took your deposition I asked if you had any of
22 the electronic communications of Ms Hammett and you said
23 it was deleted when she was terminated, didn't you?

24 A Well, that wouldn't have included the report The
25 report wouldn't have gone directly to Ms Hammett It

1 would have gone to our server She would have gone to the
2 server and pulled it off

3 Q And I - Of course I've asked you for all of the
4 documents related to that and I haven't seen a document
5 that shows an electronic transmittal on the day of
6 November 11 --

7 A There is nothing that would have gone If you upload
8 something there is not a document that would have gone
9 along with that except for the report itself

10 Q So there is no evidence other than your testimony of
11 how your company should run that Ms Hammett received a
12 report on the day she issued the letter of intent for this
13 warranty?

14 A Yes That s the way we always do it yes

15 Q When homeowners are getting this warranty in a
16 situation where there is a purchase, do you expect them to
17 get their own independent inspection like Fred Babaee did?

18 A Yea Well we recommend that they do yes

19 Q So, therefore do you ask people like Mr Strickland
20 to obtain a copy of that report that you recommend that
21 you expect people like Fred Babaee to get and then provide
22 you with a copy?

23 A The most common occurrence is that the realtor --
24 There is usually two realtors, two owners They'll send
25 the respective reports to us

1 Q So, in this case the realtor had the CK report?

2 A I assume he did I don't know that for sure

3 Q Mr Strickland had the report?

4 A He had the report I believe he referenced that he
5 did have it Actually I don't know that he had the
6 report I am not sure

7 Q That could have been the report that he uploaded to
8 your server isn't it?

9 A No He couldn't have uploaded the CK's report to us
10 no The way they upload it has to be in our format

11 Q Do you require your certified inspectors to ask
12 realtors and homebuyers for a copy of independent
13 inspection?

14 A Well that's -- The qualification for the warranty is
15 that we were looking for the inspections to evaluate the
16 home

17 Q I am not talking about your people's inspection I
18 am talking about other inspections The ones that you
19 recommend that they get, do you ask those realtors to send
20 you copies of those?

21 A Yes Yes

22 Q Did you ask Mr Lewis to send you a copy of that?

23 A We've worked with Mr Lewis quite a bit He would
24 have been familiar that we would have wanted a copy

25 THE COURT Sir please answer the the question --

1 THE WITNESS Okay

2 THE COURT -- if you know

3 THE WITNESS I don't know

4 Q Now, there is nothing in the record to indicate that
5 any repair recommendations, the second step of the process
6 that appears on Plaintiff's exhibit 6 -- There were no
7 repair recommendations ever issued from Moisture Free
8 Warranty to Fred Babaee?

9 A No other than recommending that the area that was
10 excluded needed to to be repaired

11 MR PHILLIPS I am offering Plaintiff s 46 into
12 evidence Your Honor

13 MR BLACKBURN No objection Your Honor
14 (Whereupon, Plaintiff's Exhibit No 46 was admitted
15 into evidence)

16 Q I apologize I gave your lawyer my last copy

17 A Okay

18 Q That s a communication from Claire Hammett
19 November 19, 2004 roughly eight days after she issued the
20 letter of intent?

21 A That's correct

22 Q And she notes in there that there is going to be an
23 exclusion to the warranty and that that exclusion can be
24 removed when repairs are done, correct?

25 A Correct

1 Q And then she also offers Fred and Malihe Babaee for a
2 fee you'll extend the terms of the coverage correct?

3 A Correct

4 Q Did Ms ~Hammett or anybody else from Moisture Free
5 Warranty ever follow up on that and provide repair
6 recommendations to Fred and Malihe Babaee?

7 A That's not part of our responsibility no

8 Q Well if --

9 A If they called and asked for assistance we certainly
10 would help them

11 Q So in order to trigger the second part of the
12 three-step process the homeowner has to ask you for a
13 repair recommendation?

14 A Well if they wanted assistance, we certainly would
15 help them with that, but they have to ask

16 Q But I -- and I apologize I don't mean to be dense,
17 but step two of the process laid out on Plaintiff's 6 is
18 quote The inspection is reviewed by one of our warranty
19 specialists If repairs are necessary to meet warranty
20 requirements we are available to guide you through the
21 repair process and will even provide you with a list of
22 contractors in your area who are familiar with our repair
23 standards, end quote

24 A We are available to assist them with that, yes

25 Q Did Ms ~Hammett put that in her e-mail?

1 A Well let s see

2 Q I mean she clearly says --

3 A She explains how to extend the coverage and explains
4 that the exclusion can be removed once the repairs are
5 made

6 Q So Moisture Free then is waiting for the homeowner
7 to take this step to repair the deficiency so that the
8 exclusion can be lifted?

9 A That s correct

10 Q And will only become involved in the process if the
11 homeowner asks you to

12 Q We're happy to get involved with it It s the
13 owner s -- Sometimes they ask us to help them and other
14 times they ll get it done and just call us to verify it
15 to get an inspector to verify it

16 Q Now, I show you 47

17 MR BLACKBURN No objection

18 (Whereupon, Plaintiff's Exhibit No 47 was admitted
19 into evidence)

20 Q This is an e-mail from Daniel at Moisture Warranty to
21 Claire I believe that s Daniel Claver talking to Claire
22 Hammett that we've been talking about

23 A It is

24 Q Without any repairs being done Mr Claver of Moisture
25 Warranty clears this exception?

1 A Yes

2 Q Without any requests from the Babaees for help in
3 doing the repairs, without any repairs being done, it's
4 cleared?

5 A It was cleared based on we would have believed that
6 the repairs would have been done There is no other
7 reason to request to have it removed unless it was
8 repaired but we've done hundreds of these and never ran
9 run into a situation where they would ask us to remove a
10 exclusion without them having fixed the problem It
11 doesn't make much sense

12 Q You assumed that the repair was done?

13 A We would have made the assumption it was done, yes

14 Q Mr Claver is supposed to know what those repairs
15 looked like He should recognize there had been a repair
16 made to this?

17 A Yes

18 Q But there was none?

19 A Mr Claver went down as a favor He was working in
20 the Columbia area Claire Hammett knew he was going to be
21 down there Without charging the Babae a fee he went
22 over to look at it and per direction over the phone was
23 instructed to look at the area He went out and looked at
24 the wrong side of the door and approved it and said it was
25 low moisture

1 It was our mistake We accept the mistake and
2 accepted the warranty coverage There was no contention
3 There was a mistake made and we were willing to cover it

4 Q Well, if you had these reports from Clark and --

5 A We didn't

6 Q -- Strickland --

7 A We did not

8 Q You had Mr Clark's report

9 A We did not have Mr Clark's report

10 Q Well, let me ask you about that Let me have you
11 refer back to exhibit 45, the letter of intent That
12 letter of intent --

13 A Approval

14 Q Approval, I m sorry The letter of approval states
15 in the very first line that quote based on the findings
16 of the report by C Strickland on 8/12/2004 this home
17 qualifies for a moisture free warranty with the following
18 exclusion and then it lists the exclusion?

19 A Yes

20 Q Mr Clark s report of 8/2004 did not have -- did not
21 list any problems with this house He only learned about
22 it --

23 A You're confusing the names Clark's report did
24 Strickland s didn't

25 Q I apologize Mr Strickland s first report --

1 A Yes

2 Q - the one that was dated 8/12/2004, it didn't have
3 any problems on it He only learned of the problems when
4 he was provided with Mr Clark s report So, that s not
5 an accurate statement

6 A That's not an accurate statement either The
7 inspection report that came from Mr Strickland, the only
8 one that we had to evaluate the home included the area
9 that was excluded and mentioned that it had high moisture
10 in that area I have no knowledge that Mr Strickland,
11 nor what I believe would have had a copy of Mr Clark s
12 report Otherwise, huge flags would have been thrown up
13 at that time

14 Q Well, you would agree with me that Mr Strickland had
15 two reports -- a first and second report wouldn't you
16 sir?

17 A It appears to The only one we had was the final
18 report

19 Q And that appears from the e-mails that you produced
20 from your company that says that from the original report
21 I've got to add one moisture area in the back?

22 A Yes

23 Q He only made that representation in November of 2004
24 So in August of 2004, that s the first report That's
25 the clean report That can't be the report that you re

1 referring to?

2 A It can't be

3 Q It can't be So, that's --

4 A Well, we only had one report We weren't asked to
5 get involved with this until just days before the closing
6 and there was one report that was provided to us So,
7 what happened prior to that I am not sure

8 Q So, there is a lot of ambiguity with these reports it
9 seems in this matter?

10 MR BLACKBURN I object to the form of the question

11 THE WITNESS No, I don't think so I think it's
12 pretty clear There was two reports that were produced
13 and the Clark report was never produced to us

14 Q Well, Mr Burton, Mr Strickland was your inspector
15 and it was produced to him?

16 A It was not produced to him We have no evidence it
17 was produced to him

18 Q Sir we do

19 A No we don't

20 THE COURT All right Y'all quit arguing Ask
21 questions I'm sorry that you're not getting the answer
22 that you want

23 MR PHILLIPS I apologize, Your Honor

24 Let me get the exhibit I apologize for the delay
25 I'd like to address your attention to Plaintiff's 26

1 It s already been entered into evidence

2 THE WITNESS Yes

3 Q Now read the second item What -- I'm sorry

4 Please, tell the jury what this document is

5 A It s a fax coversheet that's going to -- It is to

6 Fred Babaee, yes

7 Q From?

8 A Buddy Lewis

9 Q So it is the realtor communicating with Fred Babaee
10 and at a time 11/11/04 the day Ms ~Hammett issued the
11 letter of authorization?

12 A Yes

13 Q All right Read number two to the jury please

14 A Moisture Free Warranty bond okayed the exclusion
15 One exclusion which is window in back which is to be
16 fixed Their inspector Charles Strickland who did the
17 measurement himself do not find the areas to be problems
18 and that is why bond was okayed with only one repair

19 Q All right Let me -- You misread that a little bit
20 I know it's handwritten Let me read it You tell me if
21 I am right or wrong

22 A Moisture Free Warranty bond okayed with one exclusion
23 which is the window in the back Their inspector Charles
24 Strickland who did the measurement himself did not find
25 other three areas to be problems and that is why the bond

1 is okayed with only one repair area

2 A Right

3 Q That means Mr Strickland saw He's not doing an
4 inspection He is not finding something himself He saw
5 something He evaluated four areas of problems and he
6 thought only one was significant That's what that says
7 That's evidence

8 A Charles Strickland went back out there and Buddy
9 Lewis directed him to where he thought the problems were
10 He looked at them and found only one area that s high
11 moisture He did not have the CK report

12 THE COURT Is Mr Strickland here to testify?

13 MR PHILLIPS No, Your Honor I ll move on

14 THE COURT Thank you

15 Q You did mention - so, Buddy Lewis isn t an EIFS
16 expert He is a realtor

17 A He is not an expert He knows quite a bit about it

18 Q He s not an inspector for you?

19 A He's not

20 Q So, your inspector who looked at the house in August
21 of 04 is being brought back by the realtor in November of
22 2004 so the realtor can point out the problems with the
23 EIFS house?

24 A That's what I have been told

25 Q All right I mean, is that -- Strike that Is

1 Mr Strickland -- Is he a certified inspector with
2 Moisture Free Warranty?

3 A He is certified, yes

4 Q And has been for quite some time hasn't he?

5 A Yes

6 Q I believe he was even an inspector with Stucco Pro?

7 A Yes let me clarify that We don't have any
8 inspectors We don't do inspections We don't do
9 repairs but we do provide certification and training for
10 them

11 Q I apologize I thought I asked you if he was a
12 certified inspector

13 A He is certified yes

14 Q Now, no part of your inspection protocol looks for a
15 moisture vapor barrier, does it?

16 A It does not

17 Q So you don't -- You don't look for it It's not
18 part of any of your reports?

19 A It's not

20 Q So, if you were to look at a database of your reports
21 you would find no evidence of the occurrence of moisture
22 damage in homes that have a vapor retarder built into the
23 wall cabinet?

24 A I think I absolutely would see it

25 Q Well, if you don't know it's there, how could you

1 collect that data?

2 A Well, based on what has been said is these homes
3 would be afflicted to a degree much more severe than we
4 would see There would be an anomaly in our data base
5 that we've never seen in 20,000 inspections

6 Q I understand that's an opinion but my question to
7 you, sir, is if you don't look for it you don't know if
8 it's there You can only speculate as to whether it's
9 there

10 A We have -- In doing research related to vapor
11 barriers and other issues on homes we have looked at homes
12 that had vapor barriers and didn't and evaluated
13 inspections and found no anomalies between the two We
14 don't include it in the inspection protocol because we
15 haven't seen that it has any relevance We certainly
16 would if it was going to have exposure for us and those
17 homes were failing in vast numbers we wouldn't want to
18 write warranties on those So it is something that we
19 would look for, but there is no data that supports that
20 these homes fail at any significant rate different than
21 other homes we warrant

22 Q Now, if you don't look for it you can't really
23 produce any data for it, can you?

24 A I can produce data that would be South Carolina
25 versus other parts of the country, and I can compare that

1 and we should see a higher failure rate

2 Q Well, then, let me ask you, sir, how many -- Strike
3 that How many moisture free warranties have you issued
4 for the state of South Carolina?

5 A I don't know an exact number Hundreds

6 Q Thousands?

7 A Probably not thousands, but hundreds

8 THE COURT Mr Phillips, how is this relevant to
9 these people's case?

10 MR PHILLIPS I'll get to it very quickly Your
11 Honor

12 THE COURT Move along

13 Q How many from North Carolina?

14 A Maybe not thousands in North Carolina

15 Q Can you tell me the number of vapor barriers in North
16 carolina?

17 A Vapor barriers were very common in North Carolina as
18 they were in South Carolina

19 Q But that s not from your report data That s just
20 from your personal knowledge and the people you ve spoken
21 to?

22 A Well, that's published That was part of the study
23 that -- extensive study of 1200 homes that were done in
24 Wilmington They had vapor barriers

25 Q Well, when I asked you about And there is both a

1 vapor retarder and a moisture barrier in the walls of the
2 Babaee home, isn't there?

3 A There is a vapor barrier being a plastic sheet behind
4 the interior drywall and there is Kraft Paper on the
5 backside of the insulation. Neither one would qualify as
6 an installed vapor barrier.

7 Q It is a piece of plastic in the wall?

8 A Yes

9 Q You don't think that stops a piece of -- And it is a
10 six mill poly. It is like a heavy plastic yard bag
11 correct?

12 A Yes

13 Q That stops water. That is a moisture barrier.

14 A If it's installed correctly. It wasn't on this. If
15 it was installed correctly, it still wouldn't affect our
16 results.

17 Q If it had been installed properly, it would cause
18 damage, wouldn't it?

19 A No, it wouldn't.

20 Q Let me direct your attention to 111.

21 A Deposition?

22 Q Page 111 of your deposition, line 8.

23 MR BLACKBURN: What page was that?

24 Q Page 111.

25 A Line eight.

1 Q And I asked you, quote, How about the use of a
2 moisture barrier in the wall cavity? Does that in your
3 opinion cause moisture damage inside the wall regardless
4 of the cladding which you answered under oath -- Read
5 from 12 to 22, please

6 A Give me just a second In relation to bulk moisture
7 getting into the wall a vapor barrier wouldn't -- There
8 would be damage behind any cladding with a vapor barrier
9 if bulk moisture is getting in Yes

10 Q And --

11 A The vapor barrier doesn't cause the problem

12 Q Moisture -- three moisture free warranty certified
13 inspectors -- Charles Strickland Daniel Claver and a
14 Mr Blackburn -- have all looked at this house?

15 A Well --

16 Q And not one of them have noted that there is a layer
17 of plastic inside this wall?

18 A No they haven't It wouldn't be part of the
19 protocol but Daniel Claver didn't do an inspection of the
20 home other than look at the specific area of exclusion

21 Q I know time is short Let me just kind of cut to the
22 chase You don't really believe that there is any
23 problems with EIFS do you?

24 A I don't believe the problems associated with EIFS
25 homes have to do with the EIFS itself, no

1 Q And that's not an opinion held by the manufacturers
2 of EIFS because they don't make it for residential homes
3 anymore, do they?

4 A No They all have the same opinion, but they went
5 with other systems due to litigation

6 Q Why were they getting sued? Because it doesn't work?
7 Because it produced rot in windows?

8 A No I think they're getting sued because -

9 THE COURT Gentlemen Ask a question not 15
10 questions

11 THE WITNESS What was the question? Why are they
12 getting sued?

13 MR PHILLIPS They're getting sued Isn't it
14 because this is occurring in people's walls?

15 THE COURT Mr Phillips

16 MR PHILLIPS I apologize Your Honor I'll
17 withdraw --

18 THE COURT You know better than that Come on
19 Just ask one question instead of 10 at once

20 MR PHILLIPS I apologize, Your Honor I'll move
21 on

22 THE COURT No You don't have to move on Just ask
23 him one question Give him a chance to answer Ask him
24 two questions Give him a chance to answer That's how
25 the rules are I know that you get fired up, but

1 Q You re familiar with the litigation against the EIFS
2 manufacturers that caused them to stop selling barrier
3 EIFS products such as this in North Carolina -- your home
4 state -- South Carolina all over the country, correct?

5 A They didn't stop selling all over the country by any
6 means It is largest growing cladding system in the
7 United States

8 Q Sir you know that s for commercial buildings I
9 asked you --

10 A I --

11 Q -- about residential homes

12 THE COURT Mr Phillips, I am not going to tell you
13 again Now conduct yourself appropriately

14 Are you aware of the litigation? Answer that
15 question

16 THE WITNESS I am, sir

17 Q And it involves residential wood-frame construction?

18 A It does

19 Q This product is no longer sold for wood-frame
20 residential construction, is it?

21 A In most cases no

22 THE COURT Well, do you know of any case where it
23 is?

24 THE WITNESS It still gets installed in some cases

25 THE COURT How?

1 MR PHILLIPS Where?

2 THE WITNESS Probably by mistake

3 THE COURT Let s -- Gentleman, please The jury is
4 trying to be patient I am trying to be patient, but
5 y all are testing all of us

6 Q And litigation involving the use of that system on
7 wood-frame residential construction is because it produces
8 this inside of the wall cavity?

9 A No

10 Q So, what did they sue for?

11 A There is damage like that in the wall cavities of the
12 homes that have EIFS like there is damage like that in
13 other claddings as well They went after the EIFS
14 manufacturer because it was a specific target that they
15 get -- They could make a lot of money off of it mainly

16 THE COURT Ladies and gentlemen I am going to ask
17 you to strike that That s not responsive to his
18 question Let s move along We're not concerned about
19 other litigation We're concerned about these Plaintiffs
20 against this Defendant

21 Q Do you know that purchasers such as the Babae
22 moisture free warranty aren't familiar with all of this
23 technical - technical aspect of EIFS?

24 A Certainly

25 Q And your brochure certainly doesn't educate them

1 about the problems associated with EIFS, does it?

2 A It's not intended to, no It mentions that there is
3 problems with synthetic and hardwood stucco homes I
4 believe it does

5 Q And, in fact Moisture Free Warranty doesn't do
6 anything to educate EIFS homebuyers about moisture
7 intrusion problems, do they?

8 A We have a website that's pretty extensive about it

9 Q Let me direct your attention to 117 -- page 117 of
10 the deposition I asked you a question beginning on line
11 14 I guess my question to you then would be what do you
12 believe your customers think of when you say I'm

13 warranting against moisture intrusion, to which you
14 replied line 18 through 25

15 A Yes I believe that they -- Well, my customers --
16 Let's define my customer My customer is somebody who
17 through at the very end of a very long process has decided
18 to purchase a warranty My customer is not somebody who
19 starts only 20 days before on average because we don't
20 sell warranties on the front We sell them on the
21 backside of the process So at the time they get a
22 warranty and decide whether they re going to give us any
23 money for that -- for what we've helped them with they
24 have been educated They have not relied on us to make a
25 purchase They relied on many Our services that we

1 provide free of charge up to that point when they buy a
2 warranty So, what they know - what the moisture
3 problems are generally by the time -- they know about the
4 moisture problems by the time we re done with them
5 typically

6 Q So the 120-day process that you described in your
7 answer, the Babaees didn t go through that?

8 A They didn't As buyers they re on the receiving side
9 of that

10 Q All they had was a brochure and you know that this
11 brochure is what home buyers -- EIFS home buyers rely on
12 right?

13 A No I mean we try to make sure that they have the
14 terms and conditions We go to extraordinary lengths to
15 make sure they have all of the items There is also a CD
16 that we produce that we give to them so they understand it
17 better but let me clarify We usually don t have direct
18 contact with the buyers because a lot of times we don t
19 know who they are until after the fact

20 Q But you know that brochure reaches homebuyers?

21 A Yes

22 Q And you intend them to rely on it You testified to
23 that earlier?

24 MR BLACKBURN Object, Your Honor

25 THE COURT Asked and answered Move on

1 MR PHILLIPS Yes, Your Honor

2 Please turn to page 122 of your deposition

3 THE COURT I am going to tell you the same thing I
4 tell Mr Blackburn Did he answer something that was not
5 consistent with the deposition?

6 MR PHILLIPS Yes Your Honor

7 THE COURT I didn't hear the question

8 Q Mr Burton I asked you in your deposition -- Well,
9 let me ask you do you think that this brochure reaches the
10 hands of potential home buyers such as the Babaees?

11 A Certainly

12 Q And they rely on it?

13 A Well, it would be a first step in deciding whether
14 they want to buy a warranty They didn't buy a warranty,
15 in fact

16 Q Well the Babaees didn't go through the 120-day
17 process They made their decision based on your brochure?

18 THE COURT Mr Phillips, we've gone over the
19 reliance questions a number of times If you know whether
20 the Plaintiff relied on it you can answer it If you
21 don't -- I don't know how he can answer that

22 THE WITNESS I stand behind what it says in the
23 brochure

24 THE COURT Very well Move along

25 Q Home purchasers -- EIFS home purchasers such as the

1 Babaees who are not in direct contact with Moisture Free
2 Warranty, that's about half of your customers, isn't it?

3 A Yea, probably about half

4 Q So, their situation is typical of half of the
5 moisture free warranties that are issued?

6 A Not necessarily

7 Q Let me direct you to page 141

8 A Maybe I can shortcut it, Sam

9 Q My question -

10 THE COURT Gentlemen --

11 A Half the people buying --

12 THE COURT Gentlemen Gentlemen I'm not going to
13 -- Answer the question Don't shortcut anything Just
14 answer the question Ask the question again

15 Q The Babaee's experience is typical of about half of
16 the moisture free warranties issued isn't it?

17 A No

18 Q Let me have you read -- Look on page 141 of your
19 deposition I asked you a question beginning on line 5

20 A 141?

21 Q 141

22 A Line 5 yes

23 Q Quote, so it's common for a seller of a synthetic
24 stucco home to buy a warranty to be transferred very
25 shortly to a buyer then?

1 A Yes

2 Q And you said - Please just read your answer on
3 page --

4 A Correct

5 Q All right Then I asked you quote, starting on line
6 9, I believe you testified that occurs maybe in 50 percent
7 of the cases and 50 percent of the warranties, to which
8 you answered under oath, sir?

9 A Yes, with explaining that --

10 Q Sir --

11 A -- half of our customers are buyers --

12 Q Sir -

13 A -- and half are sellers

14 THE COURT Just what is in the deposition What is
15 your answer in the deposition?

16 THE WITNESS Yea

17 THE COURT Now do you want to change that now?

18 THE WITNESS I was just clarifying it

19 THE COURT Well, then clarify it

20 THE WITNESS Half of the people that end up paying
21 us the money for the warranty are buyers Half are
22 sellers You re asking if the situation with the Babaees
23 was half of what we do Relative to their situation no,
24 they were the buyers but how we handled with them was
25 somewhat unique So

1 Q My question to you is very simple, sir

2 A Okay

3 Q Half of the moisture free warranties that are issued
4 are issued for the benefit of purchasers of EIFS homes?

5 A Yes

6 Q Moisture Free Warranty on the website and this
7 brochure you promise a dry house?

8 A We do

9 Q But you don't repair moisture damage?

10 A We do When I say - Under a claim we certainly do

11 Q My question to you is very simple Moisture Free
12 Warranty does not repair moisture damage?

13 A We are not contractors no

14 Q Moisture Free Warranty does not provide funding to
15 repair moisture damage under its warranty program?

16 A The warranty company that backs us -- the Western
17 Pacific Mutual provides funds in the event of a claim

18 Q Let me direct your attention to page 305 in your
19 deposition I asked you beginning at line 11 A wet EIFS
20 house that needs damage repair, isn't that exactly what
21 your company markets its products as being a solution for
22 to which you answered and please read line 14

23 A No

24 Q Now you were under oath when you took this
25 deposition, weren't you Mr Burton?

0606

1 A I was

2 Q You're under oath here today The Moisture Free
3 Warranty does not provide funds to repair moisture damage
4 in a house?

5 A That s not the question you asked

6 Q That's the question I just asked

7 A Okay We do provide funds for fixing damage in an
8 area that may be wet That's covered under the warranty
9 Provide funds -- We usually take care of fixing it
10 ourselves We get the contractor That's 90 percent of
11 what we do

12 Q You sent a contractor to Fred Babae's house --
13 Performance Exteriors?

14 A No

15 Q Let me ask you this Who is Frank Guidera?

16 A Frank Guidera is a repair contractor based out of
17 Charlotte

18 Q He owns Performance Exteriors?

19 A He does

20 Q You have seen the documents in this case
21 Performance Exteriors did a bid to repair this home

22 A They did

23 Q I asked you about this bid in your deposition

24 A Yes

25 Q You brought Frank Guidera into this case, correct?

0607

1 A We consulted with Frank on this case, yes

2 Q You paid him to come down and spend a day looking at
3 Babaee's house?

4 A We didn't pay him to do that but he did do it, yes

5 Q He's given a deposition in this case?

6 A (Witness nods head)

7 Q He s given a bid in this case?

8 A Yes

9 Q It was a \$10,000 -- He asked for nearly \$10,000 to
10 repair a couple of discrete areas on this house --

11 A No he didn t

12 Q -- and Moisture Free Warranty didn't fund that?

13 A He didn't His repair was an estimate that ranged
14 from about \$700 up to \$9,600

15 Q All right To which Moisture Free Warranty did not
16 hire Mr Guidera to do any repairs to the Babaee house
17 did it?

18 A The Babaees would not let us fix their house

19 Q Sir, do you have any evidence of that?

20 A They would not let us fix their house We attempted
21 to do it

22 Q Sir please, do you have any evidence --

23 A Yes

24 Q -- that you offered -

25 THE COURT Gentlemen Ask the question Let him

1 answer it

2 Q Do you have any evidence that you offered the Babaees
3 to let Frank Guidera fix their house?

4 A I don't have evidence of that, no

5 Q You admitted Mr Guidera's estimate ranged from 750
6 to nearly \$10,000?

7 A It did

8 Q To which you offered the Babaees \$750?

9 A No

10 Q What did you offer them?

11 A We were offering to fix the home and Mr Babaee was
12 insisting on \$20,000 from the beginning We can't force
13 somebody to let us fix their home He insisted on money
14 from the beginning That's not the way the warranty
15 works We typically take care of repairing the home and
16 they didn't want us to do that

17 Q But you have no document no e-mail no letter
18 nothing where you put that offer in writing?

19 A We have two e-mails where Mr Babaee is insisting on
20 \$20,000

21 Q Sir my question was Moisture Free Warranty did not
22 send a letter an e-mail, or any document to Fred Babaee
23 offering to fix his house, did they?

24 A No

25 Q And you're a sophisticated business guy You've run

1 two companies that are associated with EIFS?

2 A No One

3 Q One You were involved in the Dryvit class action?

4 A That s correct

5 Q You negotiated terms and conditions and your
6 inspection protocols with a bunch of lawyers on both sides
7 of that case?

8 A Yes

9 Q So, you're telling me that you made an offer -- a
10 legally binding offer -- to Fred Babae and you didn't
11 reduce it to writing?

12 MR BLACKBURN Your Honor, I am going to object
13 It s asked and answered

14 THE COURT Overruled

15 THE WITNESS We -- There is not -- We didn't send an
16 offer to repair That s what we do in the warranty The
17 warranty offers that

18 THE COURT How did you convey if you did to the
19 Plaintiffs whatever you were going to do or what you were
20 not going to do?

21 THE WITNESS Okay There were telephone
22 conversations that were occurring that were not recorded
23 necessarily between Tim McClain who handles our claims and
24 Mr Babae He's acknowledged those

25 Q Now, when Claire Hammett, your employee, offered to

1 sell Mr Babae extended coverage --

2 A Uh-huh

3 Q -- she talked to him on the phone?

4 A Yes

5 Q And she followed it up with an e-mail, didn't she?

6 A She did

7 Q And so it's your contention that that offer was
8 made verbally to the Babaees and there was no follow up?

9 A We were trying to settle the claim and that would be
10 standard for us to do

11 Q Standard but you have no personal knowledge of that
12 phonecall do you?

13 A No, I don't

14 THE COURT Mr Phillips, let me see you please How
15 much longer you got? That's what I was going to ask you

16 MR PHILLIPS Your Honor, I -- with the Court's
17 indulgence

18 THE COURT I indulge you

19 MR PHILLIPS I would like to ask a series of
20 questions that should take no more than 10 minutes

21 regarding Mr Strickland's report and then I'll be done

22 THE COURT Very well My jury wants to eat so they
23 have to put their order in So we're going to take a
24 little quick break The clerk will come back Please do
25 not discuss the case Don't deliberate She'll come back

1 and take your order and come back and we'll finish him on
2 direct cross and I'm told this is your last witness

3 MR PHILLIPS Your Honor, I have sent a subpoena to
4 Frank Guidera I don't know if he'll show up today He
5 is in North Carolina So, of course I cannot enforce it
6 So, if Mr Guidera were to walk through the door I would
7 have one more witness If he doesn't I'm finished

8 THE COURT Y'all step out

9 (Whereupon, the jury exited the courtroom at 11 28)

10 THE COURT Anything from the Plaintiff before we
11 start the break?

12 MR PHILLIPS No, Your Honor

13 THE COURT The Defendant?

14 MR BLACKBURN Just for the record Your Honor the
15 subpoena that he sent to Frank Guidera was about a month
16 and a half ago It's not applicable to this term of
17 court

18 THE COURT What does that got to do with the price
19 of eggs?

20 MR BLACKBURN He is implying to the jury that Frank
21 Guidera doesn't want to show up even though he's been
22 subpoenaed

23 MR PHILLIPS Your Honor we sent him a subpoena
24 We sent him a follow-up notice of this hearing Several
25 letters We sent him -- We faxed him a letter yesterday

1 MR BLACKBURN I just never -

2 THE COURT I will make a curative instruction to the
3 jury the fact that he is subpoenaed and doesn't show up
4 they're not to infer anything from that whatsoever

5 MR BLACKBURN Thank you Your Honor

6 THE COURT And that the subpoena may not even be for
7 this term of court

8 MR BLACKBURN Thank you

9 THE COURT But he may have had follow-up letters
10 advising him it was this term of court

11 MR PHILLIPS Your Honor as I believe the rules
12 require --

13 THE COURT Absolutely

14 MR PHILLIPS -- we have stated that Mr Guidera
15 you're not bound by this subpoena We're asking you to
16 show up

17 THE COURT Not to infer anything from him not
18 showing up

19 Sir Mr Witness -

20 THE WITNESS Yes sir

21 THE COURT -- you're in the middle of your
22 testimony Like I told all of the other witnesses, don't
23 discuss it with your lawyer or anybody You're certainly
24 welcome to step down and go to bathroom We re going to
25 take about a 10 minute break

1 (Whereupon, a break was taken)

2 MR BLACKBURN One thing, this guidelines - This is
3 some we've already introduced this as Defendant s exhibit
4 no 37

5 THE COURT Uh-huh

6 MR BLACKBURN There some training procedure in here
7 that we'd like - some tapes that we d like to show the
8 jury about, you know, their training protocol and what
9 they do as far as the damage and how they repair it If
10 we may enter that, I would since --

11 MR PHILLIPS Your Honor I issued -- I made an
12 objection to the DVD s I don t mean to be overly
13 technical but Mr Flaherty had and produced at his
14 deposition a series of videocassette tapes, VHS tapes,
15 that it is my understanding was the original moisture
16 inspection program In my deposition Mr Burton indicated
17 there had been some modifications to the DVD and he said
18 they were minor but it is still not exactly what Flaherty
19 was testifying to

20 MR BLACKBURN I believe the minor that he was
21 referring to was they used to be on VHS when Flaherty had
22 them when he was trained back in 2002 and now they re on a
23 DVD because we're a little down the road in technology

24 MR PHILLIPS One of the specific changes that
25 Mr ~Burton said that they made involved that sill pan

1 which has been evidenced from Mr Burton from my expert
2 Chris Cooper, and, so, I guess my testimony would be that
3 it's not exactly the standard that was in place when the
4 Babaee's warranty was issued, and I think it would be
5 unduly burdensome for the jury to watch it

6 THE COURT How long are they?

7 THE WITNESS We re just showing a clip, just a short
8 segment

9 THE COURT How long are the clips?

10 THE WITNESS I believe the one we're showing was
11 probably five minutes

12 THE COURT Certainly not burdensome

13 MR PHILLIPS Well -

14 THE COURT I am going to let them in more than
15 likely You can cross on redirect You can ask him
16 whatever you want to ask him

17 MR PHILLIPS Your Honor, then if that s the case, I
18 mean, I am familiar with the material I would just ask
19 for a short recess so I can look at the DVD and put up any
20 rebuttal

21 THE COURT I gave you 10 minutes

22 MR BLACKBURN Your Honor --

23 THE COURT Gentlemen, please What?

24 MR BLACKBURN I shared with Your Honor yesterday a
25 CD that Chris has generated based on the reports being

1 introduced and his analyses that Mr Phillips is asking
2 about, and it is on a CD, and, basically -- How long is
3 that going to take Chris ten minutes to go through?

4 THE WITNESS Yea

5 MR BLACKBURN A 10-minute presentation for the
6 CD --

7 THE COURT We don't do presentations You have to
8 ask him questions He has to answer them We don't do
9 power point

10 MR BLACKBURN It is just the evidence that he's got
11 comparing the reports and showing the damage to the Babae
12 house which is at issue in this case

13 MR PHILLIPS Your Honor my retort would be just
14 like my photo brochure, I don't have that, and therefore,
15 I would ask that it be excluded

16 MR BLACKBURN It is a compilation of what he's
17 already got, Your Honor and as a matter of fact, it's
18 mostly containing what I produced --

19 THE COURT Have you shown him the chart or the flow
20 chart or whatever you're talking about?

21 MR PHILLIPS Power point

22 THE COURT Power point

23 MR PHILLIPS No Your Honor

24 MR BLACKBURN But it's been --

25 THE COURT If it hadn't been produced pursuant to

1 discovery, I'm not going to --

2 MR BLACKBURN It has, Your Honor

3 THE COURT Well, then, he just says it hadn't

4 MR BLACKBURN Well I'll show you my discovery
5 responses

6 MR PHILLIPS Your Honor --

7 MR BLACKBURN -- that we have

8 MR PHILLIPS - the material that I got from
9 Moisture Free Warranty came in a box with Mr Burton's
10 deposition If it was there - and I don't believe it
11 was -- If it was there, I certainly couldn't have reviewed
12 it and then deposed him on it

13 MR BLACKBURN What we want to do, Your Honor with
14 this right here --

15 THE COURT I thought you said power point

16 MR BLACKBURN Well it is a hard copy that he's
17 got -- it's, basically, my client as Moisture Free and
18 Chris -- For the sake of the jury we can do it hard copy
19 I mean, I produced it I can ask Chris about the hard
20 copies of this and we can do it that way but he has got
21 it I produced it, and what Chris has done for the ease
22 of the jury to understand is produce it on CD so they can
23 see it clearly, and that's what we're asking

24 THE COURT Show it to him now We'll deal with it
25 If he objects, we'll deal with it

1 (Whereupon, a short break was taken)

2 THE COURT Mr Blackburn, let me warn you, please
3 You re going to have to ask him questions I mean, I'm
4 not just going to let him do a Power Point You have to
5 ask questions to prompt where we re going, okay?

6 MR BLACKBURN Judge just so we re clear on this, I
7 am going to ask him does this CD reflect your
8 understanding of repairs and the expert reports that's
9 been produced in this case

10 THE COURT And how he interprets them

11 MR BLACKBURN And the investigations that we have
12 You got my copy right? And Chris this CD has this
13 too right?

14 THE WITNESS Yes

15 MR BLACKBURN And incorporates the studies that
16 they ve done, the moisture problems and solution and how
17 it relates and Sam has talked about the studies they ve
18 done These are all on there These are code -- the
19 damages outlined here

20 THE COURT How is that relevant to what's going on
21 in this case?

22 MR BLACKBURN It is part of the development of the
23 warranty Your Honor and how the warranty works

24 THE COURT Okay

25 MR PHILLIPS Your Honor at some point I d like to

1 put on an objection to this on relevancy and prejudice I
2 can do it now or whenever the Court --

3 THE COURT No, let's finish your cross -- your -

4 MR PHILLIPS I understand

5 MR BLACKBURN Well how would it prejudice?

6 THE COURT Sir we'll do it then It might
7 prejudice him because he hadn't gotten it before now

8 MR PHILLIPS Your Honor, I apologize I was
9 mistaken

10 THE COURT Okay

11 MR PHILLIPS We had received it

12 THE COURT No problem I believe you How long
13 does that take to do the whole presentation?

14 MR BLACKBURN This one? I wouldn't say no more
15 than 10 minutes

16 THE COURT This little thing?

17 MR BLACKBURN Yes, sir, and then we've got the
18 other one for the actual comparison on how Mr Flaherty
19 interprets the guidelines versus how they actually are

20 THE COURT Well he can't testify how Mr Flaherty
21 interpreted them

22 MR BLACKBURN Not - how they actually were

23 THE COURT We'll see

24 (Whereupon, the jury came into open court at
25 approximately 11 54)

1 THE COURT Mr Phillips, you may continue

2 MR PHILLIPS Thank you, your honor

3 Mr Burton you re familiar with Plaintiff's

4 exhibit 2, aren't you?

5 THE WITNESS Where is it?

6 Q I'm sorry It's the board -

7 A Yes, sir

8 Q And your projector is shining on it

9 A Yes sir

10 Q Let me -- I don't mean to burden you Let me put it

11 right up here Are you familiar with this document

12 Mr Burton?

13 A I am

14 MR BLACKBURN Just for the record, what are you

15 talking about?

16 MR PHILLIPS It's Plaintiff s exhibit 2 that's

17 already been entered into evidence

18 Mr Burton this document talks about wood moisture

19 content, doesn t it?

20 THE WITNESS Yes

21 Q It is promulgated by Clemson Extension for

22 residential housing?

23 A Yes

24 Q That's the same wood-frame residential housing that

25 we talked about earlier?

1 A Yes

2 Q These moisture readings that they discuss these are
3 the same type of moisture readings that your inspectors
4 collect?

5 A Using the same equipment, yes

6 Q Using the same equipment Thank you sir For
7 readings in the area of 20 to 24 percent Clemson states on
8 this document Plaintiff's exhibit 2 and I'll read it to
9 you, quote, Readings indicate -- I'm sorry We're talking
10 about readings from 20 to 24 percent Quote Readings
11 indicate a serious problem somewhere The excess moisture
12 source must be immediately corrected and the situation
13 carefully monitored until the wood moisture content -- the
14 acronym for which is WMC -- returns to 12 to 16 percent
15 range?

16 A Yes

17 Q That's what that says?

18 A Right

19 Q And you believe that moisture readings of 20 percent
20 can require corrective action just like the corrective
21 action that Clemson recommends?

22 A I believe they require corrective action yes I
23 don't know if I agree -- I don't know if they're
24 percentage -- but something needs to be done yes

25 Q Let me -- So, when Clemson says for moisture readings

1 of 20 to 24 percent the excess moisture source must be
2 immediately corrected --

3 A That's what it says, yes

4 Q In some cases that is the fact, isn't it?

5 A I believe that you need to address issues of moisture
6 over 20 percent

7 Q But the moisture warranty -- the moisture free
8 warranty does not kick in and offer any payment to a
9 warranty holder for moisture readings below 25 percent,
10 does it?

11 A It doesn't cover the maintenance that would be
12 required to correct a failure that occurs between 20 and
13 24 percent on that, yes

14 Q And it doesn't cover the damage caused by a reading
15 of 20 to 24 percent?

16 A It would cover that

17 Q Residential Warranty Corporation who underwrites the
18 moisture free warranty they won't authorize payments for
19 anything under 25 percent do they?

20 A Yes, they do if we recommend it

21 Q If you recommend it?

22 A Yes

23 Q But that's not what the terms and conditions of your
24 warranty says It sets it at 25 percent

25 A The claim -- The minimum claim standard in the

1 warranty says 25 percent That s correct

2 Q So possibly, perhaps, in your discretion you can
3 lower that?

4 A Absolutely We can do it to any moisture level It
5 wouldn't be relative -- If we saw an area that we believed
6 needed to be corrected, we could include that

7 Q The program itself sets the standard at 25 percent?

8 A The warranty language sets its at 25, correct

9 Q Do you believe that the average homeowner understands
10 when they re buying a moisture free warranty that there is
11 potential that their -- the moisture in their wall can
12 rise to a level where Clemson says immediate correction
13 should be undertaken and Moisture Free Warranty has the
14 option of doing nothing? Do you believe the average
15 homeowner understands that when they purchase the moisture
16 free warranty?

17 THE COURT Mr Phillips he -- That s - He cannot
18 testify that what the average homeowner believes, feels,
19 knows

20 MR PHILLIPS Your Honor --

21 THE COURT I am not going to let that in the trial
22 of this case

23 MR PHILLIPS I understand

24 You market your warranty to home purchasers correct?

25 THE WITNESS We do

1 Q Do you have some understanding of their level of
2 knowledge regarding what dry wood means?

3 A I - No Well if they were to ask us we would
4 certainly tell them What we talk about is keeping the
5 wood dry which my interpretation would be below
6 20 percent

7 Q But nothing in the brochure that you produce talks
8 about levels of moisture and the fact that dry wood can
9 fluctuate depending on Moisture Warranty Corporation s --

10 A No We don't get into that level of detail in the
11 marketing brochure

12 MR PHILLIPS Thank you Mr Burton

13 CROSS-EXAMINATION

14 BY MR BLACKBURN

15 Q Chris how are you doing?

16 A I m doing all right

17 Q You were asked --

18 THE COURT Let me set the ground rules before you
19 start I don't set them The Rules of Civil Procedure
20 and Evidence set them He was allowed to lead this man
21 because he is with the Defendant, but this is

22 Mr Blackburn's client So he has to ask direct
23 questions

24 Q Just so we can continue on where we were Chris, we
25 talked about that Clemson report yesterday and you were

1 here and, basically, I entered the full two-page report
2 from Clemson standards into evidence, and it's marked
3 Defendant's exhibit no 45 I am going to hand you a copy
4 of that You're familiar with this document, Defendant's
5 exhibit no 45, aren't you?

6 A Yep

7 Q In your opinion does this --

8 THE COURT No sir He's not been qualified as an
9 expert, and he can't give opinion testimony

10 MR BLACKBURN Okay Well, let me say -- Your
11 Honor may I approach the bench with Sam?

12 THE COURT Yes

13 (Whereupon, a bench conference was held)

14 THE COURT All right Mr Witness, let s worry
15 about that after -- Pay attention to the question so we
16 can move on

17 THE WITNESS Yes, sir

18 Q Chris you re familiar with moisture concentration
19 readings aren't you?

20 A Yes

21 Q How do you get that -- your experience with moisture
22 concentration readings as they apply to your warranty?

23 A We use several of the same sources that were cited by
24 Mr Flaherty

25 Q And other sources?

1 A Yes

2 Q Okay And you're familiar with the moisture
3 concentration reading as they apply to residential
4 construction, right?

5 A Yes

6 Q And would you consider yourself an expert as to
7 moisture concentration and the ability to evaluate
8 moisture concentration levels?

9 MR PHILLIPS Your Honor I object

10 THE COURT Hold on Mr Blackburn, I make the
11 determination first of all, if he is an expert Number
12 two, whether or not we need expert testimony on moisture
13 content in houses

14 MR BLACKBURN That was a bad choice of words Your
15 Honor

16 As far as moisture concentration as they apply to
17 residential construction how long have you been studying
18 moisture concentration levels?

19 THE WITNESS Since 1996

20 Q 1996?

21 A Uh-huh

22 Q And you've developed the moisture warranty based upon
23 your studies of moisture concentration levels, haven't
24 you?

25 A Yea Well, we have hundreds of thousands of these

1 readings that are part of the inspections that we evaluate
2 and that we've written warranties on. The moisture
3 content is the key to deciding what the remediation is on
4 a home. It decides where a warranty would pay a claim.
5 So these are directly relative, and we have collected
6 more data on that particular element - electrical
7 resistance meter readings than anybody in the country.

8 Q I see. So you're very familiar with moisture
9 content in residential construction, right?

10 A Yes.

11 Q And that's based on your experience, right?

12 A Yes.

13 Q Have you ever had any training seminars or college
14 education trainings regarding that -- seminars?

15 A That I've given.

16 Q That you've given or taken?

17 A Both.

18 Q Both.

19 Your Honor, I'd like to qualify Mr. Burton as an
20 expert in the field of moisture concentration based on his
21 experience and education.

22 THE COURT He hadn't even told me about his
23 education.

24 Q Okay. And you say --

25 THE COURT First of all, why do we need an expert

1 for this? Just let him testify Don't ask him his
2 opinion Just ask him what his company does and doesn't
3 do and how they arrived at that

4 MR BLACKBURN Okay

5 THE COURT We don't need opinions in that field

6 Q This Clemson Residential Housing brochure --

7 A Uh-huh

8 Q -- as it relates to moisture concentration levels
9 does it apply to anything above the ground floor?

10 A It doesn't

11 Q It doesn't?

12 A No

13 Q What does this --

14 MR PHILLIPS Object Your Honor

15 THE COURT Hold on What is the objection?

16 MR PHILLIPS I object Your Honor There is no
17 basis for that No basis has been laid

18 THE COURT Sustained Disregard that answer, ladies
19 and gentlemen

20 Q Now, the Clemson residential housing that's up on the
21 wall right there if you can read -- You got a copy of it
22 right Chris?

23 A Uh huh

24 Q Read the second paragraph

25 A The wood moisture content of wooden members of the

1 substructure of the residences being sold in the states is
2 routinely being disclosed in the closing process of the
3 sale to buyers

4 Q Is there anything else in this document that relates
5 to moisture concentration levels above the ground floor?

6 A No, not that I'm aware of

7 Q So, would this document based on your experience -

8 THE COURT No, sir No, sir No, sir I'm not
9 going to let him give opinions about that document The
10 document says what it says The jury can accept it in any
11 manner they want to They're the fact-finders There is
12 not going to be an opinion on it

13 Q Chris, I am going to hand you Defendant s exhibit
14 no 47 and ask if you can identify that document?

15 A Yes It's a copy of a Moisture Free Warranty

16 Q It s a copy of the Moisture Free Warranty, right?

17 A Yes

18 Q And this copy has been approved by the Georgia
19 Insurance Department Property and Casualty Division?

20 A It has It went through an extensive review and we
21 had to put up a \$1 5 million bond for it to be approved in
22 the state of Georgia

23 Q Okay And the homes in the state of Georgia at the
24 the time the Babae house --

25 MR PHILLIPS I object to relevancy, Your Honor

1 THE COURT How are the homes in Georgia relevant to
2 this lawsuit?

3 Q How are the homes -

4 THE COURT No sir I m asking you

5 MR BLACKBURN I'm sorry Your Honor I thought you
6 wanted me to restate the question

7 THE COURT You want to answer, Mr Blackburn? How
8 is that relevant to this lawsuit?

9 MR BLACKBURN Because it's been alleged by
10 Mr Flaherty that the houses in Georgia are built
11 different than they are in South Carolina with regard to
12 the vapor retarder

13 THE COURT It's been alleged?

14 MR BLACKBURN And Mr Flaherty says that you can
15 warrant a house in Georgia but you can't in South Carolina
16 because of the vapor retarder Mr Flaherty testified you
17 can -

18 THE COURT Go ahead Ask your question

19 Q Chris are houses in Georgia built differently than
20 they are in South Carolina?

21 MR PHILLIPS Same objection, Your Honor relevancy

22 MR BLACKBURN With respect to --

23 MR PHILLIPS Plus, Your Honor, if I might -- I
24 apologize I would also like to put on there there is no
25 foundation no basis that Mr Burton is qualified to even

1 give such an opinion even if it was relevant

2 THE COURT Well, I am not letting him give opinions
3 I don't see how Georgia has anything to do with this
4 lawsuit

5 MR BLACKBURN Because Mr Flaherty, again, Your
6 Honor, said that they can warrant a house in Georgia

7 THE COURT Well, that's right, but then you asked
8 him are houses built different in Georgia than they are in
9 South Carolina

10 MR BLACKBURN Okay

11 THE COURT My house is built different than the one
12 down the street

13 Q Let me clean up that question As part of the
14 building code in Georgia did you investigate --

15 MR PHILLIPS Same objection

16 THE COURT Very well

17 Q As part of the development of the Moisture Free
18 Warranty program did you investigate houses in Georgia?

19 A We investigated houses throughout the country and we
20 had results that were coming in from all over the country
21 from our inspectors So, Georgia was certainly part of
22 that There wasn't a state in the country that we didn't
23 evaluate with the exception of Hawaii

24 Q Okay And as a result of those investigations did
25 you produce the Moisture Free Warranty that's marked

1 Defendant's exhibit 47?

2 A As part of that that was cumulatively put together
3 and, yes that helped create the risk and remediation
4 standards that we adopted

5 Q And it has been approved by the Georgia Insurance -

6 THE COURT You've already asked that

7 THE WITNESS It has

8 THE COURT He's answered It's been approved

9 Q And is this warranty -- except for being approved by
10 the Georgia Department of Insurance, is it any different
11 in the terms and conditions -- Are they different than the
12 one issued to Mr. Babaee?

13 MR. PHILLIPS Same objection to relevancy Your
14 Honor

15 THE COURT Let's talk about the one in this case,
16 please

17 Q The terms and conditions of the warranty that's been
18 approved by the Georgia Department of Insurance included a
19 moisture concentration level --

20 MR. PHILLIPS Your Honor --

21 THE COURT Talk about the warranty that was issued
22 to the Plaintiffs in this case now Please Is it the
23 same warranty?

24 MR. BLACKBURN Yes, sir, it is

25 THE COURT Well, then why do we have to worry about

1 it being approved in Georgia? Talk about the warranty in
2 this case if you want him to explain the warranty, how it
3 came about, but I could care less about the Georgia
4 Insurance Commission If it s the same warranty fine

5 Q Same warranty And Chris, you've been asked about
6 the estimate by Frank Guidera haven't you?

7 A Yes

8 Q Okay Now, tell me, you testified earlier about the
9 purpose of that

10 THE COURT Mr Blackburn, ask a question

11 Q Tell --

12 THE COURT You have to ask direct questions of this
13 witness We know what he s already testified about Just
14 ask him the question

15 Q Does that estimate by Frank Guidera call for a repair
16 of the Babaee home for almost \$10 000?

17 MR PHILLIPS Objection, Your Honor It's a leading
18 question

19 THE COURT It is What does the repair by that man
20 call for? That s how you ask it

21 MR BLACKBURN Thank you Your Honor

22 THE COURT By way of money

23 THE WITNESS This estimate was put together to give
24 a range of what the potential costs of fixing the home
25 might be based on the inspection that was provided to him

1 from David Blackburn David Blackburn went back out to
2 the home after we had two very conflicting inspections
3 the one from Charles Strickland and the one from CK
4 Service and they were dramatically different We sent the
5 inspector out there to find out what was going on with the
6 home

7 He produced his report confirmed a few areas that
8 agreed with Strickland's report and agreed with some
9 elements of CK's report That was used to give to Frank
10 Guidera He made an estimate based on that that spanned
11 the potential that could be repaired in there

12 Q Did Frank Guidera ever go to Mr Babae's house?

13 A Not for the purpose of this

14 MR PHILLIPS Objection, Your Honor hearsay

15 THE COURT If you know, did he go out to the house?

16 THE WITNESS He did not for the purpose of this

17 Q Okay For the purpose of the estimate by Frank
18 Guidera, right?

19 A No he did not

20 Q And tell me what Guidera's estimate is

21 A It's a spanning estimate that would say that if
22 the -- the best case scenario worst case scenario

23 Q What is the worst case?

24 A Well the worst case scenario that we have here the
25 highest price I believe he had here totaled was around

1 \$9 600

2 Q What about the best case scenario?

3 A Let's see

4 THE COURT Best case for who?

5 THE WITNESS It might be somewhere around a
6 thousand

7 Q Okay And does it say anything about if damage is
8 found?

9 A If damage is found yes that there would be
10 additional charge of \$50 per man-hour

11 Q So at that point Mr Guidera wasn't sure if there
12 was damage to the house, right?

13 A Well he is referring specifically to framing damage
14 We're assuming in the higher price that there would be
15 substrate damage and system replacement

16 Q Substrate damage to the exterior cladding?

17 A Yes

18 Q Okay And Mr Guidera -- We brought him down there
19 right, because he's -- he used the --

20 THE COURT Is that a question?

21 MR BLACKBURN Yes

22 THE COURT It's not We brought him down there

23 That's not a question Mr Blackburn, ask direct
24 questions

25 Q Chris, are you familiar with a document that I just

1 handed you?

2 A I am

3 MR PHILLIPS Please identify the exhibit Your
4 Honor

5 THE WITNESS EIFS position paper It's Defense
6 exhibit 48

7 Q Are you familiar with this document, Defendant's
8 exhibit no 48?

9 A I am familiar with the document yes

10 Q And what is the document?

11 A It's an EIFS position paper from the organization
12 CLAPCA

13 THE COURT It is a position paper from where?

14 THE WITNESS An organization named CLAPCA, the
15 Carolina Lathing and Plastering Association

16 Q And did Mr -

17 MR PHILLIPS Your Honor I would ask that this be
18 excluded

19 THE COURT For what reason?

20 MR PHILLIPS There s -- There s -- Mr Burton has
21 not been qualified as an expert There is no basis for
22 him to give opinions about this

23 THE COURT Plus, it's hearsay Hearsay

24 MR PHILLIPS And this would be hearsay I was
25 getting to it, Your Honor

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1 THE COURT Sustained

2 MR BLACKBURN Your Honor if I may --

3 THE COURT No sir, I've ruled He's not -- You can
4 only use those documents if the witness is an expert and
5 that's what he normally relies on in rendering an opinion

6 MR BLACKBURN Okay

7 THE COURT Not -- you're --

8 MR BLACKBURN Can I --

9 THE COURT Your guy the Defendant is not an expert
10 that can render opinions

11 MR BLACKBURN Can I ask him a question if he relied
12 upon this document to come up with the moisture
13 concentration levels?

14 THE COURT You can ask him that but I am not going
15 to let him go into what the document says

16 Q Chris, this document Defendant number 48 --

17 MR PHILLIPS Your Honor, again, I don't mean to be
18 contentious, but there has been no basis for the entry of
19 this document

20 THE COURT I've said he can let him -- It's not
21 being introduced into the trial of the case

22 MR PHILLIPS I understand

23 THE COURT I will let him ask him did he rely on
24 that document when he formulated his warranty

25 Q Did you Chris?

1 A It was an element of it yes

2 Q It was? And does this document refer to moisture
3 measurements?

4 A It does

5 Q Okay And where does it refer to -

6 THE COURT No, sir Now you're getting into what
7 the document says

8 Q What does this --

9 THE COURT You can't do that That's hearsay

10 Q As far as the CLAPCA position paper --

11 MR PHILLIPS Your Honor hearsay

12 THE COURT He relied on it Go to something else

13 He can say what all he relied on in reaching his decision
14 to put the moisture levels in his warranty, but he can't
15 tell me what all of those papers say unless you bring the
16 people in who did the paper It is clearly hearsay

17 Let me ask the question What all did you rely on in
18 formulating the moisture content which is set forth in
19 your warranty?

20 THE WITNESS There's several documents, some of
21 which Mr Flaherty referred to EIFS position paper was
22 another one that has a position similar to ours that 25
23 percent is a moisture level that is acceptable in the
24 evaluation of EIFS cladding

25 THE COURT So, you used a number of documents a

1 number of research studies in formulating your level in
2 your warranty?

3 THE WITNESS We did

4 THE COURT Thank you Move along

5 Q Do you agree -- You heard Mr Flaherty's testimony
6 correct?

7 A Yes

8 MR PHILLIPS Objection, leading, Your Honor
9 Pitting witnesses

10 THE COURT Please ask a question We all heard
11 Mr Flaherty's testimony

12 Q Do you agree with Mr Flaherty's testimony --

13 THE COURT No, sir I am not going to let you pit
14 witnesses

15 Q Chris I am going to hand you Defendant's exhibit
16 no 37 and ask if you're familiar with that document?

17 A I am very familiar with this document

18 Q How are you familiar with that document?

19 A This was created to -- as a training tool for the
20 inspectors and contractors that we had across the country
21 We've got about 1,000 inspectors and contractors that we
22 use across the country as independent inspectors and we
23 created this video training program so that -- There is
24 seven and a half hours of video that they go through and
25 watch They go through the manual itself It is about

1 300 pages and then they go online and take a test

2 The inspectors beyond that have to submit all of
3 their inspections to us for review for us to verify that
4 they are following protocols and to do quality control and
5 the inspectors -- The contractors both know what the other
6 one does The inspectors -- When they have repair
7 protocols the inspectors go and look at those inspections
8 to -- or those repairs to make sure that they re adequate
9 for our warranty

10 Q And the document, Defendant exhibit 37 it has some
11 CD's up front?

12 A It does

13 Q And those are reflected in the hard copies, is that
14 right?

15 A Yes

16 Q And is there one of the CD s that actually for the
17 jury would educate them on how the moisture warranty
18 process works?

19 A Well there's -- All of them would educate them, but
20 it s seven and a half hours of really boring video

21 THE COURT And we're not going to listen to all of
22 that

23 THE WITNESS No There is one part in here that I
24 thought would be relative for them to watch and that was
25 -- There is home in North Carolina with a vapor barrier

1 that we went out to to show it to the inspectors --

2 MR PHILLIPS Objection Your Honor

3 Q This is based off this report, right?

4 A It is based off this training

5 THE COURT Hold on Do you have an objection?

6 MR PHILLIPS Yes, Your Honor That's all hearsay
7 You've got somebody that has not been qualified as an
8 expert He's talking about a study of a house in North
9 Carolina It has nothing to do with this house We've
10 been provided with no information on So I ask that it
11 be excluded as hearsay

12 THE COURT Is this something y all produced
13 yourselves?

14 THE WITNESS We shot the video Yea we produced
15 this document for training yes

16 THE COURT Training for your people and your
17 subcontractors?

18 THE WITNESS Everybody, yes

19 THE COURT Something that you had directed or you
20 produced or had produced for you?

21 THE WITNESS Yes

22 THE COURT And you use it in training?

23 THE WITNESS We do

24 THE COURT Well, you got a cause of action for
25 negligent supervision So, unless you want to drop that

1 cause of action

2 MR PHILLIPS No, Your Honor We'll proceed Thank
3 you

4 THE COURT All right What I have told them to do
5 is redact it down It is about how long? About five
6 minutes?

7 THE WITNESS Yes, I believe that If I can get it
8 running That was an issue

9 THE COURT Now, I assume that you can get it
10 running

11 THE WITNESS I don't know if I can To preface this
12 it was a home that was about to have the synthetic stucco
13 removed and we came in to shoot this video to be able to
14 show what it looks like A lot of inspectors out there
15 would have not been familiar with what happens when a
16 tear-off goes on, and, so, it's among the training that we
17 did

18 (Whereupon, the video is played)

19 Q So that condition for the kickout flashing that you
20 were depicting -

21 THE COURT No sir That was a training film that
22 happened to be of a house that was having the stucco taken
23 off and he was showing that as a training film, is that
24 correct? It has nothing to do with this house in this
25 case

1 THE WITNESS That's correct Your Honor This is an
2 example We were trying to show everybody what you
3 typically find when you tear the system off one of these
4 homes The perception a lot of times is that if you tore
5 it off you're going to see rot and massive kinds of
6 problems, and what we did is study thousands of these
7 homes to determine accurate ways of testing them so that
8 we could go and modify them but we use data to determine
9 what s going on off homes that were stripped and there
10 was a significant number of those that were stripped in
11 North Carolina and became part of our research and this
12 goes on to show the rest of the house that there is very
13 limited damage that s on this particular home

14 MR PHILLIPS Your Honor --

15 THE COURT Sir that's not even responsive to what I
16 was asking you

17 THE WITNESS Okay

18 Q Chris --

19 THE COURT That s just a training film ladies and
20 gentlemen of the jury You give it whatever weight you
21 desire It doesn't have anything to do with this
22 particular house or the alleged damage on this particular
23 house

24 Q Chris, can you tell the jury about the history of
25 Moisture Free and its involvement with synthetic stucco?

1 A Yes The - In 1996 -- I started telling this a
2 little bit yesterday I owned a building that had
3 synthetic stucco on it This was bought in 1993 It had
4 a facade on it with synthetic stucco, and we had some
5 leaks that were occurring in that office and we wanted to
6 get it inspected So we had an engineering firm in
7 Charlotte come to take a look at it They charged us
8 \$1200 and provided us with a five page report, two pages
9 of which was just language of disclaimers It was just a
10 really poor report It really didn't tell us what was
11 going on

12 From that and discussions with other folks I started
13 formulating a method of testing these homes that
14 standardized how you tested them, how the report would be
15 generated with photographs that went all the way around
16 the home We used an X-Y grid pattern so that you could
17 refer to a location on that particular photo to go to B-7
18 and it would be very clear From that -- We tried to get
19 that patented and weren't able to do that, but we licensed
20 inspectors across the country to use that process

21 What they did is they collected their field data
22 They took the pictures They did the probing of the
23 homes They did a protocol inspection, but they sent all
24 that data into us and we put the report together and Fed
25 Ex'd it out to where the client was It might be a

1 homeowner or attorney or whoever it might be

2 So, we collected a tremendous amount of data It was
3 coming out of -- It wasn't really a plan of ours at the
4 time That was part of our business was to do these
5 inspections We ended up collecting the largest database
6 of information about what was going on with these homes
7 and we found an anomaly in what we saw and what was being
8 said in the media primarily, and that was that while some
9 of these homes -- very limited number of these homes had
10 really significant problems, most of them had very minor
11 problems and we went on to use other research data to
12 develop what we -- not only inspection protocol, but to
13 try to research how do you fix these homes, how do you
14 make them better

15 MR PHILLIPS Your Honor --

16 THE COURT That's gone way beyond the question

17 Q So Chris as part of these investigations -- I am
18 going to hand you Moisture problems and solutions

19 A Yes

20 Q Are you familiar with that document, Chris?

21 A Yes

22 Q Can you explain to the jury what that document is?

23 A This is -- It was a Power Point presentation I did
24 for engineering seminar up in Washington DC

25 Q Okay And, Your Honor we have --

1 MR PHILLIPS Your Honor I'd like to object

2 THE COURT Well --

3 MR BLACKBURN This -

4 THE COURT Gentlemen, one at a time What is your
5 objection?

6 MR PHILLIPS Your Honor, I mean, this document
7 has --

8 THE COURT Let me see it

9 MR PHILLIPS It has very little relevance to what
10 we're here talking about today

11 THE COURT Moisture problems and solutions a
12 presentation of Moisture Free Warranty

13 (Whereupon, a bench conference was held)

14 THE COURT Sir who was this Power Point given to?

15 THE WITNESS It was a group of engineers We re
16 just using some elements of it

17 (Whereupon a bench conference was held)

18 THE COURT I am going to allow 63 These are the
19 bate stamp numbers 95 100, bate stamp 92 bate stamp
20 84, bate stamp 69 All right I am not going to allow
21 the rest Either it is is hearsay or irrelevant or
22 self-serving

23 MR PHILLIPS Your Honor, just for the record just
24 briefly I would like to interpose an objection to Moisture
25 Free Warranty 100 95 and 69 as hearsay being testified

1 to by a non-expert

2 THE COURT Go ahead

3 Q Chris you developed - You wrote the Moisture
4 Warranty, didn't you?

5 A In cooperation with Residential Warranty Corporation

6 Q Were you the the author of the terms and conditions
7 of the warranty?

8 A I was one of them, yes

9 Q And would you consider yourself very familiar with
10 the terms and conditions of the warranty?

11 A Right

12 THE COURT Mr Blackburn, if you wrote it you know
13 doggone well he's familiar with it Come on Move along

14 MR BLACKBURN Okay Judge, I'd like to -- and as
15 far as the training manual Defendant s exhibit no 37,
16 tell the jury what type of participation you had in
17 developing this

18 THE WITNESS It was -- As you saw I was involved in
19 being the cheapest talent we could find to do it and we
20 spent about \$250 000 developing that training What you
21 saw was one small snippet of seven and a half hours of
22 training that went into detail about how to inspect and
23 repair these homes

24 Q Does this document reference anything about
25 19 percent moisture?

1 A It does yes Several places

2 Q Can you read for the jury where it does?

3 A You might have to point that out for me to save time
4 here I don't have those page numbers

5 THE COURT That document is going to be in the jury
6 room They can look at it

7 THE WITNESS There's six references I think are in
8 here that specify that 19 percent is the level of moisture
9 that we believe something needs to be done Up to
10 24 percent is an area that we believe maintenance needs to
11 be done on the home It's not indicative of damage
12 There are two things you look for when you're probing the
13 home It's not just what the moisture level is You're
14 trying to determine what the stability of the substrate
15 is too, and we certainly, look at that, and we would
16 evaluate whether or not a repair needs to be done
17 regardless of the level of moisture if there is soft
18 substrate

19 Q And does 25 percent based on your studies cause
20 damage to a structure?

21 A No

22 Q And 19 percent you reference in the training manual
23 is basically for what?

24 A Just determining a source of moisture to be able to
25 remediate it and eliminate the source

1 Q We talked about the Clemson Residential Standards and
2 I've handed you exhibit no 45 which is the full version
3 of the Clemson Residential Standards. If you look on page
4 2 of exhibit 45 --

5 A Yes

6 Q -- where it says on page 2 top paragraph, Decay
7 organisms are active at full saturation points 21 to
8 31 percent

9 A It is 28 to 31 percent, yes

10 Q That's when this document says actual damage occurs
11 doesn't it?

12 A That's what this says and that's general agreement
13 throughout the history that 28 percent is kind of a lower
14 threshold for damage to --

15 THE COURT Ladies and gentlemen, strike the response
16 that everyone considers. What do you consider, sir?

17 THE WITNESS I believe that 28 percent is where you
18 would begin to have moisture saturation and damage that
19 could occur to the wood

20 Q And that's in agreement with the Clemson Standard,
21 isn't it?

22 A It is in agreement with the Clemson Standards, yes

23 Q Okay. And you developed the 25 percent reading for
24 moisture concentration and you developed that because you
25 felt like --

1 THE COURT Mr Blackburn, I am not going to tell you
2 again Quit asking leading questions

3 Q Okay Based on your studies what did you find to be
4 the level where damage occurred?

5 A Twenty-eight percent is where we believe is the
6 beginning of where you would start to have damage to wood
7 based on the research mentioned by Bill Flaherty and
8 another organizations

9 Q And Mr Flaherty talked a lot about this training
10 manual didn't he?

11 A He did

12 Q And how he felt in his opinion --

13 THE COURT Sir -

14 MR PHILLIPS Objection

15 THE COURT Sir, we all heard his testimony We know
16 what he said Ask your witness a question Don t tell us
17 what we heard and that Mr Blackburn, please don't make
18 me fuss

19 MR BLACKBURN I'm sorry, Your Honor I am trying
20 to do this thing as simple as possible

21 Do you believe Mr Flaherty was accurate in his --

22 THE COURT No, sir

23 Ladies and gentlemen of the jury panel, it is
24 improper for a lawyer to ask one witness does he believe
25 or disagree with another witness The twelve of you are

1 the fact-finders You determine who you believe It
2 doesn't make any difference whether he believes them or
3 not He is going to testify to what he would say The
4 other guy would testify and then y'all decide who you
5 believe So, ask him a question

6 Q Turn to page 15 of Defendant's exhibit no 37 --

7 A Okay

8 Q -- where it talks about proper caulking techniques,
9 right?

10 A Yes

11 Q And if you can read for the jury what your company
12 Moisture Free considers to be the proper caulking
13 paragraph two

14 A Interface between EIFS and dissimilar material is a
15 common source of water intrusion not the EIFS lamina
16 basecoat and finish The most frequent source of moisture
17 intrusion is windows Water frequently enters EIFS at
18 windows locations via two ways Either the joint around
19 the perimeter of the window or through seams and joints in
20 the window construction itself Large quantities of water
21 that can result in some of the most severe damage have
22 frequently been discovered entering behind where a roof
23 meets the termination of lower edge of the wall Other
24 potential sources of water intrusion are chimneys, decks
25 and other penetrations of the EIFS cladding

1 Q Are you reading from page 15? Chapter 15?

2 A Yes, chapter 15 or page 15?

3 Q Chapter 15

4 A I'm sorry No, I'm not

5 THE COURT I'll tell you what Why don't you read
6 it and ask him if he agrees?

7 MR BLACKBURN Yea, let me do that

8 Are you on chapter 15?

9 THE WITNESS I am

10 Q Where in chapter 15 of the training manual -- It says
11 in chapter 15 Proper caulking is needed to prevent
12 moisture intrusion on all cladding systems is that right?

13 A Yes, I'm there now

14 Q Have you been to the Babae house?

15 A I have

16 Q Have you inspected the caulking at the Babae house?

17 A Yes, I have

18 Q Do you believe that the caulking on the Babae house
19 is causing damage to the entire house?

20 A There is no evidence of that

21 Q Okay And as far as Mr Flaherty's
22 characterization --

23 THE COURT No, sir

24 Q Okay We'll go - Continue on with the second
25 paragraph of chapter 15 Most EIFS home were built

1 without the recommended backer rods installed at many
2 locations. However, retrofitting of a backer rod joint is
3 not recommended since improper retrofitting is common and
4 intends to increase the likelihood of moisture
5 penetration, is that right?

6 A That's correct. What we were trying to point out
7 here is that if we were to come to a home that needs to be
8 remediated or needs to be sealant joints on it and it's
9 never been done these are the standards you would want
10 applied to that home if there are not adequate sealant
11 joints on the home at the time. We don't require a
12 homeowner to strip all of the sealant off and then put
13 these on unless we believe that the sealants are going to
14 fail during the term of the warranty. Then we would

15 On this Babaee home these joints were adequate for
16 protecting the home through the term of the warranty which
17 is what we're taking the responsibility.

18 Q And that's how your company warrants the caulking,
19 right?

20 A That is

21 Q What research did Moisture Free do to break the
22 Moisture Free Warranty as it applies to the proper
23 technique of caulking?

24 A We evaluated -- In about 1998 we started the
25 evaluation of these inspections that we gathered from all

1 over the country We had somewhere in the neighborhood of
2 seven or eight thousand We took 3200 of those
3 inspections and what we're looking for was what -- how
4 were they failing where were they failing, were there
5 differences around the country in how they re failing, and
6 then we looked at 1300 homes that had never had any
7 remediation ever done to them So, they were in the
8 condition they were since the time they were built, and we
9 looked at those failure rates and we measured how often
10 windows fails and how often a kickout fails, how often
11 everything fails

12 Then we looked at 1400 additional homes and we were
13 looking for what repair techniques were used and how they
14 performed So, we would take a home and it had been
15 remediated We would look at how many windows are failing
16 on that home These homes didn't have any particular
17 standard of how they were fixed It was what the repair
18 contractors were coming up with in the field and what we
19 found was that these repair contractors were very
20 innovative in some cases They were coming up with good
21 repair techniques and we were looking at those techniques
22 and looking at the failure rate of those techniques and
23 then decided you know what should be part of that

24 Then we took an additional 500 homes where the repair
25 techniques did follow a particularly -- fairly close to a

1 particular protocol that we endorsed and then we looked at
2 the failure rates when you applied those particular
3 repairs to the home and that was what the basis of the
4 information we took the Residential Warranty Corporation
5 They are the largest independent warranty home warranty
6 company in the country and we asked them if they would
7 back a warranty based on what this research and we spent
8 about two years working with them to develop that through
9 '98 to 2000, then introduced the warranty in 2000 and
10 they're the backers of the warranty We are not the
11 backers of the warranty They are a multi-hundred million
12 dollar company that backs the warranty

13 Q And how many of those warranties did you issue based
14 on that research?

15 MR PHILLIPS Your Honor, we're pretty far afield of
16 what we're here today about

17 MR BLACKBURN We're talking about the warranty
18 Your Honor, and -

19 THE COURT How many warranties have you issued?

20 THE WITNESS Under 10 000 but close to that

21 Q How many claims have you had made under that
22 warranty?

23 A We've had claims made under warranty I think we're
24 in the range of about 700 claims have been made on the
25 warranty

1 Q How many of those claims have resulted in a lawsuit?

2 THE COURT That s totally irrelevant

3 Q How does Moisture Free handle a claim when it's made?

4 A The process for handling a claim is that -- as what s
5 been mentioned before Our warranty -- The three or
6 five-year warranties include an interim inspection and the
7 way that you make a claim on the warranty is that we need
8 evidence that there is a reading of 25 percent or
9 19 percent if it s in the Dryvit warranties that we
10 issued That information a lot of times is gathered by us
11 during these interim inspections, but it can also be
12 gathered like in the case with the Babaees where they have
13 an inspection done and there is warranty on the home
14 They would send an inspection to us and that might trigger
15 a claim

16 So any inspection that shows evidence if there is a
17 reading of 25 percent So, they would send that in to us
18 We would evaluate that inspection and determine how we
19 could better take care of that Ninety percent of the
20 time what we do is get a contractor to repair that
21 condition We have a tremendous amount of leverage with
22 the contractors because we -- In the process of writing
23 the warranty --

24 MR PHILLIPS I object to this line, Your Honor

25 There is no contractor at issue in the case Nothing was

1 done --

2 THE WITNESS That's our process

3 MR BLACKBURN He is explaining

4 THE COURT Hold on, gentlemen I am trying to be
5 fair, but how you do it in every other case I understand
6 has some relevancy, but let's talk about this case

7 MR BLACKBURN Okay

8 THE COURT Just streamline how you handle the
9 warranty claim but there wasn't a contractor in this
10 case I'll let you go a little bit into how you handle
11 it, but let's move along

12 THE WITNESS The way that we handle claims typically
13 is we got a contractor involved We can -- if the
14 homeowner elects that they would rather have a payout for
15 the warranty we can do that We don't like to do that
16 because it is -- We don't have the leverage that we have
17 with the contractors We're sending millions of dollars
18 worth of work to these guys so we can get cooperation from
19 them to take care of problems that we run into in the
20 field that the homeowner can't do

21 THE COURT How many claims have you had?

22 THE WITNESS We've had about about 700 claims

23 THE COURT You're spending millions of dollars with
24 them? With the contractors?

25 THE WITNESS I'm sorry We're not spending -- To

1 get the homes repaired and in a condition for a warranty
2 they have to get a contractor to start it off

3 THE COURT But you said that you had leverage with
4 the contractors and you're spending - The reason for that
5 is because you're spending millions and millions of
6 dollars

7 THE WITNESS The homeowners are spending money to
8 repair the homes to get them up to warranty standards with
9 those contractors We certify the contractors and
10 recommend them

11 THE COURT Move along

12 Q And it s been alleged that Moisture Free does not pay
13 to repair any damage to the home Is that accurate?

14 A No that s not accurate We -- What we determine is
15 whether or not it's necessary to make an evasive repair in
16 the area In the case of the Babaee's home where we had a
17 failure that's occurring under the kickout to where --

18 They re not necessarily associated with a kickout, but we
19 know we have soft substrate We got an area that's
20 significant We would be opening up the wall and
21 replacing the system

22 Q And it s been alleged that Moisture Free -- Moisture
23 Warranty Corporation did nothing in response to the claim
24 on the Babaee home Do you agree with that?

25 A Nothing could be further from the truth What were

1 trying to do is exactly what we always do which is to fix
2 the home The indication from the very beginning was that
3 they wanted money So, we were were trying to negotiate
4 how to do that Now so the inspection that came from
5 the Clark report which is where they were trying to make
6 the claim we have five other inspections that say that's
7 not the condition of the home

8 So the inspection that was done by David Blackburn
9 showed these areas that we identified and we're taking
10 responsibility for those areas and there was five
11 locations of moisture associated with those areas We
12 were paying \$500 a piece if they wanted to take a check
13 for each one of those areas It was \$2 500 They can
14 appeal that decision to RWC They can - beyond us
15 They're the ones that write the check So if they wanted
16 to contact RWC beyond us because they re not satisfied
17 with that, they can do that We can t do it The only
18 way we can file the claim with RWC is to provide the
19 evidence to them that there is these locations and they
20 would pay that amount or they would pay the contractor we
21 get involved to fix it That's how it's done

22 Q How many of the claims have been made against your
23 company have resulted in a lawsuit?

24 THE COURT You just asked that and I told you that
25 was irrelevant Isn't that right?

1 MR BLACKBURN Yes, Your Honor I'll move on

2 THE COURT I don't think that you listen to what I
3 say

4 MR BLACKBURN I'm sorry

5 THE COURT Are you at a stopping point?

6 MR BLACKBURN I can stop, Your Honor

7 THE COURT Well, I know you can, but I don't want to
8 interrupt you Are you about to get to this place?

9 MR BLACKBURN I probably got maybe 30 minutes

10 THE COURT Well that's a good stopping point The
11 food is here for the jurors is the reason I'm asking All
12 right Let's take our lunch break The food is back
13 here Y'all enjoy your lunch Is 2 o'clock too quick for
14 y'all? That's an hour and 15 minutes

15 Is that okay with the lawyers? Can y'all eat --

16 MR PHILLIPS That's fine

17 MR BLACKBURN Yes Your Honor

18 THE COURT We'll start back at 2 o'clock Don't
19 discuss the case or deliberate

20 Mr Witness, you're in the middle So, please don't
21 discuss your testimony

22 THE WITNESS Yes, Your Honor

23 THE COURT All right We'll stand adjourned until
24 2 o'clock

25 (Whereupon, a lunch break was taken)

1 THE COURT Anything for the record?

2 MR PHILLIPS No, sir

3 MR BLACKBURN No sir

4 THE COURT I assume when he finishes cross and you
5 do redirect we'll be at the end of your case unless

6 Mr What's-his-name shows up

7 MR PHILLIPS It does appear that's the case So,
8 yes, your honor

9 THE COURT All right What I will probably do
10 instead of doing motions we'll go right into the defense
11 case and I'll do motions at 5 o'clock so we can get as
12 much testimony in as we can

13 MR BLACKBURN Yes And I've got my witness coming
14 in at 4, Your Honor So I don't know if that's --

15 THE COURT You better call and have them here
16 quicker than that I mean you got one witness back here

17 MR BLACKBURN Yea I am going to call him It's
18 2 o'clock I am expecting to call him maybe 2 30, 3 --
19 well after he gets through direct -- maybe 3 o'clock

20 THE COURT This witness here?

21 MR BLACKBURN This witness here And my other one
22 is coming in at four They shouldn't take more than about
23 30 minutes

24 MR PHILLIPS Your Honor if I might I would just
25 like to inquire of the court how best to handle it Of

1 course, you have the ruling regarding the exclusion of the
2 testimony about the \$110,000 for the stucco repair I
3 would ask and I am happy to do it before each witness that
4 outside of the presence of the jury that you instruct the
5 witnesses of that limitation who of course, haven't been
6 in the courtroom

7 THE COURT I will We'll go over it

8 MR PHILLIPS Thank you, sir

9 MR BLACKBURN Just for the record, we -- You're
10 going to put all the motions for the Plaintiff's case and
11 in my case --

12 THE COURT Absolutely I am just going to do them
13 out of order This jury the tired I am getting that
14 reported to me correct, Madam Clerk?

15 THE CLERK That's correct Your Honor

16 THE COURT And when juries are tired neither side
17 gets a fair shake I don't mean that You just don't get
18 sometime the deliberation you want out of a fresh jury
19 So I'm trying to -- You understand what I'm saying

20 MR BLACKBURN What would you recommend Your Honor,
21 as far as deliberations? I mean, if we end at five do
22 you want to keep them here at five?

23 THE COURT No, you aren't listening to me,
24 Mr Blackburn I suspect he is going to finish his case
25 before 5 o'clock, obviously

1 THE COURT Instead of sending the jury back in there
2 for an hour while we do motions, I am going to let you
3 start your case

4 MR BLACKBURN Okay

5 THE COURT At 5 o'clock when I dismiss them, then
6 we'll do motions They won be sitting back there waiting
7 on us

8 MR BLACKBURN I see

9 THE COURT We'll be the ones sitting here going
10 until late And you will have the right to make every
11 motion you would have had except you're just going to make
12 them then instead of at the end of the Plaintiff's case

13 MR BLACKBURN And the jury is going to come back
14 tomorrow morning?

15 THE COURT Oh, yea We're not going -- Hopefully,
16 we'll be through with the testimony If not, we'll just
17 have a little bit of testimony If that's the case then
18 we'll argue and charge in the morning That's what I am
19 hoping for

20 MR BLACKBURN As far as my witnesses coming in I
21 do have two coming in at 4 It is 2 o'clock now and I
22 expect to finish Mr Burton in probably 45 minutes I
23 will do it as quick as I can

24 THE COURT I'm not -- You do it however you want to
25 I am going to go to 5 If you're through with your

1 witnesses at 5, fine If not, we'll bring them back in
2 and finish them up in the morning

3 MR BLACKBURN One of my witnesses is a part-time
4 deputy sheriff He s got a training that he has to go to
5 tomorrow and he is telling me that he can't come tomorrow
6 So, I am trying to get him in today

7 THE COURT You run your case like you want to

8 MR BLACKBURN Your Honor, if I may if he can t -
9 if he says he can't come tomorrow is there any way we can
10 get him here? He is under subpoena

11 THE COURT Get him where?

12 MR BLACKBURN To the trial If he can't -- If we
13 don't get to him today we ll have to bring him out --
14 That will create just more, you know, time and length to
15 get my witness here because he told me he can t come
16 because --

17 THE COURT He is under subpoena He is a deputy?

18 MR BLACKBURN Yes

19 THE COURT I suggest he comply with the subpoena
20 If he wants to not I'll send for him All right
21 Anything else?

22 MR PHILLIPS Your Honor you had mentioned that you
23 wanted to take up the default motion I assume that you
24 want to do that at 5 o clock?

25 THE COURT Absolutely

1 What happened to your computer screen and all that?

2 MR BLACKBURN We decided just to go forward, Your
3 Honor We're going to go without it

4 (Whereupon, a break was taken)

5 (Whereupon, the jury came into open court at
6 approximately 2 06)

7 THE COURT I will do my best to give you some idea
8 I have spoken with the lawyers Hopefully, we ll be able
9 to conclude the testimony this afternoon This is the
10 last Plaintiff's witness Normally, at the end of the
11 Plaintiff s case we take a break and I listen to a variety
12 of motions I ve gotten the lawyers to agree to do this
13 Instead of sending y'all out at 3 o'clock and making you
14 wait until 4 o'clock while we do all of that we re going
15 to continue on with testimony and we'll stay late this
16 afternoon into the evening doing motions while y all go
17 home

18 If we don't complete the testimony today it won't be
19 much testimony in the morning, and once we do that
20 testimony, then we will go into arguments and charge and
21 hopefully, turn it over to you no later than lunch
22 tomorrow for your deliberation That s my best guess on
23 it

24 Please listen to this I know y all think I m hard
25 on these guys I apologize for being rude to them if I

1 have been so Please don't hold it against their clients
2 in any manner whatsoever the fact that I may have lost my
3 patience with the two lawyers or I may have fussed at them
4 a little bit They're doing their job, okay? So, don't
5 have any -- give either side any adverse inferences from
6 me getting a little testy Please Is that fair?

7 MR BLACKBURN May it please the court, Your Honor

8 THE COURT Yes sir

9 BY MR BLACKBURN

10 Q Chris about the Babaee house, the inspection from
11 Charles Strickland was used to qualify the warranty on the
12 Babaee house right?

13 A Yes it was

14 Q But the inspection from CK shows substantial
15 different information?

16 A Yes

17 Q Is this common and how does Moisture Free typically
18 deal with these differences?

19 A It's not common but it comes up in cases where
20 you've had an inspection done by both parties, and if
21 there's a discrepancy in them, we ask the inspectors to
22 get together and determine what is actually going on with
23 the home That's the way to resolve it, and it may be
24 that one of their meters is not working or they're not
25 using proper protocol or whatever it is, but that's where

1 what we ask them to do is get together at that time and
2 compare their information and agree on their differences

3 Q I don't believe we marked Mr Strickland's report I
4 am going to hand you this report and ask you to identify
5 it

6 A That s a report by Preferred Home Inspections
7 Charles Strickland did it

8 Q It is marked Defendant s no 8 right?

9 A Yes

10 Q Have you reviewed this report?

11 A I have

12 Q And what's the date of this report?

13 A 8/12/04

14 Q 8/12/04 And this is the report that was used that
15 generated the exclusion in the warranty?

16 A Give me a second I've got to look back and see
17 Yes it was

18 Q Okay And the report Defendant's exhibit no 8 --
19 It s not like the CK Services report is it?

20 A No, it's not They're substantially different

21 Q And when did you first get the CK report?

22 A Sometime in '06

23 Q '06 And how did you get it?

24 A We requested it in response to a request for claim
25 service by Mr Babaei that he had reported that he had --

1 they said staining We told them that we needed a report
2 I think he tried to either fax it or something but it
3 didn't come through clearly originally Then he sent us a
4 copy of the report and it was reviewed

5 Q Okay And the report that you re talking about from
6 Mr Babaee is this the report?

7 A That is -- Yes this is the report

8 Q And that s Defendant's exhibit no what?

9 A That is no 26

10 Q Twenty-six Okay And this is the report that you
11 got from Mr Babaee on January 11 2006, correct?

12 A That s correct

13 Q What I am going to hand you now to compare it to is
14 Plaintiff s exhibit no 30 Okay Tell me the date on
15 Plaintiff's exhibit no 30

16 THE COURT P-30 is what? Plaintiff's 30 is what?

17 MR BLACKBURN Plaintiff's exhibit 30

18 THE WITNESS Is the CK report

19 THE COURT Thank you

20 THE WITNESS The date on the report is November 8 of
21 2004

22 Q Okay And is the November 8, 2004 report by CK
23 Services the same as the CK Services report that you
24 received from Mr Babaee on January 11, 2006?

25 A It -- No It s missing the first two pages

1 Q Okay And the first two pages --

2 A And it s been altered The third page has been
3 altered

4 Q The third page has been altered? Are there any other
5 differences between the two reports?

6 A I'm not aware of any other differences

7 Q Okay And the third page of the CK report that
8 Mr Babae sent you how has it been altered?

9 A The header at the top has been eliminated which had
10 the date on it

11 Q Okay Is it a complete copy other than page three
12 that has date altered?

13 A Besides the date altered on page three and the first
14 two pages which had where the dates were

15 Q And we ve marked and talked about Plaintiff's exhibit
16 no 7, haven t we?

17 A Yes

18 Q Plaintiff's exhibit no 7 which I just put on the
19 wall, is that the third page of the report that Mr Babae
20 sent you?

21 A Yes it is

22 Q Okay And what we got here, Defendant s no 6, is
23 the actual page of the CK Services report dated
24 November 8, 2004, isn't it?

25 A Yes

1 Q Now can you properly evaluate a home that Mr Babaee
2 has sent a report to you that is not complete?

3 A No

4 Q Okay And why did Mr Babaee send you the CK Service
5 report on January 11 --

6 MR PHILLIPS Objection Your Honor That calls for
7 speculation

8 THE COURT Well let him finish the question Why
9 did he send you the report?

10 MR BLACKBURN Yes Why did Mr Babaee send you the
11 report on January 11, 2006

12 THE COURT Hold on I don't know that he can answer
13 why this man sent the report I mean, that's --

14 Q Let me put it this way Did Mr Babaee send you the
15 report and ask Moisture Free to look at it and evaluate
16 it?

17 A He sent it to us for the purpose of making a claim
18 against the warranty

19 Q Okay Would you consider the receipt on January 11,
20 2006 the initiation of the claim that Mr Babaee was going
21 for?

22 A He had contacted us previously to make a claim and it
23 was explained that we need -- we need a report that shows
24 that there is a claim issue, and yes so, we had talked
25 to him before that but the initiation of the claim that

1 we were processing was based on the arrival of the Clark
2 report

3 Q And when was that conversation when you talked to him
4 and said we need some information to help process the
5 claim?

6 A I don't know the dates of that I think there was
7 communications between Mr Babae and Tim McClain
8 discussing what needed to be done

9 Q In around October 2005?

10 A I believe it was

11 Q And he sent you the report that you were asking for
12 on January 11 2006 right?

13 A The one that we could make out, yes

14 Q And then in response to that report you sent an
15 inspector out didn't you?

16 A Yes, we sent out David Blackburn to -- Defendant's
17 exhibit 27 is David Blackburn's report on the home which
18 we sent the inspector out in order to hopefully correct
19 the discrepancy between the inspection that we had from
20 Charles Strickland that we had looked at and evaluated for
21 the purpose of issuing the warranty and the inspection
22 that came from CK Services which dramatically differed and
23 Mr Blackburn's report delivered was consistent with most
24 of the information that was in the Strickland report, but
25 then we had elements that we picked up Also, there was a

1 lot of elements that were eliminated from the CK report
2 that just weren't accurate

3 Q I see And so, when you got the Blackburn report on
4 February 21, 2006, did you give a copy to Mr Babaee?

5 A Yes, we did

6 Q And what did Mr Babaee do in response to you giving
7 him a copy of the Blackburn report on February 21 2006?

8 A He wanted a check for -- I believe at that time he
9 was asking for a check or he wanted money We were trying
10 to get this established so we could determine what repairs
11 actually needed to be done on the home so we could
12 initiate the repairs

13 Q Did Mr Babaee ever give you the opportunity to go to
14 his house and inspect it and continue the warranty
15 process?

16 A No

17 Q Mr Babaee wouldn't allow you to perform under the
18 terms of the warranty would he?

19 A We could not -- There was no authorization by them to
20 proceed with doing repairs There was an interest in
21 getting money from us and that changed the processing of
22 the claim

23 Q And the money he wanted from you -- Was the money he
24 wanted from you pursuant to the terms of the warranty -

25 MR PHILLIPS Objection Leading Your Honor

1 THE COURT Sustained That means don't ask leading
2 questions

3 Q How much money did Mr Babae want from Moisture Free
4 at this time?

5 A \$20,000

6 Q Is the \$20,000 he wanted does it comply with the
7 terms of the warranty?

8 A No, it doesn't It's not consistent What we found
9 with the report that we had done by David Blackburn was
10 that there was the areas -- We were in agreement on the
11 areas that needed to be repaired and we wanted to repair
12 those so we could get those repaired The locations ended
13 up being five separate locations of claim that related to
14 two locations on the home - the front kickout and the
15 back area that we had excluded previously had been
16 included and the total area included there was five
17 locations times the \$500 per location and that was the
18 \$2,500 that we got approval from from RWC to issue

19 Q I see And we talked about interim inspections
20 Mr Babae talked about you didn't do any interim
21 inspection You didn't send anybody to his house within a
22 time that Moisture Free said they do an interim
23 inspection Is that right?

24 A No, that's --

25 MR PHILLIPS Objection, Your Honor Pitting

1 witnesses

2 THE COURT Hold on

3 MR PHILLIPS Putting witnesses, Your Honor I
4 object

5 THE COURT Rephrase it

6 Q Chris the warranty to Mr Babae was issued on what
7 date?

8 A I believe it was November The closing was on
9 November 18 was when the transaction took place I
10 believe that s right It was November 18 of '04

11 Q Do you recall when the date -- the actual he received
12 the warranty was?

13 A I believe it was within 10 days of that

14 Q Would Mr Babae have received a copy of the terms
15 and conditions according to Plaintiff s exhibit no 27
16 before the closing?

17 A Yes We would have sent -- Procedure is that when we
18 send the document for closing the pocket that was the
19 folder has their standard elements that we put in there
20 One was the authorization cert -- the letter of approval
21 that we sent that where they sign off and say that they
22 have received that and we send a copy of the terms and
23 conditions at that time but we don't rely on that because
24 that s going to the realtor at closing We're not
25 directly involved with it

1 So, when we sent the authorization certificate they
2 actually get another packet which looks very similar
3 It's in a folder and has the authorization certificate
4 with it with the terms and conditions included in it I
5 believe that we got a Federal Express evidence of that
6 being sent to them

7 Q So, he had a copy of the terms and conditions before
8 the closing, right?

9 MR PHILLIPS Objection Your Honor That's
10 hearsay

11 Q Did Moisture Free as part of their normal course of
12 business issue the terms of warranty prior to the closing?

13 A Yes we did

14 Q Okay And Mr Babae in this Defendant Chipco
15 Computer letter talked about - Mr Babae wanted to see a
16 copy -- In his November 8, 2004 letter to Buddy Lewis, he
17 wanted the moisture bond warranty and termite bond must be
18 received and reviewed before closing right?

19 A Yes

20 Q And you gave him -- That s what you did, right?

21 A I believe we sent it We had made the effort to
22 review the inspection and get that prepared for them and
23 sent it to them for the closing I believe it's on the
24 11th I am not positive, but it was around that date

25 Q I see With the letter of approval on November 11 -

1 That's what we're talking about right?

2 A Yes

3 Q And the bond was issued on the document right here --
4 Plaintiff's exhibit no 27, the authorization
5 certificate -- Does that tell you when the warranty was
6 issued?

7 A This is the one that was issued with no exclusion
8 So, this was not - This wasn't the one that was issued at
9 that time

10 Q Okay And what is the date of the terms of the
11 warranty on that document?

12 A November 29 It would have been the same date as the
13 other one It just would have -- It would have included
14 the exclusion at that time

15 Q I see And Mr Blackburn at Mr Babae s request
16 renotified you about his concerns of the stucco on
17 January 3 2006 and he sent you the altered CK report on
18 January 11, 2006 You had Mr Blackburn go out there on
19 February 21 right?

20 A Yes

21 Q Was that time within the interim inspection time that
22 the warranty allows?

23 A I think it was right at 16 months and that s what we
24 specify

25 Q And the interim inspection is, basically a range,

1 isn't it 16 to

2 A Yea We try to do it somewhere around the middle of
3 the term of the warranty and coordinate it with the
4 homeowner

5 Q So, Moisture Free complied with that part of the
6 warranty in having an interim inspection within 16 to 20
7 months, didn't it?

8 A Yes

9 Q There were a total of about eight inspections on this
10 house by your account, right?

11 A That's correct

12 Q And just tell the jury what eight inspections of this
13 house that you're talking about

14 A There were inspections -- The original inspections
15 that were done by Charles Strickland is one Then the CK
16 inspection was done both prior to the purchase of the
17 home There's the David Blackburn report that was done as
18 an interim inspection that was used for the purpose of
19 evaluating the claim Their expert -- Plaintiff's expert
20 Bill Flaherty I believe was out three separate times and
21 issued reports on each of those occasions Ron McClure
22 our expert and myself were there and conducted an
23 inspection and if you counted Chris Cooper going out that
24 could be an additional one

25 Q And you weren't there when Chris Cooper did his

1 inspection?

2 A We weren't notified

3 Q And as far as the inspections that you did with Ron
4 McClure, when was that?

5 A I can't recall the exact date of that It was the
6 summer sometime

7 Q This summer? Last summer?

8 A Yes

9 Q What was the purpose of your inspection this past
10 summer when you and Mr McClure went to the Babaee's
11 house?

12 A I went for the purpose of going with Ron because I
13 wanted to be absolutely sure that the information in the
14 CK report was inaccurate

15 Q I see

16 A We went and probed Well we probed the entire
17 house, every single window, all of the areas that were
18 brought up The areas that were in question that aren't
19 associated with the moisture locations but reported as
20 soft or medium-soft or whatever in the CK report we
21 probed all of those locations extensively I think there
22 was 140 locations of probing that had been done on the
23 house, and we couldn't find any of the areas that the CK
24 report had included in it with the exceptions of the ones
25 that we already knew about limited to the front and back

1 kickout areas

2 Q Right So, your inspection and testing didn't
3 confirm the CK report did it?

4 A No It was in agreement with Bill Flaherty's report
5 None of the reports that we did agreed with the CK
6 inspection

7 Q And I've got CK's inspection -- I'm sorry
8 Strickland's inspection up here Plaintiff's exhibit
9 no 1 -- Defendant's no 1 page 22 and 23 and
10 Mr Strickland -- I'm sorry Mr Flaherty

11 A Yes

12 Q Mr Flaherty's inspection on June of 2006 This is
13 what we talked about and Mr Flaherty on June 13 2006
14 he didn't identify any elevated moisture or soft
15 substrate --

16 MR PHILLIPS Objection Your Honor He is leading
17 the witness

18 THE COURT He sure is It is your witness You
19 have to ask him a direct question

20 Q Is Mr Flaherty's report --

21 THE COURT What does Mr Flaherty's report show
22 compared to the other reports?

23 MR BLACKBURN That's right

24 THE WITNESS Basically, Mr Flaherty's report was in
25 agreement with the report that David Blackburn did as an

1 interim we used for the claim It was in agreement with
2 one that Ron McClure and myself had done

3 MR PHILLIPS Your Honor, I'd object He s not been
4 qualified as an expert and he s giving his opinion

5 THE COURT He is not giving an opinion He is
6 telling after reviewing all of the inspection reports he
7 is just comparing them -- what they found, not what he's
8 found

9 MR PHILLIPS Thank you Your Honor

10 THE COURT The jury can compare them as well but
11 that s a proper question

12 MR BLACKBURN Thank you, Your Honor

13 And your inspection was in agreement with
14 Mr Flaherty's inspection?

15 THE WITNESS Yes There was -- I think this
16 particular inspection was duplicated exactly what we found
17 which was the one location on the front of the house that
18 found moisture that was in reference to the knockout
19 location but we disagreed with the cause of that
20 location -- why it was getting moisture to it So, there
21 is disagreement why that's happening, but it was included
22 in David Blackburn s report which was a claimed area that
23 we were going to address

24 Q I see Let's talk about your disagreement with this
25 one area on page 23 of Mr Flaherty s report What did

1 Moisture Free determine was the source of this damage?

2 A We hadn't at that time determined what's the source
3 but it was suspect because the having done thousands of
4 these evaluations it s - You never see where there s low
5 moisture readings and solid substrate directly below the
6 kickout and then halfway down the wall is solid and the
7 substrate is good and it's low and then you have moisture
8 at the bottom

9 MR PHILLIPS Your Honor, I'm sorry I have to
10 object again Mr Burton is testifying about thousands of
11 inspections I don t believe he s ever performed a single
12 inspection This is clearly hearsay This is clearly
13 hearsay He is talking about other people s inspections

14 THE COURT Overruled

15 MR BLACKBURN Thank you Continue

16 THE WITNESS I have done hundreds of inspections
17 personally and I have looked at thousands of inspections
18 Kickouts are a common area of failure They fail in a
19 very particular way It is very predictable In this
20 case we had low readings and firm substrate above an area
21 That leads me to believe that something else is going on
22 in that area It could be a plumbing leak in the wall
23 It could be something else In subsequent inspections
24 that were done Ron McClure and I determined that there
25 were anomalies that were associated with that particular

1 area of the home that were coming from the interior of the
2 home It didn't change that we were willing to take care
3 of it under terms of the warranty

4 Q And those anomalies that you found, were they covered
5 under the warranty?

6 A Technically, they're not covered under the terms of
7 the warranty, but we weren't excluding them

8 Q Okay You weren't excluding them but, now, why were
9 they excluded under the terms of the warranty?

10 A They're excluded because we do an assessment of the
11 exterior of the home to put a warranty that's protecting
12 the homeowner from problems that come from the stucco -
13 the synthetic stucco system If a leak happens from the
14 interior from the plumbing or something like that that's
15 not something that we have a responsibility for So we
16 specifically exclude that from the warranty

17 Q I see

18 And Your Honor I am going to hand him what's been
19 previously agreed to produce and I haven't marked it yet

20 MR PHILLIPS Which document is that?

21 MR BLACKBURN It's bates label Moisture Free 092
22 (Whereupon Defendant's Exhibit No 66 was marked for
23 identification only)

24 Q Chris I am going to hand you this and ask you to
25 kind of show it to the jury We don't have it blown up

1 but Defendant s Exhibit no 66 -

2 THE COURT Any objection?

3 MR PHILLIPS Without objection, Your Honor

4 (Whereupon, Defendant s Exhibit No 66 was admitted
5 into evidence)

6 Q And Chris, are you depicted in this photograph? in
7 one of these photographs

8 A I am

9 Q That's you? What are you doing right here?

10 THE COURT Where is the photograph taken?

11 THE WITNESS The photographs is in our training
12 manual It is associated with teaching inspectors and
13 contractors about issues related to failing kickouts

14 Q And so, you -- What is the purpose of this training?

15 A The training is to make sure that inspectors are
16 familiar with how a kickout can fail and where they need
17 to be testing the wall to determine it, but the thing that
18 shows in this which there is four or five pictures here is
19 the consistency of the failure It starts at the point of
20 the kickout

21 Q Right

22 A Right at the top

23 Q Right

24 A And the failure can damage the wood all of the way to
25 the bottom What you wouldn't find is that you tear that

1 off and find perfectly good wood up at the top and find
2 damaged wood at the bottom It works its way down and
3 damages the wood on its way down

4 Q Because water runs downhill right?

5 A Right

6 Q And you've got the kickout flashing up on the roof
7 right?

8 A Right

9 Q So, you would expect the water to run down the side
10 like is depicted in these photographs and down the
11 substrate if the kickout is failing, right?

12 THE COURT Mr Blackburn please quit asking leading
13 questions

14 MR BLACKBURN Sorry, Your Honor

15 Does this document Defendant's exhibit 66, depict an
16 accurate depiction of a failed kickout flashing?

17 THE WITNESS Several failed kickout flashing areas

18 Q Now and I want to talk to you about Chris Cooper's
19 photographs that we previously marked as exhibit no 59
20 I want to refer you to -- Let's just start off on page 88
21 and ask you if page 88 -- are you familiar with that
22 photograph?

23 A Yes

24 Q Where was that photograph taken?

25 A This photograph was taken directly above where the

1 cut-out was done on the front of the house under what was
2 said to be a failing kickout area that showed the damaged
3 substrate -- substantially damaged substrate in that area

4 Q I see And you got 88 Flip the page Show that to
5 the jury That is in this area depicted on page 23 right
6 below the kickout flashing in the front, right?

7 A That's correct

8 Q Is that sheathing and that -- is that sheathing
9 damaged?

10 A No It looks like perfectly good, dry OSB

11 Q Would you expect that from a kickout that's failed?

12 A It would be almost impossible

13 Q I see And when you tested it this past summer, what
14 were your results in that area?

15 A We had -- Well all of the tests that were conducted
16 including the ones that were done by CK Services
17 Strickland -- Charles Strickland found this to be dry and
18 solid when the warranty was written back in 2004

19 Q I see

20 A And we've confirmed that again this summer that there
21 was still no damage above the area that was determined to
22 have a problem

23 Q I see So would Mr Strickland's report be accurate
24 when --

25 A It was He tested below the kickout, got solid and

1 firm He didn't test down below that which was a
2 violation of our -- how you should be doing the
3 inspection We require that they do that He probably
4 may have used the --

5 THE COURT Sir, don't speculate, please

6 THE WITNESS Okay

7 Q And as far as Mr Strickland's report page 22 and
8 23 does he note - Does his report conform with the
9 guidelines for Moisture Free inspection?

10 A It doesn't in that we'd like to see three locations
11 under that kickout tested -- probed and tested because
12 it's an area where a lot of damage can occur but the
13 testing that he did directly below the kickout where you
14 had firm and dry was confirmed by all of the inspectors
15 and it would be very odd to have firm and dry there and
16 then have it We want them to inspect it further down so
17 if we have soft here we want to go down and see if we got
18 soft there -- determine the scope of the area that's
19 affected for us to be able to determine if it was a claim
20 issue or if we're making recommendations of repair, we'd
21 be able to show that that they need to open up that entire
22 area and repair it So, that's the purpose of the three
23 locations that were tested

24 Q I see And you talked about the failed kickout
25 flashing you determined wasn't failed right?

1 A If -- It's very unlikely that the kickout is causing
2 that problem

3 Q What do you believe the high moisture in this area
4 was?

5 A We believe --

6 MR PHILLIPS Your Honor, again, an opinion from a
7 non-qualified expert

8 THE COURT Do you have any personal knowledge as to
9 what caused the moisture in that area?

10 THE WITNESS Yes Your Honor

11 THE COURT You may testify

12 THE WITNESS Upon inspection of the property that
13 Ron and I did when we're out there two things came to
14 light There is substantial moisture that's still sitting
15 in the crawl space and there was evidence of that moisture
16 migrating into the floor joists and into the area directly
17 adjacent to that wall In addition to the comment that
18 was made by -

19 MR PHILLIPS Your Honor I don't know how that s
20 not an opinion as to

21 THE COURT He saw it He just said he saw it

22 MR PHILLIPS Your Honor, the quantification of
23 moisture as we've heard testimony on is done with an
24 electronic meter by somebody who knows what they're doing

25 THE COURT I have overruled your objection

1 MR PHILLIPS I appreciate it, Your Honor

2 Q Chris just so the jury knows you crawled under the
3 house, didn't you?

4 A Yea, actually, I crawled under the house with
5 Mr Phillips and Mr McClure We were all three
6 underneath there

7 Q You then you came to the opinion of exactly what's
8 going on?

9 THE COURT Not opinion Just what he saw

10 THE WITNESS What I saw was an accumulation of
11 moisture that was sitting in that area, evidence of very
12 high moisture content in the CMU There was evidence of
13 damage in a very specific square location in the floor
14 area where the insulation had been removed that was a
15 source of moisture that was unassociated with the cladding
16 system or would be very unusual to have associated with
17 the cladding system

18 Q I see And what you saw was similar to what
19 Mr Cooper saw in his photographs we talked about,
20 Defendant's exhibit 59 on page 96, right?

21 A Yes

22 Q And in your experience when developing the Moisture
23 Free Warranty is it common for moisture intrusion into a
24 crawl space that's in your opinion occurring here to
25 result in damage?

1 A It can to the floor system and adjacent areas

2 Q I see So getting back to the Blackburn report that
3 you had was formed to help Mr Babae on his claim, based
4 upon the Blackburn report what did Moisture Free do?

5 A We -- Well, at the time we had already been
6 instructed by the Babaees that they weren't interested in
7 having us do repairs So, we were working trying to come
8 up with a dollar amount that we could issue

9 MR PHILLIPS Again Your Honor this is hearsay I
10 asked him on my part of the examination do you have any
11 evidence of that He told me no So, this must be
12 hearsay because there is no bit of evidence other than
13 Mr Burton's testimony that that is true

14 THE COURT Overruled

15 MR BLACKBURN Thank you Your Honor

16 Continue Chris please

17 THE WITNESS The Blackburn report was what we used
18 to determine what dollar amount we could issue to the
19 Babaees so we could recommend to RWC RWC is the one that
20 will write the checks to them and they can appeal to RWC
21 if they disagree with that, but what we have to send to
22 RWC is based on what that inspection shows and how many
23 locations of moisture If left in our hands we can repair
24 it and we can go beyond that, but if they want a check
25 that's how it's determined how much they're going to get

1 and that's -- Within the terms of the warranty, that's
2 what it specifies

3 Q And Mr Babae would n t let you do the work correct?

4 A That s correct

5 Q In 2006 when Mr Blackburn did his report -- You've
6 looked at Defendant's exhibit no 27, right, the Blackburn
7 report?

8 A Yes

9 Q And what do you believe is the condition of the
10 sealant around the windows in the Blackburn report in
11 2006?

12 THE COURT Now wait a minute He can't do that
13 now

14 MR BLACKBURN All right

15 THE COURT He can testify about what he saw out
16 there and what he observed, but he can't testify to what
17 Blackburn observed in his report Just ask what he
18 observed The Blackburn report speaks for itself

19 MR BLACKBURN I see

20 THE COURT We don't have to have him interpret it

21 Q In February 21, 2006 we're within the terms of the
22 warranty right?

23 A Correct

24 Q And Mr Babae wouldn't let you perform any work on
25 the house, would he?

1 MR PHILLIPS Your honor leading the witness

2 THE COURT We ve asked that about a hundred times

3 Q As far as part of the warranty process, you've got
4 the warranty right up there with you Chris? The
5 authorization certificate?

6 A Uh-huh

7 Q What are the warrantor s obligations under the
8 authorization certificate?

9 A Under the warranty or the authorization certificate?

10 Q Let s read the authorization certificate I handed
11 you a copy

12 A You did?

13 Q I'll give you this one Tell me what the Babaee s
14 responsibilities were according to the terms of the
15 warranty

16 A They are required to perform normal maintenance on
17 the home but we specifically limit that to caulking or
18 sealant work and painting so they're not burdened with
19 having to fix a kickout or something like that but they
20 are responsible for keeping the sealants in working
21 condition

22 Q I see And why does Moisture Free Warranty recommend
23 that?

24 A We recommend that because -- well as normal
25 maintenance, typically we will -- We won't write the

1 warranty unless we believe that the sealants are going to
2 be sufficient for the term of the warranty We don't
3 anticipate that they're going to fail In this case we
4 have no evidence that they failed during that time
5 allowing moisture in 62 percent of our customers renew a
6 warranty and at that time we may come out and say there s
7 are no failures or there may be a failure whatever but
8 we may say, well it's been good for the last five years,
9 but you're going to have update your caulking or sealant
10 to qualify for another five years So, at that time we
11 might require them to do it, but during the term if there
12 is a failure that's obvious it would technically be their
13 homeowner s responsibility to repair that but we rarely
14 find that to be an issue

15 Q Did Mr Blackburn s report recommend sealant to the
16 Babae s house?

17 A There were areas that he said could use improvement
18 There weren t failures related to sealant but there were
19 areas that he recommended be maintained

20 Q Why?

21 A He just had -- In his opinion he believed that those
22 areas might be at risk

23 Q I see But there was no damage noted in Mr --

24 A There were no moisture - high moisture readings
25 associated with that area that he pointed out There were

1 areas that we were addressing within the claim --

2 Q Right

3 A -- that had sealant issue that we would resolve as
4 part of the repair that we would put in place We would
5 have torn that whole area out by the door We would have
6 replaced the substrate system We would have replaced the
7 caulking that was associated with the window, and then we
8 would have repaired the source of the damage in that area
9 which was failing accent above the copper roof and that
10 would have been remediated That is the only thing that
11 was going to stop this problem The kickouts actually
12 weren't failing in that area either

13 Q Are you aware of any maintenance by Mr Babae
14 between February 21, 2006 and today?

15 A There was no -

16 MR PHILLIPS Hearsay, Your Honor Objection

17 THE COURT What is the objection?

18 MR PHILLIPS Objection, hearsay

19 THE COURT Hearsay How can that be hearsay?

20 MR PHILLIPS He asked if he knew of any evidence

21 THE COURT Of your own personal knowledge

22 Q Go ahead

23 A My personal knowledge having been out there and
24 looked at it there was no evidence that any work of any
25 sort had been done on the home within the last three or

1 four years

2 Q I see And Mr Flaherty is the next report we have
3 and it's dated June 2006 We've got it right up here
4 plaintiff's exhibit no 1, right? We talked about the
5 damage indicated in Mr Flaherty's report, and it is
6 fairly consistent with the Blackburn report, isn't it?

7 A It is consistent with all of the reports with the
8 exception of CK

9 Q Okay

10 A And Strickland didn't find the front area in his
11 inspection

12 Q I see So now, let's move back and talk about
13 Mr Babaee's demands for money How many demands for
14 money did you receive from Mr Babaee?

15 A Two

16 Q Two?

17 A Well, two in writing

18 Q When were they?

19 A I don't know the dates They were - I am not sure
20 of the dates

21 Q You're not sure of the dates And during this time
22 that he's demanding money from you, he wouldn't allow you
23 to do to work?

24 A We could not -- Well the only way to proceed --

25 MR PHILLIPS Your Honor --

1 THE COURT Hold on a second

2 MR PHILLIPS Asked and answered

3 THE COURT It's been asked and answered and,
4 obviously he has the option of doing the work or getting
5 monetary compensation So, let s move along We ve been
6 over that a bunch

7 MR BLACKBURN Yes, Your Honor

8 Did Mr Babae -- We talked about Mr Babae s
9 exhibit where Moisture Free sent him \$2,500 right?

10 THE WITNESS Yes

11 MR PHILLIPS He is leading the witness, Your Honor
12 It was a reference back to earlier testimony leading the
13 witness

14 THE COURT You are leading and we've been over the
15 monetary aspects of it Don't ask another leading
16 question

17 MR BLACKBURN I will Your Honor

18 THE COURT Obviously, you know the difference
19 between leading and direct

20 MR BLACKBURN Yes

21 THE COURT What is your name? That is a direct
22 question Your name is Charles Blackburn? That's a
23 leading question Come on, now Please

24 Q When an inspector for Moisture Free like
25 Strickland -- When he gets a reading between 19 and

1 24 percent how is that handled by Moisture Free Warranty
2 Corporation?

3 A The way it s handled -- Well, it depends on when it
4 happens If somebody is trying to qualify their home for
5 a warranty from the very beginning then it doesn t really
6 matter what the moisture readings are at that point We
7 make recommendations as to how they modify that home to
8 get it ready for a warranty Even if the readings were
9 low we may say that the whole house needs to be sealed
10 We may require kickouts We may specify that they have a
11 lot of things they need to do with a home to get it
12 qualified If a reading comes up during the interim
13 inspection or for a claim -- Let s say that somebody else
14 is getting ready to buy the house They have an
15 inspection and we find a high reading If it falls
16 between 19 and 24 percent there would be maintenance that
17 would need to be done by the homeowner at their expense
18 It's a maintenance item In addition if we re doing an
19 interim inspection you could have an area that doesn't
20 have a high reading -- it could be at 10 percent reading
21 We may say that area needs to be maintained as well but
22 again, it's qualified that we limit that to sealant or
23 painting so that that is something that's within the scope
24 of that they could easily get done by somebody

25 So, the difference between the warranty that the

1 Babaee's home and the one that was issued with Dryvit was
2 19 to 24 percent reading would simply mean that we would
3 be doing the maintenance It would be taken care of
4 either way

5 Q And Mr Phillips made a statement in his opening
6 comments that Moisture Free changed the warranty to
7 25 percent moisture level to make a claim, but that Dryvit
8 set the level at 19 percent Is this accurate?

9 A No that's not accurate

10 Q Why is it not accurate?

11 A The first warranty that we created was the Moisture
12 Free Warranty that was developed in 2000 That standard
13 was at 25 percent at that time In the negotiations for
14 the Dryvit settlement that dragged on for about two and a
15 half years the claimant's counsel and defense counsel for
16 Dryvit, they came up with -- wanted to use 19 percent

17 We did a study to determine whether or not there was
18 excessive risk to us if we were to do that and determined
19 that we didn't believe that there was excessive risk So,
20 we've accepted the warranty terms for Dryvit at 19 percent
21 -- above 19 percent

22 Q And if you can tell the jury about those studies that
23 you did to set the level at 25 percent

24 A The studies that we did incorporated the ones that I
25 spoke about this morning where we did the 3200 homes

1 throughout across the country and looked at that data It
2 also included extensively a research study done by a
3 national homeowner s association research counsel They
4 studied, I believe it was, 1200 homes in the Wilmington,
5 North Carolina area, and they actually tore off the stucco
6 on 300 of these homes -- 350 of these homes, I believe,
7 and 100 of these homes were analyzed in detail and what
8 the purpose of that study was and why it was relevant to
9 us is because they were trying to determine if you use
10 this particular protocol for testing the home is it
11 accurate in predicting what s going on with the substrate
12 Is it getting damaged? What's happening?

13 So, they tested these homes and then they tore the
14 cladding all off and they compared their data What they
15 found was that there was a complete consistency with
16 testing the homes determining moisture levels soft
17 substrate and identifying what was wrong with the home
18 They also determined that the vast majority of these
19 homes -- 91 percent of the homes -- had less than
20 6 percent of the cladding affected in any way by moisture
21 So most of these homes even though they re in
22 Wilmington North Carolina, had very little damage

23 We compared the results of that Wilmington -- that
24 extensive research that was done by NHBRC and compared it
25 to the data that we had of all of the homes to match up

1 and see were they finding a lot of more problems than we
2 were finding? Was there big discrepancies? We found that
3 our data was almost right on with what their data was
4 So, we used that data as a comparison to support the
5 justification for the Dryvit settlement

6 Q And those homes in North Carolina, did they have
7 vapor retarders?

8 A Yes, they did It was part of the code and it was
9 heavily enforced especially in Wilmington

10 Q And it made no difference?

11 A There is no anomaly between the data that we see in
12 North Carolina versus South Carolina We have changes in
13 some of the other areas of the country where we've had our
14 claims rate in Minnesota, Washington but unassociated
15 with anything to do with the vapor barrier

16 Q And the homes in South Carolina, did you investigate
17 those with your analysis?

18 A We did

19 Q And did you find any vapor retarders in the homes of
20 South Carolina?

21 A What we found -- Basically we found the same thing
22 that we found in North Carolina was that there were vapor
23 barriers in these homes that we reported to be with vapor
24 barriers Again the protocol that we -- We don't require
25 the inspector to look for a vapor barrier in the home to

1 drill a hole in there because it certainly wouldn't make
2 the homeowner's happy if we were drilling a hole to
3 determine it. What we were determined is there was no
4 adverse effect that was caused by the vapor barrier. If
5 water is getting into that wall having a vapor barrier or
6 not having it had very little bearing at all on what our
7 results were. In fact we couldn't find any anomalies
8 associated with the vapor barrier.

9 Q In South Carolina, right?

10 A Anywhere.

11 Q So, your analyses found that the vapor retarder would
12 not --

13 A Vapor barrier.

14 Q Vapor barrier would not prevent the Moisture Free
15 bond from working in South Carolina?

16 A No, it didn't have any bearing on it. In fact what
17 was found was you could remove the the vapor barrier and
18 you certainly wouldn't solve the problems you have in all
19 homes be it synthetic stucco or hard coat any of those
20 homes. The vapor barrier being removed is not the sole
21 source of eliminating a problem with moisture. You have
22 to eliminate the bulk moisture source which is primarily
23 coming from the windows.

24 Q As far as the Babae house goes, do you recall the
25 age of the Babae house when it was built?

1 A I believe it was built in '96

2 Q What code was applicable in 96?

3 A It is according to Fred - I'm sorry, Bill Flaherty
4 MR PHILLIPS Objection Your Honor Hearsay

5 THE COURT Overruled

6 Q And, Chris do you have a contractor's license?

7 A No I don't

8 Q Are you familiar with construction practices?

9 A I am

10 Q Are you familiar with the CABO code?

11 A I am

12 Q Does the CABO code require a vapor retarder being
13 installed in houses built during the time the Babaee house
14 was built?

15 A During that time it certainly does

16 Q So, the Babaee house was built in 96 and as far as
17 the analyses that you did, where does the Babaee house
18 fall in regards to damage to a home that would be you
19 know 12, 13 years old?

20 A Well, when we compare that to the data we've
21 collected and the data that was collected in the MHB or
22 study where they stripped all these homes the Babaee home
23 based on the areas that we found high moisture that we're
24 in agreement with all of the inspectors having agreement
25 we came up with a total square footage of affected area on

0700

1 this home of less than 2 percent So, of the 91 percent
2 of the homes that have less than 6 percent it fell in the
3 very lowest category of affected area, especially in a
4 ratio this home has about 5400 square feet of synthetic
5 stucco on it We found that there somewhere in the range
6 of about about 40 or 50 square feet that were affected by
7 this

8 Q And that's why you offered Is that the reason you
9 offered the Babaees the money you gave them?

10 THE COURT Mr Blackburn Mr Phillips look here
11 (Whereupon a bench conference was held)

12 Q Did Moisture Free remove the exclusion from the
13 Babaees home?

14 A We did

15 Q Why?

16 A We were requested to remove the exclusion by --
17 Mr Babae called and asked to have the exclusion removed
18 The standard practice that we would do is to assist in
19 getting an inspector for them We don't pay for that
20 inspection to be done It's the responsibility of the
21 homeowner Claire Hammett assisted in that because she
22 knew that Danny Clayborn was going to be in area and he
23 went and did it at no cost He went and looked at the
24 area He looked at the wrong side He did not have the
25 report with him and he mistakenly approved it to have the

1 exclusion removed

2 MR PHILLIPS Objection That s hearsay Your
3 Honor

4 THE COURT Overruled

5 Q How did you find out about the claim on the Babae
6 house?

7 A They called originally -- From our database the
8 record shows there was a call referencing staining on the
9 home

10 Q Did you question why there was no date on the
11 inspection you received?

12 A When went got the inspection actually we didn t
13 question it at that time because we didn t assume that it
14 was anything other than a new inspection that was in
15 disagreement with the Strickland inspection

16 MR PHILLIPS Asked and answered, Your Honor
17 several times

18 THE COURT It has been Sustained Move along

19 Q Did Mr Babae make any contact with you after the
20 check you sent him to settle the claim?

21 A No There was no contact after the letter that went
22 out that had the check for \$2,500 and the explanation of
23 how to proceed if he disagreed with that amount

24 Q With regard to Mr Flaherty, have you ever met
25 Mr Flaherty before and discussed issues related to vapor

1 barriers?

2 A We have He mistakenly thought we met at Bonnie
3 Jackson's home I never went to -

4 MR PHILLIPS Objection Your Honor Pitting
5 witnesses

6 THE COURT Well, that's not pitting Have you ever
7 met him?

8 THE WITNESS I have met him yes but I conducted an
9 advanced training seminar in Atlanta He was in
10 attendance at that seminar and I specifically remember
11 meeting him there because he was sitting next to Dave
12 Bennett who was a repair contractor that we had
13 disagreements with that was in support of tear off of
14 homes but anyway Bill was there and he had mentioned --

15 THE COURT The question was have you met him?

16 THE WITNESS I have met him Yes Your Honor

17 Q And discussed issues related to vapor barriers?

18 A We did at that time at the advanced training seminar
19 He mentioned vapor barriers I have asked him about the
20 issue related to the Bonnie Jackson home where he
21 included --

22 THE COURT That's not relevant in this trial - the
23 Jackson home

24 Q Do you know of anyone else that agrees with
25 Mr Flaherty's opinion of vapor barriers?

1 A I don't know of anybody else that agrees with that

2 Q Mr Flaherty mentioned that his inability to do any
3 additional moisture location on the Babaee house was
4 likely due to drought conditions?

5 MR PHILLIPS Putting witnesses

6 THE COURT What's the question?

7 Q Mr Flaherty indicated that his inability to perform
8 any additional moisture locations on the Babaee home was
9 likely due to drought conditions

10 MR PHILLIPS Same objection

11 THE COURT Hold on He hadn't asked a question yet

12 Q Do you believe that is a possibility?

13 THE COURT Do not answer that

14 Sustained That's putting witnesses That's
15 improper The jury will make that determination

16 Q You've seen the samples of the test cuts that
17 Mr Flaherty took from the home What is your opinion
18 about those samples?

19 THE COURT That's not a proper question

20 MR BLACKBURN Have we got those samples up here?

21 THE COURT They better be up there

22 MR PHILLIPS They're in the white box

23 Q Plaintiff's exhibit 15 Chris, have you seen that
24 before?

25 A Not before we arrived today, no, or arrived

1 yesterday

2 Q Do you believe that - What do you believe the
3 condition of that OSB is?

4 A This particular sample looks inconsistent with OSB
5 that s been damaged by moisture

6 Q And where was that test cut to your recollection
7 made?

8 THE COURT What is it consistent with being damaged
9 by?

10 THE WITNESS Removing it by --

11 THE COURT Removing it? That's what damaged it
12 removing it?

13 THE WITNESS And you core a hole with a 2-inch hole
14 saw to do this trying to get it back out of the hole saw
15 and trying to pull it back out of the wall will damage it
16 So, it s difficult to do -- to pull out The stain that
17 we typically see where -- and we got the pictures that
18 show which show this completely black We have all kinds
19 of mold all over it It's just - It does not look
20 consistent with what we typically see

21 Q And you recall where that was taken that test cut?

22 A I don't recall exactly where that was Either to the
23 left of the back or right of the back doorway or it was on
24 the front of the house

25 Q How many test cuts are you aware that Mr Flaherty

1 made?

2 A I believe there were three test cuts done by
3 Mr Flaherty We weren't there when it was done So I
4 am not positive but what I ve seen is I think three test
5 cuts

6 Q Why do you believe the CK report was inaccurate?

7 A The CK report, I believe, was inaccurate because
8 Mr Clark is rather elderly and uses somebody else to lift
9 this ladder take it around the house, and they are
10 actually doing the probing in the wall

11 MR PHILLIPS Objection, hearsay

12 THE COURT Hold on Mr Witness, were you there
13 when he did the report?

14 THE WITNESS No, sir, I was not

15 THE COURT Then you don t know if he had somebody up
16 on the ladder or if he climbed the ladder Don't
17 speculate That s not what we re here to do

18 THE WITNESS Okay

19 THE COURT We're here to determine what the true
20 facts are and for you to tell me how I drove my car last
21 night when you weren't out there that's impossible

22 THE WITNESS Yes, Your Honor

23 THE COURT You can tell us I mean -- You you don't
24 agree with the report, right

25 THE WITNESS I don t

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1 THE COURT You can tell us why you don't agree with
2 it, but to tell us how he did it, that's impossible
3 That's speculation I can't allow speculation in the
4 courtroom You've testified a lot that you disagree with
5 it We all understand your opinion or your position on
6 that

7 Q Chris, I am going to hand you these photographs that
8 Mr Phillips marked into evidence as Plaintiff's exhibit
9 no 48 You testified about these windows How many
10 windows are depicted in those four photographs?

11 A There's three separate photos I can't tell if
12 they're of the same windows or they're different windows
13 They are too close up to be able to tell if they're
14 different angles of the same window or not I am not
15 sure There is up to three potentially

16 Q Did you find any moisture -- elevated moisture levels
17 in those windows?

18 A Nobody found moisture levels under those windows

19 MR PHILLIPS Your Honor I believe he just
20 testified that they're too close a shot to identify the
21 windows and now he's saying -

22 THE COURT Sir you might not like his answer, but
23 that's not an objection You can argue that to the jury
24 You can ask him on redirect

25 MR PHILLIPS I apologize

1 Q How many windows are on the Babae house?

2 A By our accounts separating out the gain windows there
3 are 49 windows on the home

4 Q In your experience percentage wise how do windows --
5 Percentage-wise how much moisture intrusion can be related
6 to a window?

7 A It is usually between -- If they're never been
8 remediated the failure rate is typically between 18 to
9 22 percent If they've been remediated they can drop
10 down to zero or a very low percentage

11 MR BLACKBURN Chris, thank you Answer any
12 questions that Mr Phillips may have

13 THE COURT Redirect is in response to what went on
14 in cross

15 MR PHILLIPS Thank you, Your Honor

16 REDIRECT EXAMINATION

17 BY MR PHILLIPS

18 Q Mr Burton I want you to take a close look at
19 Defendant's no 7 Tell me what that is

20 A Page 7? I'm not sure you mean 7

21 Q Defendant's exhibit 7 There is a sticker up here

22 A I got you

23 Q What is that? That's, obviously, not something you
24 received That's a blow-up of a piece of paper, isn't it?

25 A Yes

1 Q Do you recognize that?

2 A Yes

3 Q What is that?

4 A That's the first page of the report we received in
5 response to the claim filed by Mr Babae

6 Q When did you receive that?

7 A I believe that we with received that somewhere
8 around --

9 Q January?

10 A January of 2006

11 Q January of 2006? I didn't mean you cut you off You
12 received this piece of paper that is the basis for this
13 blow up in January of 2006?

14 A Together with the rest of the report

15 Q And you reviewed that personally?

16 A It was brought to my attention I typically wouldn't
17 review that personally at that time It was brought to my
18 attention because it is in sharp contrast to the qualifying
19 report from Mr Strickland

20 Q Was it you brought to your attention sometime in
21 early 2006?

22 A It was

23 Q I believe you testified that you were deceived into
24 thinking that that was a current report because it had no
25 date on it Is that a fair characterization of your

1 testimony?

2 A I believed it was a current report because it would
3 be very odd to receive a report for a claim that wouldn't
4 be relatively current

5 Q And you studied the report and all of the materials
6 personally?

7 A I did at some point yes

8 Q And you reviewed them to see what it said about the
9 condition of the Babae s house?

10 A I did at some point, yes

11 Q Now, you will recall I took your deposition up in
12 Charlotte back on July 16, 2008 and at the start of that
13 deposition you brought me a bunch of documents I had asked
14 for from production and we went through those?

15 A Yes

16 Q And we put some of those into evidence And those
17 documents are now attached to the copy of your deposition
18 that I moved into the record earlier today?

19 A Yes

20 Q Could I ask you again -- I know it's big Could you
21 get exhibit no 11? I believe they have these little tags
22 on it

23 A Yea

24 Q Exhibit 11

25 And, Your Honor with permission I'd like to let

1 Mr Burton take it apart -- pull exhibit 11 out so that he
2 can look at his deposition testimony

3 THE COURT Well if that s possible

4 THE WITNESS Good luck with that

5 MR PHILLIPS Thanks I feel like the Jeopardy
6 music should be going

7 THE COURT I don't know if I agree with Jeopardy
8 music I might agree with some other kind

9 MR PHILLIPS Your Honor I m pulling as hard as I
10 -- all right Let s just be careful as we take it apart
11 That s exhibit 12 This is exhibit 11 Here are the
12 pages of exhibit 11

13 THE WITNESS Yes

14 Q I am going to hand those to you And then for time
15 sake I am going to sit this down here and I ll reassemble
16 it later with the court s permission I am going to put
17 the other exhibits here I am going to put this on here
18 so you can read from the deposition

19 I would ask you to look at -- while I'm putzing
20 around here, if you could look at that and see if you can
21 identify that document?

22 A Yes

23 MR PHILLIPS And, Your Honor with the Court's
24 permission, I d like a sticker and I'd like to move
25 exhibit 11 to Mr Burton s deposition into evidence in

1 this case

2 MR BLACKBURN The whole deposition?

3 THE COURT No

4 MR PHILLIPS Just the exhibit 11 to the deposition

5 MR BLACKBURN That's fine No objection

6 THE COURT All right Give it to the court reporter
7 and then move on

8 (Whereupon Plaintiff's Exhibit No 49 was marked for
9 identification and received into evidence)

10 Q Is that the January 2006 correspondence that you
11 received from Fred Babaee that attached the Clark report?

12 A Yes

13 Q And you testified to that under oath in Charlotte
14 back in July?

15 A Yes

16 Q Please pull the page -- I believe it s the third
17 page -- from the exhibit and I would ask you to stand and
18 publish it to the jury so they can compare it to what you
19 are claiming is the page that you received from Fred
20 Babaee in January of 2006 There is a difference between
21 those documents, isn't there?

22 A One is larger

23 Q Well, there is another Look in the upper righthand
24 corner Is there another difference?

25 THE COURT Point it out to him

1 THE WITNESS Yep There is a date that's written on
2 here

3 Q What is that date?

4 A 11/2/04

5 Q 11/02/04 Please publish that to the jury so they
6 can see that Please go to next page, page four Tell me
7 what that is

8 A The first page of the report?

9 Q Look in the upper righthand corner Is there a date
10 there?

11 A There is a date You can't see the year, but you can
12 see 11/2

13 Q Please sit it down and go to the next page and see if
14 there is a date in the upper righthand corner of that
15 page?

16 A There is the first 11 is there

17 Q Next one please

18 A 11/2/04

19 Q 11/2/04?

20 A Yes

21 Q Let's publish that to the jury The next page, can
22 you read the date on that?

23 A It's hard to make out It looks like 11/2/04

24 Q The next, sir?

25 A It looks like the same thing

1 Q Okay

2 A The same thing Same Same Yes

3 Q The same thing?

4 A Yes 11/2/04 11/2/04, also

5 Q If you can see it hand it to me If not right
6 there in the pile?

7 A It is hard to make out, but -- You can't see

8 Q Thank you, sir Now, this document you gave me at
9 the deposition this was your document This was the
10 original document that's been preserved in the record?

11 A Yes

12 Q And it has dates on it which you received from Fred
13 Babae back in 2000 -- in January of 2006 had a date
14 written on it, but, yet you've testified repeatedly that
15 there was no date on that and that exhibit has been up
16 there during this whole trial hasn't it?

17 A It's been up there most of the trial

18 THE COURT Well, let me ask you this Where was
19 that blown-up - What document was it made from?

20 THE WITNESS I don't know

21 Q One two three, four five, six, seven eight nine
22 ten pages of that document that you received had the date
23 on it and you have testified repeatedly that you were
24 deceived because you thought it was a current report Is
25 that not your testimony?

1 A We were under the impression that it was a current
2 report We treated it as if it was a current report

3 Q Mr Burton, it s been a long trial You're under the
4 impression of a lot of things

5 THE COURT Hey -

6 MR PHILLIPS I apologize, Your Honor I apologize

7 THE COURT Disregard that, ladies and gentlemen

8 MR PHILLIPS I apologize

9 THE COURT Let me ask a question Where is the
10 document that that exhibit -- What exhibit is it

11 Mr Phillips? Defendant 8?

12 MR PHILLIPS Defendant 8, Your Honor

13 THE COURT What was that blown up from?

14 THE WITNESS I don t know I didn't have it blown
15 up Your Honor So I don't know

16 THE COURT I ll inquire into it

17 Q Let me ask you about what you do know about Frank
18 Clark not about his age how he does business Do you
19 know who he is?

20 A I know basic stuff about him

21 Q He is a builder, isn't he?

22 A Yes

23 Q He runs a termite company?

24 A Yes

25 Q He was a member of the Wilmington task force that

1 first got into EIFS problems?

2 A I -- Okay

3 THE COURT If you know Now don t --

4 THE WITNESS I don t know that, no

5 Q Do you know he operates an inspection company?

6 A I do know that

7 Q Do you know from this case that he operates a termite
8 company?

9 A Yes

10 Q How about a structural repair company?

11 A I m not aware of that

12 Q Do you know that he runs a light commercial business?

13 A I did not know that either

14 Q But he knows about EIFS doesn t he?

15 A I imagine he does yes

16 Q He's been an applicator and he s done strip and
17 reclads?

18 A Yes

19 Q He knows something about how to put this up?

20 THE COURT If you know that

21 THE WITNESS I don't know any -- Basically what I
22 know is from what I've heard

23 THE COURT How did you know how old he was?

24 THE WITNESS I have been told that by

25 Mr Strickland He lives next door

1 THE COURT How do you know that he couldn't climb
2 ladders?

3 THE WITNESS Mr Strickland told me that

4 THE COURT See that's what we don't need in this
5 trial

6 Ladies and gentlemen please disregard all of that
7 stuff about ladders and age

8 Q Sir, I want to go back to the kickout location If
9 you will give me just a moment I'd like to put up a
10 picture I speak of course, of the front kickout
11 location which is Plaintiff s no 9 Am I pointing to the
12 kickout?

13 A You are

14 Q The purpose of that what I think the construction
15 industry calls a detail is to literally take water running
16 down that roof line and kick it away from the wall so that
17 it then drains down?

18 A That s correct

19 Q And your inspection protocol calls for three
20 inspections of that area One underneath it am I
21 correct?

22 A Correct

23 Q Two in the middle of the wall?

24 A No The second one at the middle of the wall, yes

25 Q The second one in the middle of the wall?

1 A Yes not two locations, but one location in the
2 middle of the wall yes

3 Q The third one down at that band sill -- that
4 baseboard that holds the walls up and the floor joist
5 comes in?

6 A Yes

7 Q Right there where Mr Flaherty made his cut?

8 A Yes

9 Q Right there where that wood was taken from?

10 A Yes

11 Q Mr Strickland looked up here He didn't look down
12 there and I believe that you testified that that was
13 contrary to what he was supposed to do?

14 A There is no evidence in the report that he looked at
15 those other areas He has a probe location recorded there
16 that's dry and firm below the kickout, but there is not
17 other readings

18 Q I have a blow-up of that page So let's look at
19 that so you can explain this to the jury I show you
20 what's been marked into evidence as Plaintiff's 32 Do
21 you recognize this as a blow-up of a page from the
22 Strickland report?

23 A I recognize it

24 Q And let's -- For the jury what is the significance of
25 Moisture Free 132? What is the significance of that

1 number? Is that a date label that your attorney has put
2 on the documents you've produced to us to identify it?

3 A I believe so

4 Q So this is your document?

5 A I am not positive but

6 Q But you've studied this report Is this consistent?

7 A It looks consistent with the report

8 Q All right And this is -- in this grid system these
9 dots here, this one is in D-4 This one is in F-4 This
10 one is in G-4 and this one in H-4 They're all in that
11 column and then DHF and G-4 they all have readings there

12 A They do

13 Q Low moisture content?

14 A Correct

15 Q All right Mr Strickland was supposed to do a cut
16 down here I'm sorry a probe?

17 A Yes

18 Q A probe down there He should have had a reading for
19 H-7 on this list He's got other 7's He's got a D 7 and
20 an F-7, but they're over here on this other section of
21 wall He has no measurement in that G,H section Why?

22 A He doesn't you're right

23 Q He should by your standards

24 A We would like to have a reading there, yes

25 Q And anyone who is familiar with your protocol can

1 look at this and say, gee he s missed one just as easily
2 as I just showed the jury right here So Mr Strickland
3 didn't do a good job

4 A He missed that area You're right

5 Q And you have no idea as of the time of his inspection
6 what the moisture was underneath there?

7 A We don t

8 Q Now, in your testimony you would claim -- I believe
9 you testified -- and tell me if I am wrong because I don t
10 mean to mischaracterize your testimony -- that moisture
11 damage typically occurs in the area they I ve put the
12 squiggly line onto exhibit 32?

13 A When a kickout is failing that is the pattern that
14 would be found

15 Q Kind of like a Christmas tree?

16 A Yes

17 Q And that s because the point source is here and
18 gravity pulls that moisture down?

19 A Yes

20 Q Spreads out?

21 A Yes

22 Q Now, the difference and, frankly, the problem with
23 barrier EIFS is wouldn t you agree, the material sits
24 directly on the wood as is shown here in Plaintiff's
25 exemplar no 1 and there is nothing to protect that wood?

1 A That is the criticism that's been made

2 Q That's the criticism and there is moisture barrier as
3 this product is designed between the foam and wood?

4 A Sometimes they install it with mechanical fastening
5 like on this home where they mechanically fastened it and
6 it can drain

7 Q Other homes -- other types of siding -- Let's just
8 use brick for example They'll have the same OSB
9 sheathing and I understand they have other products, but a
10 lot of them have wood sheathing on it, correct?

11 A Correct

12 Q And that sheathing is covered with a protective
13 layer They call it a house wrap don't they?

14 A Sometimes

15 MR BLACKBURN Your Honor I would object I am not
16 sure where he is going with all of this and how relevant
17 it is

18 MR PHILLIPS I'll get there real quick, Your Honor
19 I promise

20 Q What are those -- What are those wraps that protect
21 wood? What do they look like?

22 A They vary in what they look like but they typically
23 look -- well they're big sheets

24 Q They call some of it tar paper, asphalt paper, don't
25 they?

1 A That's one type

2 Q It is a heavy gauge paper that's impregnated with
3 tar?

4 A Yes

5 Q It is black in color?

6 A Yes

7 Q And they use that to protect wood so that if water
8 gets behind that brick, that wood is protected?

9 A That's one of the purposes

10 Q Right You would agree with me on that? Do you
11 still have the pictures from Mr Cooper that you were
12 discussing with your attorney?

13 Charles did you take those?

14 MR BLACKBURN I've got my copy Sam It's not the
15 original exhibit

16 MR PHILLIPS I'd rather have the exhibit This is
17 my copy

18 Your Honor, for time Mr Blackburn, would you agree
19 that those are pictures taken by Mr Cooper?

20 MR BLACKBURN Why don't you use my copy?

21 THE COURT Gentlemen, y'all --

22 MR BLACKBURN These have just been marked on To
23 make it clear I mean

24 THE COURT Y'all can't agree on which pictures to
25 let him look at?

1 MR PHILLIPS Let me ask you this I apologize for
2 the delay I can't find these pictures

3 Could I mark these Plaintiff's next?

4 (Whereupon, the attorneys conferred and looked for
5 the exhibit)

6 MR PHILLIPS Your Honor, I promise you I am not
7 trying to delay this

8 THE COURT I am not fussing

9 MR PHILLIPS During Mr Burton's testimony there
10 was a representation, Defendant s 59 - He was looking at
11 it It turns out what he's looking at is Mr Blackburn's
12 copy of Defendant s 59 which has writing on it and I don't
13 think that would have been -- That s not an appropriate
14 exhibit

15 MR BLACKBURN Why don t we use the original
16 exhibit?

17 MR PHILLIPS Yes, let's use the original exhibit

18 THE COURT Ladies and gentlemen, just don t pay any
19 attention Lawyers sometimes get excited

20 MR PHILLIPS I apologize You want me to rush,
21 Your Honor This is me rushing

22 THE COURT I didn't want you to rush

23 Q Defendant's 59 - Yea, you do, Your Honor, and I am
24 trying

25 Tell me what Defendant's 59 is

1 A It is the cut out of the area directly below the
2 kickout on the front of the house

3 Q All right Mr. Burton, I didn't want to do this, but
4 we introduced this into evidence. I said I would leave
5 this in the bag. It is Plaintiff's 38. I am going to
6 tear it off now.

7 MR. BLACKBURN Your Honor, no objection to him
8 tearing into the exhibit.

9 THE COURT I hope not.

10 Q What is that?

11 THE COURT Now get back away from the jury with
12 that.

13 THE WITNESS That looks like the sample of the test
14 cut that was taken from below the kickout relative to this
15 photo.

16 Q All right. That's Mr. Flaherty's hole, right?

17 A It is. Yea.

18 Q What is the black stuff on the back of it?

19 MR. BLACKBURN Your Honor --

20 THE COURT Wait. Now what?

21 MR. BLACKBURN I have an objection to using this now
22 because I have never seen it before. I wasn't out there
23 when it was cut off the house. I am not sure if it
24 depicts the actual condition of that area. It was wrapped
25 up in the bag. I haven't seen it. We weren't invited to

1 look at it I have no idea, A, really where it came from
2 I expect it came from the house where he says it did, but
3 how has it been altered? Is there any moisture barrier
4 back there we've been talking about? It could have been
5 removed

6 Your Honor, I have never seen it before We hadn't
7 produced it to me He never told me about it

8 THE COURT Didn't y all agree on those exhibits at
9 the beginning of the trial?

10 MR PHILLIPS And Mr Cooper moved it into evidence
11 Your Honor, and I indicated I didn't want to take it out
12 of the bag

13 MR BLACKBURN Conditioned upon him not taking it
14 out of the bag

15 THE COURT You didn't say that Objection
16 overruled

17 Q What is that on the back of the board in your
18 opinion? I'm sorry not your opinion What do you
19 observe on the back of the foam?

20 A The back - it looks like the printing of the
21 original foam that was on the --

22 Q The dark stuff?

23 A It is probably degradation of the the OSB that's
24 still on there after it's been taken off

25 Q Is the appearance of this foam consistent with

1 moisture damaged wood?

2 A Yes, it is

3 Q All right Let me move this away from the jury

4 THE COURT Now in a little while when the jury
5 leaves, put it back in the bag and zip it up

6 MR PHILLIPS I'll have to bring a new bag, Your
7 Honor I tore it off in my haste

8 Mr Burton look at the first photo Mr Cooper s
9 photograph --

10 THE WITNESS Yes

11 Q - which your lawyer entered into evidence?

12 A Yes sir

13 Q That's a picture of the cut What is that black
14 paper hanging down at the top of it?

15 A It looks like the tar paper that was probably put in
16 place if there was a repair made in that area but I can t
17 tell for sure

18 Q That s the tar paper we discussed earlier that
19 protects wood from moisture correct?

20 A It s put in there for the intention of protecting
21 wood from moisture, yes

22 Q Well let's say it works So, we see from that
23 picture -- That first picture we see an edge of it at
24 about there, would you agree? Let's put that squiggly
25 line up with an A next to on Plaintiff s 32

1 A Yes

2 Q All right Turn the page The next page please

3 And it would probably go faster if you would hand it to me
4 and I'll show it to you

5 A Okay

6 Q Now, I will ask you to look at Cooper 68

7 A Yes

8 Q It is another picture of the tar paper Then behind
9 the insulation there is also plastic Would you agree
10 with that?

11 A The vapor barrier is there and you can see the split
12 between the vapor barrier and this looks like it is tar
13 paper

14 Q All right Now that vapor barrier doesn't come
15 down It's about an inch You testified earlier that the
16 vapor barrier wasn't properly installed Is that inch at
17 the base of the wall, is that the improper installation
18 that you made reference to?

19 A That is incorrect, yes

20 Q Okay Fair enough

21 THE COURT Mr Blackburn, please sit down

22 Q Do you recognize Cooper 73?

23 THE COURT Or either go stand over there

24 Q That's just a close-up of the same --

25 THE COURT Quit wandering around

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1 Q -- lowering edge of that black tar paper?

2 A It looks like it yes

3 Q The black tar paper up at the top of the cut is
4 designed to protect wood sheathing from moisture correct?

5 A Yes

6 Q All right Let's go -- We're at the bottom of the
7 wall Let's go up to the top The picture of the top up
8 by the kickoff

9 A Uh huh

10 Q And there is Mr. Cooper's ladder and Mr. Cooper's
11 made a little rectangular cut up almost underneath that?

12 A Yes

13 Q You agree? That's in 84 A little square I am
14 going to go draw on it this You tell me about position
15 Is my pen positioned in the correct position?

16 A It looks like it is the about the right area

17 Q All right He cut some EIFS out there?

18 A He did

19 Q All right And he removed it It looks black
20 underneath that?

21 A It's the tar paper

22 Q Doesn't look like the wood OSB which is a brownish
23 color?

24 A No

25 Q It looks like the moisture barrier that it is?

1 Q -- lowering edge of that black tar paper?

2 A It looks like it yes

3 Q The black tar paper up at the top of the cut is
4 designed to protect wood sheathing from moisture, correct?

5 A Yes

6 Q All right Let s go -- We're at the bottom of the
7 wall Let s go up to the top The picture of the top up
8 by the kickoff

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11 made a little rectangular cut up almost underneath that?

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14 going to go draw on it this You tell me about position
15 Is my pen positioned in the correct position?

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18 A He did

19 Q All right And he removed it It looks black
20 underneath that?

21 A It's the tar paper

22 Q Doesn't look like the wood OSB which is a brownish
23 color?

24 A No

25 Q It looks like the moisture barrier that it is?

1 A It is It is tar paper over the OSB

2 Q It's tar paper So underneath here in this area
3 that you said should have moisture damage at this kickout,
4 there is tar paper protecting that wood?

5 A There is tar paper protecting that wood that still
6 would not protect the area of the kickout Not in our
7 experience

8 Q Eighty-six is another picture of that cut?

9 A Yes

10 Q You can see it Now we've got a blow-up -- 88
11 Would you agree?

12 A Yes

13 Q There it is It has a cut in it so you can see Is
14 that tar paper?

15 A It is tar paper

16 Q All right So the date number of this page is
17 Cooper 88 and it's Defendant's 59 You believe that to be
18 tar paper?

19 A Yes

20 Q All right In fact in Cooper 88 you can see the
21 kickout up at the top edge?

22 A You can

23 Q All right Right there That's the kickout and
24 that's the tar paper underneath it So, we're up maybe a
25 little higher So, my box maybe isn't high enough

1 A Right

2 Q So we have evidence of tar paper up here and we
3 have evidence of tar paper down there Possibly, it's all
4 the way up and down?

5 A Yes

6 Q Let me ask you this Barrier EIFS is no longer sold
7 for wood-framed residential construction in the state of
8 South Carolina?

9 A We established that yes

10 Q I think you testified that if somebody builds one it
11 is a mistake?

12 A Well it's against code

13 Q It is against code?

14 A Right

15 Q The EIFS industry hasn't gone away They've come up
16 with a new product haven't they?

17 A They have

18 Q Called drainable EIFS?

19 A Correct

20 Q What is the difference in structure between the
21 drainable EIFS system and this barrier EIFS exemplar
22 that's Plaintiff 1?

23 A There's many different types, but it incorporates a
24 drainage plane between the substrate and the system

25 Q And the drainage plane is the tar paper?

1 A Well, it is very rarely tar paper, but --

2 Q It could be?

3 A It could possibly be

4 Q Isn't it possible what's happened here is -- You
5 heard Mr Cooper testify that there had been a repair
6 Isn't it possible that somebody has tried to turn this
7 into a trainable system, has succeeded, but the water
8 drains down until it gets to the base and it has no place
9 to go so it rots it out?

10 A It's --

11 Q Just like Mr Cooper testified

12 A Is it possible? I would say it's possible It is
13 unlikely based on our data

14 Q Based on your data but let's talk about the pictures
15 and the Babaee house

16 A Okay

17 Q From what you've seen is that a reasonable hypothesis
18 that someone has come back and fixed this house didn't
19 leave an area for the water to get out and that water has
20 concentrated down there --

21 MR BLACKBURN Objection, Your Honor

22 THE COURT All right Hold on And your objection
23 is?

24 MR BLACKBURN He has no personal knowledge of any
25 repairs that were made or how they were made or how it

1 affected the performance of that side of the house

2 THE COURT Try this Objection because asking
3 whether something is possible is just totally
4 inappropriate Sustained

5 MR BLACKBURN Thank you Your Honor

6 Q In your experience Mr Cooper --

7 A Burton

8 Q Mr Burton I apologize

9 THE COURT Careful, now You objected to all of his
10 opinions before Now, don t be asking him opinions

11 Q Let me ask you this Is that wet wood?

12 A That s shot

13 Q That s shot

14 A Yea

15 Q That s consistent with wet wood?

16 A That is

17 Q Not moisture free and not dry?

18 A Not moisture free and not dry

19 Q And that came from underneath that kickout?

20 A Yes

21 THE COURT What exhibit is that that you got in your
22 hands that you're squeezing?

23 MR PHILLIPS That's Plaintiff's 35 and that exhibit
24 was collected right underneath the black tar paper
25 moisture barrier that runs from that kickout all the way

1 down the wall?

2 A Right in the area we're covering as a claim, yes

3 Q Just so we're clear, Mr Burton, I asked you earlier
4 you have no evidence via document or anything other than
5 your testimony You have no personal knowledge that Fred
6 and Malthe Babaee were ever offered a single repair from
7 Moisture Free Warranty?

8 A I don't have documentation of that, no

9 MR PHILLIPS Madam Court Reporter if I may have
10 one last sticker

11 (Whereupon Plaintiff's Exhibit No 50 was marked for
12 identification only)

13 (Whereupon a bench conference was held)

14 Q Mr Burton, did Mr Babaee provide Moisture Free
15 Warranty -

16 THE COURT Hold on one second That was withdrawn?

17 MR PHILLIPS Withdrawn Thank you Your Honor -
18 with repair estimates to fix his house?

19 MR BLACKBURN Your Honor I think this question has
20 already been asked and answered with the Guidera estimate

21 MR PHILLIPS I'll reask it, Your Honor

22 Other than the Guidera estimate, did Fred Babaee
23 provide Moisture Free Warranty with proposals fix -- not
24 strip and reclad, to fix it specifically from a company
25 called Realtor's Friend and the original applicator

1 charlie Smoak and an applicator name Bufano Are those in
2 your file?

3 A There were record of an -- estimates that were sent
4 or they were obtained They were related to the CK report
5 that didn't qualify

6 Q And didn't Fred Babae with those estimates that he
7 collected that were in excess of \$20 000, didn t he offer
8 to you, You pay me the \$20 000 under the terms of your
9 warranty and I ll pick up the rest of the cost?

10 A The estimates were not -- were not for over 20 000
11 One of them was and there was a duplicate of it that was
12 12 000 and they were still related to the CK report which
13 we couldn't submit So we had the Blackburn report that
14 we had and, so, they weren't relative to the claim

15 MR PHILLIPS I understand

16 Your Honor, that s all the questions I have for this
17 witness and the Plaintiff rests

18 THE COURT Thank you You may step down

19 All right Madam Foreman ladies and gentlemen
20 let's take our afternoon break about 10 or 15 minutes
21 We'll start back up and we'll go to five It looks like
22 my representation is a misrepresentation but I am going
23 to do my best Step out for just a second Don't
24 discuss Don t deliberate

25 (Whereupon, the jury exited the courtroom at 3 34)

1 THE COURT All right, Gentlemen We'll start back
2 up in about 10 minutes

3 MR BLACKBURN Your Honor can we approach the bench
4 about this document the blow-up? Can I talk to you about
5 it?

6 THE COURT Hold on a second

7 All right Mr Blackburn, what blow up document are
8 you talking about?

9 THE WITNESS I'm talking about the one hanging on
10 the wall there Your Honor

11 THE COURT Which is exhibit no 8

12 MR BLACKBURN And Mr Phillips entered an exhibit
13 from Mr Burton's deposition Is it no 11?

14 THE COURT That's correct

15 MR BLACKBURN Mr Burton was deposed on July 16
16 2008 Mr Babae was deposed on July 9 2008 I entered
17 the same CK report that Mr Babae sent to -- and
18 Mr Babae testified he sent this to my client on
19 January 11, 2006 and I would like just for the Court's
20 you know knowledge to show you what has been previously
21 marked as exhibit no 26 to Mr Babae's deposition and I
22 will pretty much --

23 THE COURT Does it - Is it the same thing that you
24 got blown up up there?

25 MR BLACKBURN That is a blown up page for trial

1 on it and it's in one set of documents and not in another
2 You have the full right to call your guy back up in your
3 case in chief at end or wherever if you want to if you
4 think it is necessary I am not precluding you from doing
5 anything to protect your client

6 MR BLACKBURN Thank you, Your Honor All I am
7 planning on doing is just asking him about this deposition
8 to Mr Babaee s -- I mean, you know I would almost have
9 to call Mr Babaee --

10 THE COURT You can

11 MR BLACKBURN -- to ask him about this

12 THE COURT We're just going to go into just that

13 MR BLACKBURN Yes

14 THE COURT Or we can allow me to tell the jury that
15 in Mr Babaee's deposition that same report does not have
16 header on it and you can introduce it into evidence
17 however you want to do it I'll do it whichever way you
18 want to

19 MR BLACKBURN I'd like to do that I mean, I guess
20 to the extent that I could question Mr Babaee about this
21 document and how he testified that this was an actual and
22 accurate depiction of the exhibit and we went through it

23 THE COURT Here is what I am going to say You try
24 your case however you want to I am not going to hold you
25 back

1 purposes of page three of the report and I blew it up for
2 the sake of the jury

3 THE COURT And it has no date on it?

4 MR BLACKBURN And it has no date on it And Mr --
5 Again Mr Babaee was deposed prior to Mr Burton and
6 this is the exhibit that I've marked exhibit 26 from the
7 Babaee deposition on July 18 2008

8 THE COURT I believe you

9 MR BLACKBURN Okay And just so -- I mean I
10 really think that that was, you know -- I wouldn't say
11 objectionable, but there was clearly some -- let's see
12 There was some insinuation that my client altered that
13 document which he didn't do and what I want to do for the
14 record is this is actually --

15 THE COURT Well, you're getting ready to put your
16 case up If you want to call him back and go into that,
17 you can Do whatever you want to do I believe you I
18 mean, I don't think you pulled anything

19 MR PHILLIPS I do too Your Honor

20 MR BLACKBURN I mean there's no --

21 THE COURT I agree with you I believe you

22 MR PHILLIPS I do too, Your Honor

23 THE COURT But what is in the record is in the
24 record and what was in the deposition is in the
25 deposition You were making a big deal about no heading

1 (Whereupon a break was taken)

2 THE COURT Anything from the Plaintiff before we
3 begin?

4 MR PHILLIPS He indicated he wanted to call
5 Mr Maoli, the son of the seller of the house Of course
6 we have the restriction based on the document about the
7 \$110,000 reduction that you've already ruled on First
8 I'd say I would ask to exclude this witness He doesn't
9 know anything about the Moisture Free Warranty We've
10 gone through ad infinitum about the negotiation process
11 All his evidence will be cumulative but if the court does
12 allow him to testify I would ask that there be -- that he
13 be instructed outside of the presence of the jury not
14 to get into the evidence that the court has excluded

15 THE COURT Very well

16 MR BLACKBURN Your Honor just not to run afoul of
17 your ruling may I approach the bench? Mr Maoli has seen
18 this report It was presented to him during the sale of
19 the home and Mr Babae gave that report to him

20 THE COURT Okay

21 MR BLACKBURN And Mr Babae gave that report to
22 him --

23 THE COURT Okay

24 MR BLACKBURN -- and was demanding a credit to fix
25 the stucco He said the house is going to be torn up It

1 is damaged because of these issues identified in this
2 report

3 THE COURT I am not going to allow that as to
4 \$110 000

5 MR BLACKBURN Can we take the 110 out and say -

6 THE COURT That he demanded credit and not the
7 amount?

8 MR BLACKBURN That's right That he demanded a
9 credit to strip and re clad the house

10 THE COURT Are you going to call him first?

11 MR BLACKBURN I m going to call him first

12 THE COURT What in the world can he testify to?

13 MR BLACKBURN He can testify about seeing this
14 report

15 THE COURT Hadn t everybody seen it?

16 MR PHILLIPS Everybody has seen it

17 MR BLACKBURN But Mr Maoli has seen it and
18 Mr Babaee came to him and Mr Babaee told him despite the
19 warranty I want money to fix my house

20 THE COURT Well, I've already ruled that s not
21 relevant in this case and he s not to testify to that
22 So, do it however you want to

23 MR BLACKBURN Okay Well, hold on Just so I m
24 clear I mean, as far as

25 THE COURT You can ask him about the report, but not

1 anything about credits or anything like that

2 MR BLACKBURN What about what Mr Babaee told him
3 about damages that he thought was in the report? I mean,
4 how about his communications with Mr Babaee? I can ask
5 him about those about this report

6 THE COURT You know what my ruling is I have been
7 patient with you

8 MR BLACKBURN Yes Your Honor I know, and this is
9 a very critical part of our case, Your Honor It really
10 is

11 THE COURT I have already ruled

12 MR BLACKBURN Well, you ruled that we can't talk
13 about the negotiations I understand that

14 THE COURT No I ruled that you could talk about
15 it You just couldn't talk about the \$110,000 that it was
16 reduced by

17 MR BLACKBURN Okay And just so you know --

18 MR PHILLIPS Your Honor

19 MR BLACKBURN Excuse me Sam Just so I don't try
20 and backdoor you

21 THE COURT You're not going to backdoor me You
22 know that

23 MR BLACKBURN I know Just so you don't have any
24 belief that I am trying to because I am --

25 THE COURT I don't believe that either I believe

1 that you're doing what you think is proper and you are
2 representing your client I certainly don't think you're
3 trying to backdoor me

4 MR BLACKBURN Your honor what happens is
5 Mr Babae has already testified and that's why I asked a
6 specific question that he was not aware of the extent of
7 the damages to his home when he bought it and what
8 Mr Maoli was going to tell the court and the jury is
9 Mr Babae was aware of the extent

10 THE COURT Well, they had discussions about the
11 report and the condition of the house, I guess and they
12 took that into consideration in negotiating the price

13 MR BLACKBURN They did That's right Excuse me,
14 Sam And they did take it into discussion and he also
15 asked Mr Babae about the the warranty He told
16 Mr Babae there is already a warranty in place and
17 Mr Babae told him I don't care I will take the money
18 that you give me to fix the house

19 THE COURT Well that's going close to what I have
20 already ruled on My ruling may be wrong and you may be
21 good in Columbia if you get busted but I am going to be
22 consistent I am not going to allow the \$110 000 to be
23 mentioned It's not going to be allowed that he is TKE
24 demanding a credit and the negotiations were what they
25 were --

1 MR BLACKBURN And -

2 THE COURT -- or the price is what it was

3 MR BLACKBURN And Your Honor, just so I'm clear,
4 because, again this is --

5 THE COURT Well, I think I made myself clear Stay
6 away from that

7 MR BLACKBURN If I asked him about the purchase
8 price of the house --

9 THE COURT It is \$700,000

10 MR BLACKBURN The purchase price when he saw it was
11 not \$700 000 It was 810

12 THE COURT It went down as a result of that

13 MR BLACKBURN We can talk about it right? We
14 already have Mr Babaee admitting it

15 THE COURT The final sales place was \$700,000 as a
16 result of all of their negotiations based on everything

17 MR BLACKBURN And we can talk about the
18 negotiations, but not the actual cost, right?

19 THE COURT Y'all had negotiations As a result of
20 negotiation the price ended at 700, more than what
21 Mr Babaee wanted to pay, less than what his father wanted
22 to sell it for

23 MR BLACKBURN Well it wasn't more than what

24 Mr Babaee wanted to pay It was less than what

25 Mr Babaee wanted to pay

1 THE COURT I am not going to argue with you anymore
2 You know what my ruling is Comply with it Please

3 MR PHILLIPS Your Honor I would just state that
4 how can Mr Maoli testify regarding what Mr Babaee
5 knew --

6 THE COURT He can't

7 MR PHILLIPS -- about this report?

8 THE COURT He can't All he can say is that
9 Mr Babaee showed it to him, they talked about it, but as
10 far as anything else that's about it

11 MR BLACKBURN And they talked about it and what did
12 Mr Babaee tell him about this report

13 THE COURT Well this guy is not a party to the
14 case

15 MR BLACKBURN He is is seller's son, Your Honor

16 THE COURT He still hasn't got anything to do with
17 it

18 MR BLACKBURN He sold it --

19 MR PHILLIPS He is not a party

20 MR PHILLIPS He is a witness, Your Honor

21 THE COURT Well, I know that

22 MR BLACKBURN He's been deposed We talked about
23 this They were at his deposition He is a named
24 witness I am trying to have him testify at trial about
25 his knowledge of the CK report and what Mr Babaee --

1 THE COURT You know what my ruling is Tiptoe
2 through the tulips and if you get awry I'll tell you to
3 come over here

4 MR BLACKBURN Let me talk to Mr Maoli so that he
5 knows what the ruling is

6 THE COURT Mr Maoli my ruling is this In a
7 pretrial ruling you re not to discuss the reduction You
8 can discuss that you and Mr Babaee had many negotiations
9 back and forth, but the sales price ended up at \$700 000
10 You can testify that y'all may have discussed the report
11 and that's about the extent of it

12 MR BLACKBURN And what Mr Babaee told him about
13 the report

14 MR PHILLIPS And no Your Honor I would ask you
15 to instruct the witness no testimony about a demand to
16 lower the price because of the stucco

17 MR BLACKBURN Well that's related to his
18 conversations with him

19 THE COURT You know what my ruling is So, I d stay
20 away from it I have been patient I may be wrong but
21 you know where to go with that Stay away from it

22 MR BLACKBURN Your Honor, I'll be honest with you
23 I don't want to get on the bad side of it

24 THE COURT You're not on my bad side, but I've made
25 the ruling and you keep trying to get around it and I

1 don t blame you I would too, if I was over there but I
2 am sticking with it If I am wrong I'm wrong, but don t
3 go into that That's all I can tell you

4 MR BLACKBURN And I can call Mr Maoli as my
5 witness, right?

6 THE COURT You can call him but stay away from what
7 I told you to stay away from I ve ruled that that is not
8 proper in this case

9 MR BLACKBURN The \$110 000 credit --

10 MR PHILLIPS And the reduction in the price for the
11 stucco

12 THE COURT And the demand for reduction in the price
13 for the stucco

14 (Whereupon, a break was taken)

15 (Whereupon the jury came into open court at
16 approximately 4 13)

17 THE COURT You may call your first witness,
18 Mr Blackburn

19 MR BLACKBURN Thank you, Your Honor The Defendant
20 calls Eligio Maoli

21 THE COURT Mr Maoli you were present when we were
22 having our discussions on my pretrial ruling I m asking
23 you to please stay away from that testimony

24 MR MAOLI Okay, sir

25 THE COURT Thank you How are you today sir?

1 MR MAOLI I'm fine How are you Your Honor?

2 THE COURT Come around there and they'll ask you to
3 swear or affirm to tell the truth and then we'll get right
4 to you and move along

5 ELIGIO MAOLI, after being duly sworn testified
6 as follows

7 THE CLERK Thank you please have a seat in the
8 witness stand and state your full name and I'll need you
9 to spell your first name and your last name

10 THE WITNESS Okay ma'am First name is Eligio,
11 E-L as in Lima -I-G as in George-I-O Last name is
12 Maoli, M as in Mike A-O as in Oscar-L as in Lima-I as in
13 India

14 THE COURT You must have some military background?

15 THE WITNESS Yes, sir, transportation

16 THE COURT Charlie Company?

17 THE WITNESS No sir

18 THE COURT C as in Charlie?

19 THE WITNESS C as in Charlie

20 THE COURT All right Mr C as in Charlie
21 Blackburn -- B as in bravo?

22 THE WITNESS Bravo sir yes, sir

23 THE COURT A little levity this afternoon The only
24 reason I know that is my son went to the Citadel and he
25 was in Charlie Company and Bravo was next to him

1 and was over transportation company in Italian Army I
2 was an instructor and I instructed also on guns, big guns
3 I am currently also a Major in the South Carolina
4 State Guard South Carolina State Guard is a volunteer
5 organization under the umbrella of the National Guard
6 When you see funny people dressed in camos we are the ones
7 running towards the hurricane while everybody else running
8 away from it I am also a reserve deputy in Lexington
9 County Sheriff and in between I have a family I have a
10 wife three wonderful kids, a daughter who is a teacher in
11 Mecklenburg County That's Charlotte I have an older
12 son who is a paralegal He works in workman's
13 compensation and a younger son who is a junior at
14 Blythewood High

15 THE COURT Thank you

16 Q Thank you, Mr Maoli And are you familiar with the
17 house that we've depicted right here marked Plaintiff's
18 exhibit no 7?

19 A Yes, sir

20 Q And how are you familiar with that house?

21 A That house was built by my parents and they lived
22 there for a number of years That's 133 Beaver Dam Road
23 It is two houses down from mine basically

24 Q Two houses down from yours?

25 A Yes, sir

1 Q And tell me did -- did your parents sell this house?

2 A Yes

3 Q Who did they sell it to?

4 A Mr Babae

5 Q Mr Babae And if you would tell the jury how
6 you're involved in helping your parents sell that house

7 A My parents were already elderly My father was
8 terminally ill with Parkinsons and their English was not
9 as good as they wanted to be in negotiations For them
10 selling the house was a big deal They were going to move
11 to a retirement community and a smaller house, and they
12 wanted to make sure that they understood everything that
13 was on the contracts and I'm not a lawyer So, if there
14 were any legal questions we would defer always to a
15 lawyer, but otherwise basically a real estate contract
16 is something I can handle The accounting for the closing
17 was something that I could review and I also knew Buddy
18 Lewis who was the designated agent, and, so, I was in
19 between the two making sure that my parents understood
20 what was required whenever an offer came -- well what
21 it's going to give you, what you're going to end up with,
22 and how long it will take and then all the conditions of
23 the sale because there are inspections to do and titles to
24 prepare and things like that and then be there at closing
25 to make sure that everything was still square

1 Q And when were your parents planning on moving into a
2 retirement home?

3 A There wasn't a definite date because the retirement
4 house was being built by Wildewood Downs They give
5 you -- Whenever you sign the contract in a retirement
6 community you do not buy the house You buy the right to
7 occupy the house which is, basically, similar, but not
8 exactly the same and they tell you, We'll start on this
9 date We are shooting to complete it in a certain
10 amount -- number of weeks, but then, of course, it might
11 rain Things might go wrong

12 They knew that they might be able to move in there as
13 soon as January, but that was a target date and eventually
14 I think it was a little bit later than that -- not much,
15 but a little bit later than that

16 Q January of what year?

17 A January 05

18 Q January of 05?

19 A Yes sir

20 Q Thank you And did your parents put the house on the
21 market?

22 A Yes, sir Somewhere in the spring of 04 we had a
23 meeting with Buddy Lewis, a realtor, and a listing was
24 signed

25 Q A listing agreement was signed And are you familiar

1 with what I am going to hand you, Defendant's exhibit

2 no 36?

3 A Yea

4 Q Tell the jury what Defendant's exhibit no 36 is

5 A Well this is, basically a series of pictures You
6 always take pictures when you sell a house and you prepare
7 something like a brochure where you describe what the
8 features of the house are how old the house is, what
9 offers that is particular, how big the lot is That s,
10 basically, what this is, and the rest of the pictures are
11 at the end There are pictures of the interior to show
12 how the house is furnished at that particular time and
13 pictures of the exterior showing the swimming pool the
14 amenities in general

15 Q Does it include an original listing price on the
16 house?

17 A Yes sir It was \$935 000

18 Q I see And tell the jury when did you first meet --
19 Do you know Mr Babae?

20 A Yea, I mean, we are neighbors We are acquaintances
21 I met the first time during the negotiations

22 Q I see And are you familiar with this report I am
23 going to hand you, Plaintiff s exhibit no 30?

24 A Yes This is a letter that was prepared by CK
25 Services and it included a report on items that had to be

1 corrected on the house A little background -- this is
2 about the stucco The house was built with soft stucco
3 Some of you might be familiar with it I don't know how
4 else to --

5 MR PHILLIPS Your honor, I --

6 Q We've heard a lot about it

7 MR PHILLIPS This is not responsive to the
8 question

9 THE COURT Hold on What now?

10 MR PHILLIPS I would object The answer is not
11 responsive to the question

12 THE COURT Well he is responding We've heard
13 You don't need to give us a lesson on stucco

14 THE WITNESS Okay

15 THE COURT For three days we've had stucco up to
16 here

17 THE WITNESS Okay You've been stuck with stucco

18 THE COURT I don't want to say it like that

19 Q Well, you know the report Plaintiff's number 30,
20 how did you get the report?

21 A I knew it was coming Buddy Lewis called me --

22 Q Right

23 A -- and said, Eligio, we got a problem

24 THE COURT Sir we don't testify - The rules won't
25 allow you to testify about what somebody else said

1 THE WITNESS Okay

2 THE COURT As a result of talking to Buddy Lewis you
3 realized the report was coming?

4 THE WITNESS Yes a report was coming

5 Q And about when was that that you talked to Mr Lewis?

6 A Was just a few days before we were supposed to close

7 Q I see And what day were you supposed to close?

8 A This is dated the 8th of November It was like five
9 or six days It was somewhere around the 14th of

10 November if memory serves me right

11 Q That you were going to close?

12 A That we were going to close yea, close the deal

13 Q And when -- Who gave you personally a copy of this
14 report?

15 A Mr Babaee

16 Q Mr Babaee gave you a copy of this report didn't he?

17 A Yea

18 THE COURT He just answered that Come on

19 Q Okay And then what - Why did Mr Babaee give you a
20 copy --

21 THE COURT He can't tell why he gave - why We
22 can't read the man's mind

23 Q When Mr Babaee gave you a copy of this report what
24 did he tell you?

25 A He told me that the inspection that we had already

1 had done on the stucco previously that had resulted in a
2 contractor licensed in South Carolina to provide a bond on
3 the stucco which was part of the conditions of the sale
4 did not address problems that this report was going to
5 address

6 Q And the bond he told you about, what bond was that?

7 MR PHILLIPS Objection, Your Honor Leading

8 THE COURT Overruled You re fine What bond was
9 it?

10 THE WITNESS It was It s called a stucco bond
11 Like a termite bond if you have problems the bond covers
12 within the scope of the contract and part of the
13 negotiations -- I mean, part of the conditions was that
14 being soft stucco we had - My parents had to provide a
15 bond This bond was subject to inspection It had to be
16 done by a certified contractor He did the inspection and
17 he issued a bond for which my parents paid about \$4 300
18 That was percented and that was the last I heard of it

19 Q Okay

20 A Until I was faced with this

21 Q And tell the jury about what happened when you were
22 faced with this document, Plaintiff's exhibit no 30?

23 THE COURT Mr Blackburn, be careful

24 MR BLACKBURN I am

25 THE COURT You understand what my pretrial rulings

1 are?

2 THE WITNESS I hope so, sir

3 THE COURT I'm not that --

4 Q You understand the Judge's ruling when we talked
5 outside of the presence of the jury So, what did
6 Mr Babae tell you?

7 A Not being a lawyer, I'll do my best

8 THE COURT You're doing fine

9 THE WITNESS Actually I asked Mr Babae what this
10 was because I was confused myself I never saw it before
11 And this was a report on the stucco again that was
12 prepared by a gentleman that Mr Babae took to my
13 parent's house that day He was with him and --

14 Q And that was when you met him, right?

15 A Yes And Mr Babae said this is a very experienced
16 stucco contractor someone who knows this very well He
17 has done extensive studies, and he's come up with this
18 report, and I asked the contractor to explain to me what
19 the report was about, and there were a bunch of pictures
20 that I think are here with a bunch of black dots that,
21 obviously to a contractor means something To me it
22 meant points on the stucco where he might have done some
23 inspection of some sort and he say --

24 THE COURT No sir No, sir Don't tell me what
25 anybody else said

0755

1 THE WITNESS Okay

2 THE COURT Let me tell you why I am not picking on
3 you We have a rule called hearsay evidence, and you
4 can't testify about what somebody else said unless that
5 somebody else is here --

6 THE WITNESS Okay

7 THE COURT -- to verify he either said it or didn't
8 say it

9 Q Right What did that contractor look like that was
10 with Mr Babae the day he came out and gave you the
11 report?

12 A It was a white male, 35 to 45 years old salt and
13 pepper hair Can I say that?

14 Q I hope so

15 A I never met him before in my life

16 Q You never met him before in your life?

17 A No that I can remember I mean I met so many
18 people It's not someone that I have ever dealt with
19 before extensively, not enough to be able to remember him

20 Q And Mr Babae brought him to your house when he gave
21 you the report?

22 A Yes sir

23 Q Okay And the report that he gave you --

24 A That's it

25 Q -- there is a page in the report -- That's it, right?

1 A Yea

2 Q And we talked about this report earlier I am not
3 going to belabor the point but the report -- It s
4 contained within Plaintiff s exhibit no 30 isn't it?

5 A Yes

6 Q And it says up here at the top 10 of 15, right?

7 A Yea, page 10 of 15

8 Q And let's get back - When Mr Babaee came out there
9 with the contractor and had this report what did he tell
10 you?

11 A He told me that there were serious issues about the
12 stucco that have not been addressed in the report that led
13 to the bond

14 Q That led to the bond?

15 A Exactly

16 Q What did he tell you about the bond?

17 A That the bond did not satisfy him

18 Q Okay What did satisfy him? Just remember to be
19 very careful with the Judge's ruling

20 THE COURT Wait a minute

21 THE WITNESS This report --

22 MR PHILLIPS Objection, Your Honor

23 THE COURT This report didn't satisfy him

24 THE WITNESS It didn't -- This -- No The previous
25 didn't but this one did because it addressed problems

1 that the previous one didn't

2 Q And the problems he was telling you about were what?

3 A Apparently, the house I was told had extensive damage
4 for sure in the front where water had seeped behind the
5 stucco and had done extensive damage that there was no
6 way to know exactly what was hidden behind it but
7 certainly there was extensive damage and that stucco
8 would have to be removed -- the present stucco, the stucco
9 that was there and work would have to be done in order to
10 fix it

11 Q And Mr Babae told you that?

12 A Yes Well him and the contractor

13 Q Both told you that, right?

14 A Both of them yes

15 Q What was the price of the house at that time?

16 A \$810,000

17 Q Okay What did you do when Mr Babae told you that
18 the house was going to be stripped and had to be fixed?
19 What did you do?

20 MR PHILLIPS Your Honor I think this is coming
21 close to your ruling

22 MR BLACKBURN Your Honor I am just asking him what
23 did you do --

24 THE COURT I heard what your question was Go ahead
25 and ask it

1 Q What did you do when Mr Babae presented this report
2 to you and told him the issues in the report, Plaintiff's
3 exhibit no 30, had to be fixed?

4 A Well I was - I had to report that to my parents

5 Q Uh-huh

6 A So I went to my parents and said, look we've got a
7 serious problem We're not going to close the way we were
8 supposed to close on the 14th about of November because
9 this report surfaced and I said Mr Babae brought it He
10 has an expert He's told me that this expert is a much
11 better expert than the expert that we provided Bond
12 notwithstanding there are many more damages on the house
13 than we thought there were and that unless we do something
14 about it he was not going to close

15 Q So did you have to change the closing date from the
16 initial closing date?

17 A Yes

18 Q Why did you have to change it?

19 THE COURT Wait a minute, now

20 Q I mean that's probably - I mean I just want to,
21 you know -- you had to change it?

22 THE COURT That's fine They changed it

23 THE WITNESS We had to change it yea It was moved
24 forward

25 Q It was moved and were you present at the closing?

1 A Yes Among other things this document had to be
2 inserted It had to be part of the closing package and it
3 was not at that point This was the first time I saw it
4 or my parents saw it So --

5 Q And when you took this demand back from Mr Babae
6 back to your parents, what did your parents tell you?

7 THE COURT No sir

8 MR BLACKBURN Okay

9 THE COURT Let me ask it As a result of showing
10 the report to your parents and the closing being put off,
11 did y all ultimately close the house -- sell it to
12 Mr Babae?

13 THE WITNESS Yea, we closed the house

14 THE COURT Later on?

15 THE WITNESS Later on, not on the original date,
16 but, yea

17 THE COURT And what was the closing price? What did
18 you sell it to him for?

19 THE WITNESS The net at the end --

20 THE COURT Here is a closing statement

21 Q Here s a closing statement You can look at that,
22 Mr Mao11

23 THE COURT You can the tell us what the gross price
24 was and then, of course I am sure there was some
25 deductions for your parents

1 THE WITNESS Apparently, yes \$700,000 was the final
2 figure

3 Q Thank you

4 A And --

5 THE COURT That's good

6 THE WITNESS Oh, okay There is a bunch of numbers
7 here

8 Q Thank you That s just the final sales price, right?

9 A Yea

10 Q When you were set to close on November 15, what was
11 the sales price?

12 A 810 000

13 MR BLACKBURN Okay Mr Maoli I think that's all
14 I have

15 THE COURT Cross, if any

16 MR PHILLIPS Just briefly

17 CROSS-EXAMINATION

18 BY MR PHILLIPS

19 Q Mr Maoli, did Mr Clark -- the gentleman with the
20 salt and pepper hair - did he provide you with another
21 report besides the stucco report?

22 A Not that I can recall I recall this report

23 Q Do you recall a discussion with Mr Clark about
24 moisture on the ground moisture in the crawl space, a few
25 things that needed to be fixed in the house? I think the

1 THE COURT You re doing well I am proud of you for
2 that last one

3 MR BLACKBURN Thank you, Your Honor

4 THE COURT Mr Lewis spell your last name for us

5 THE WITNESS L-E-W-I S

6 THE COURT Thank you Your witness, sir

7 DIRECT EXAMINATION

8 BY MR BLACKBURN

9 Q Mr Lewis, how are you doing this afternoon?

10 A Fine

11 Q Thank you Could you tell the jury a little bit
12 about yourself what you do, how you make your living,
13 your education?

14 A I m a realtor and have been for 32 years with Russell
15 and Jeffcoat Realtors I sell primarily high-end homes in
16 Northeast Columbia and education at Clemson University in
17 Agricultural Economics but I changed after 13 years in Ag
18 business to be a realtor

19 I have two children They're mid-40's I am a
20 little bit older than some folks and I was born in 1938
21 My passport name is Carl Lewis but I ve been known by
22 Buddy all my life I go to St Andrews Lutheran Church
23 every Sunday if that's permissible and I am glad to be a
24 realtor

25 THE COURT Is it permissible to go to church every

1 Sunday or is it permissible to say you go to church every
2 Sunday?

3 THE WITNESS I'm not sure Your Honor I don't tell
4 people what to do I just know that I go to church every
5 Sunday

6 Q Mr Lewis, how long have you been a realtor?

7 A Thirty-two years

8 Q In the Columbia area?

9 A Yes sir

10 Q And you're familiar with synthetic stucco?

11 A I am

12 Q Are you?

13 A I am

14 Q And what type of house do you live in?

15 A A synthetic stucco home

16 Q Do you have any problems with that home?

17 THE COURT That's not relevant All right Come
18 on Let's stay with this case You did good last
19 witness Let's keep going

20 MR BLACKBURN I hope to continue on, sir

21 Mr Lewis you're familiar were with this house
22 Plaintiff's exhibit no 7 aren't you?

23 THE WITNESS Yes sir

24 Q How are you familiar with that house?

25 A The Babae family bought it from me I had the

1 listing and they bought it from me

2 Q The Babaee's bought it from you right?

3 A Yes, sir

4 Q I am going to hand you Defendant's exhibit no 9 and
5 ask if you recognize Defendant's exhibit no 9?

6 A It's a property disclosure statement

7 Q Okay And what is the purpose of the property
8 disclosure statement?

9 A It give a history of the home to the potential buyer

10 Q Okay Did you show this document to Mr Babaee?

11 A I did

12 Q Did you show it to Mrs Babaee?

13 A I did

14 Q And what did they say when you showed it to them?

15 A They read it I don't recall them saying anything
16 about it

17 Q Okay And on the second page of this disclosure
18 statement what does it say on paragraph one?

19 A Paragraph one says that the outside of the home is
20 synthetic stucco and it s no problems

21 Q Okay If you can I believe -- If you can pick up

22 36 Mr Lewis we've got Defendant's 36 marked in
23 evidence Did you prepare this document?

24 A I did

25 Q Okay

1 A It is the story of the home --

2 Q The story of the home?

3 A With photos

4 Q And it's the Babae home right?

5 A It is

6 Q And when you first put this house on the market what
7 was the price of the the house?

8 A 935

9 Q Okay I am going to hand you Defendant s exhibit
10 no 10 and ask you if you recognize that document?

11 A I do This is the contract of sale which I started
12 by the purchaser and then I gave to the owner, the Maoli
13 family

14 Q Tell the jury about is this a typical contract of
15 sale prepared by Russell and Jeffcoat?

16 A It was very typical at that time yes

17 Q Did it include a moisture bond at the time?

18 A It did

19 Q And what time -- What date was this document
20 executed?

21 A Twenty-ninth of August we started and the date of
22 acceptance was about the same time

23 Q Okay

24 A We went back and forth a couple of times

25 Q Is that Mrs Babae s signature on the back page?

1 A I believe so

2 Q Did you witness that signature?

3 A I did I did

4 Q Okay Did Mr Babae -- Did Mr Babae see this
5 document, Defendant's exhibit no 10?

6 A I would assume he did

7 Q Were they aware that a moisture bond was in place
8 with this contract dated August 29 2004?

9 A I had it on the contract that said that the seller to
10 pay \$4,095 at closing for moisture bond

11 Q Okay And I am going to hand you this exhibit and I
12 am going to reference as Defendant's exhibit no 11 Do
13 you recognize Defendant's exhibit no 11?

14 A I do That was another contract that came in because
15 Mr Babae said he wanted this to be the contract

16 Q And this you're talking about, Defendant's exhibit
17 no 11, did you prepare this document?

18 A I did not prepare the document I filled in the
19 blanks and wrote on that different parts of it

20 Q All right For instance, where the purchase price,
21 one -- purchase price?

22 A I did

23 Q You filled that in?

24 A I did

25 Q And do you recognize the signatures beside that

1 purchase price?

2 A I believe they say the Babaee s initials

3 Q I see

4 A I know they ve signed the contract in the back

5 Q They signed the contract And who prepared this
6 contract?

7 A I do not know who prepared the contract I don't -

8 It appears that it wasn't a standard Russell Jeffcoat
9 contract One thing I added to the contract was the
10 paragraph 18 had been blocked out of the contract -

11 Q Okay

12 A -- which you know and I changed that

13 Q What was the significance of blocking out paragraph
14 18?

15 A Well the initial contract said that realtors would
16 get no commission from the sale of this house

17 Q That s -

18 A That s what it said

19 THE COURT Did that get your attention?

20 THE WITNESS It does So I put it back in

21 THE COURT You can t help them for trying can you?

22 Q And you didn't prepare that contract of sale?

23 A I did not I did not prepare the words in this
24 contract for sale I don't know who did

25 Q You just filled in blanks?

1 A Filled in the blank

2 Q I am going to hand you Defendant's exhibit 4 and I am
3 going to ask you if you recognize Defendant's exhibit
4 no 4?

5 A It appears to be a letter from Fred Babae to the
6 Maolis

7 Q Did you prepare Defendant s exhibit no 4?

8 A I did not

9 Q You did not prepare Defendant s exhibit no 4?

10 A I did not

11 Q Why was Defendant s exhibit no 4 prepared?

12 A I think Mr Babae wanted to tell them that he wanted
13 a few things fixed which were in the second paragraph

14 Q And if you read to jury what the second paragraph
15 says?

16 A The second paragraph says, At this time the suck
17 stucco inspection reveal errors that must be corrected
18 prior to the moisture bond warranty being authorized
19 They are the front porch garage corner, left side of the
20 front porch and the window to right of the back door I
21 will obtain the complete report next Tuesday Hopefully
22 other areas will not need correction

23 Q And the report that he was saying he will obtain by
24 next Tuesday do you know what report that was?

25 A I do not know

1 Q Okay And as far as the moisture bond warranty
2 authorized had you told Mr Babaee about the moisture
3 bond warranty at that time? I did It was on to the
4 contract of sale

5 Q And did you give a copy of the moisture bond warranty
6 to Mr Babaee?

7 A I did not

8 Q Okay Was he aware of the terms and conditions of
9 the moisture bond warranty?

10 A I do not know that

11 Q Okay He did know there was a bond, correct?

12 A Well at the closing --

13 MR PHILLIPS Your Honor, I will have to object He
14 doesn't know what Mr Babaee knows

15 THE COURT Sustained He doesn't know what he
16 knows

17 Q I am going to hand you Defendant's exhibit no 19 and
18 ask you if you recognize Defendant's exhibit no 19?

19 A I do This is a letter of approval that I gave
20 Mr Babaee before closing and right at closing which is
21 typical of the way we do our warranty programs

22 Q And where it says on this document if you read it
23 says -- and did you see Mr and Mrs Babaee sign this
24 document?

25 A I did

1 Q And they signed it when?

2 A At the closing

3 Q When was the closing?

4 A The 18th if I am not mistaken

5 Q Okay You have a copy of the settlement statement up
6 here It was November 18, 2004?

7 A Whenever the closing was, right

8 Q And Defendant's exhibit that you're looking at --
9 this letter of approval -- 19 - you saw Mr and
10 Mrs Babae sign it, and it says -- What does it say? It
11 says I have read and understand this letter of approval
12 dated 11/11/04 and the moisture bond warranty terms and
13 conditions I accept the warranty and any exclusions
14 listed for the home at 133 Beaver Dam Columbia South
15 Carolina

16 At that time of the closing November 18 had the
17 Babaees received a copy of the terms and conditions of the
18 warranty?

19 MR PHILLIPS Objection, Your Honor

20 THE COURT If you know that

21 THE WITNESS I do not know that

22 Q Did you give him a copy?

23 A I did not

24 Q Okay

25 A Can I explain why?

1 THE COURT Yes, sir You may

2 THE WITNESS Usually, like at a closing even on a
3 termite bond --

4 MR BLACKBURN Uh-huh

5 THE WITNESS -- if we have a termite bond on the
6 house then it's -- you re welcome as a purchaser to call
7 the termite company and ask them what is in the termite
8 bond That's typically the way we do this or before So,
9 that s how it's handled

10 THE COURT It is handled the same way a termite bond
11 is handled?

12 THE WITNESS It is

13 THE COURT Do you have the actual warranty yourself?

14 THE WITNESS I do not Typically speaking the
15 warranty is just like on a termite bond the check goes to
16 the warranty company or to the termite company and then
17 the bond comes back That s how typically it works

18 THE COURT Did you give them anything in regards to
19 the moisture warranty?

20 THE WITNESS The only thing I gave with regard to
21 the moisture warranty was this piece of paper and I told
22 them they had to have the Moisture Free Warranty on the
23 house or I wouldn t have a closing as well as the termite
24 bond

25 Q So they had at closing the Moisture Bond Warranty in

1 place, right?

2 A Right They did Oh, yes

3 Q Okay I am going to hand you this document,
4 Defendant s exhibit no 17, and ask if you recognize this?

5 A I do

6 Q What is that document?

7 A This is a fax coversheet that I sent to the Maoli
8 family about the stucco repairs

9 Q And why were the stucco repairs necessary?

10 A Well they were -- certain things needed to be done
11 like there was a few places in question where -- that need
12 to be repaired So that s why we -- I tried to get
13 someone to do it and the only person that would do it was
14 a company called Realtor s Friend They were not
15 employed though That s why I sent this to them

16 Q Are you familiar with Realtor s Friend?

17 A I am

18 Q Do they do stucco repairs?

19 A They do

20 Q In South Carolina?

21 A They do

22 Q They fix stucco?

23 A They do

24 Q In paragraph two it says Charlie Smoak of Ace -- and
25 Ace is who?

1 A Ace is a -- was a stucco applicator and I assume he
2 still does stucco applicator I don't know what he -- but
3 he doesn't do houses anymore he said
4 Q Are they referred to as Ace Drywall?
5 A That's Ace is, uh-huh
6 Q It says Charlie Smoak of Ace Drywall would not bid as
7 his insurance company said he could not bid?
8 A That's correct
9 Q Are you aware of a bid that was ever prepared by Ace
10 Drywall?
11 A No
12 Q Okay And then the third paragraph says other bidder
13 Charles Bufano cannot bid until Monday as he must discuss
14 meter readings with Frank Clark is that right?
15 A Correct
16 Q Okay And what meter readings were you talking about
17 discussing with Frank Clark? Do you recall?
18 A I do not know that
19 Q And did Charles Bufano ever prepare a bid before the
20 closing?
21 A He did not
22 Q He did not Okay And these bids that you were
23 seeking, were they in response to the letter --
24 Defendant's exhibit no 4 - that Mr Babaee wrote to the
25 Maolis about the termite repair bond and the stucco and

1 saying, Hopefully, we can agree on necessary repairs and
2 close as agreed?

3 A They were

4 Q Okay Did you close as agreed?

5 A We closed the house on the day it was scheduled to
6 close which, I think, was the 18th

7 Q The eighteenth? Was that the first closing date for
8 the house?

9 A No No it was not We had a -- every now and then
10 we have a couple of delays

11 Q Why was the house closing delayed?

12 A We couldn't get everybody together

13 Q Let me ask you, Mr Lewis, Plaintiff s exhibit
14 no 30 - it should be right up there Right here Are
15 you familiar with plaintiff s exhibit no 30?

16 A I have seen it

17 Q You ve seen it?

18 A Uh-huh

19 Q How have you seen it? Who gave it to you?

20 A I think I got a copy of it -- I am not sure - a copy
21 of it from Fred Babae, but I am not sure about that

22 Q You re not sure that you got a copy of the CK
23 Services report?

24 A No I know that I had a copy I don't know where it
25 came from

1 Q I see

2 A I did not order it I don't order anybody s
3 inspections Sometimes I get them Sometime I don t

4 Q And this report was prepared for Mr Babae?

5 A Prepared for him?

6 Q Was it prepared for Mr Babae?

7 A Yes it says right here to him -- addressed to him
8 So, I assume he ordered it I was at the house a couple
9 of times when this report was being done, but I did not
10 question them because I didn't order it and I don t
11 interpret it

12 THE COURT So, let's move along

13 MR BLACKBURN I am just trying not to run afoul of
14 your ruling Your Honor

15 THE COURT Well, don t You re doing great

16 MR BLACKBURN Thank you Your Honor I appreciate
17 it

18 I am going to hand you Defendant's exhibit no 64 and
19 ask if you recognize exhibit number 54?

20 THE WITNESS This is a letter that I wrote to or
21 faxed to the bank paralegal named Angie Morton getting
22 ready for the closing It says, I hope to close no later
23 than Thursday the 18th

24 Q Okay And the third paragraph on exhibit number 44
25 says what? Although sales price is \$810,000 Russell and

1 Jeffcoat's commission is based on \$700,000, right?

2 A Correct

3 Q Why - Do you know why the price changed from 810 to
4 \$700 000?

5 MR PHILLIPS Your Honor Your Honor I would renew
6 my objection

7 THE COURT What was the question? For once I wasn't
8 paying attention

9 (Whereupon a bench conference was held)

10 THE COURT Your objection is sustained

11 Q What was the closing price at the first scheduled -
12 What was the price of the house at the first closing on
13 November 15?

14 THE COURT Well there was -- There was only one
15 closing

16 MR BLACKBURN Right You were going to close the
17 house on November 15 2008?

18 THE WITNESS No 2008 no

19 Q 2004 I'm sorry It's been a long day

20 A No There was only one closing

21 Q There was only one closing?

22 A Right, only one closing

23 Q But it had to be rescheduled, right?

24 A It was like -- closings only occur one time That's
25 when the check is passed and this closing was the 18th

1 and we had other we had originally tried to close on
2 November 8 but things got -- every now and then we have
3 delays on closings --

4 Q Right

5 A -- on different reasons

6 Q Right

7 A So that's -- It closed on the 18th

8 THE COURT Let me just make sure that we're all
9 within my ruling As a result of all of the negotiations
10 from top price to the offers et cetera when you finally
11 closed what was the closing price?

12 THE WITNESS The closing price was 700 000

13 Q Was there another closing that had been scheduled
14 before November 18 2004?

15 A No There is never -- You can only schedule one
16 closing

17 Q Right

18 A You can have one closing

19 Q You had one closing but was there one scheduled that
20 didn't take place before November 18?

21 A There was

22 Q There was What was the purchase price of the house
23 at the one that didn't close on -- before November 18?

24 A (No response)

25 Q And I'll hand you a document and ask if you can

1 identify it, Defendant's exhibit no 65?

2 A This is a fax I sent to the bank

3 Q Uh-huh

4 A Which showed the price of the house to be 700 and it
5 says right here first page contract revised to 700

6 That s all this says

7 Q Okay And this was November -- What was the date of
8 this document?

9 A 11/17

10 Q Oh-four?

11 A Oh-four

12 Q And are you familiar with the contract price at the
13 first scheduled closing November 15 2004?

14 MR PHILLIPS Your Honor, it s been asked and
15 answered

16 THE COURT It has and he's talked about the
17 negotiations and that it, ultimately, ended up at seven
18 hundred

19 MR BLACKBURN Okay

20 THE COURT Let s move along

21 MR BLACKBURN If I can beg the court's indulgence,
22 I think I am just about through

23 THE COURT Thank you

24 Q Mr Lewis, do you normally as your course of business
25 include a moisture bond warranty when you sell a synthetic

1 stucco home?

2 A Yes

3 Q About how many synthetic stucco homes have you sold
4 in your experience in Columbia?

5 A Fifteen

6 Q Fifteen And have you ever had any problems arise
7 with a moisture bond warranty on the homes you sold?

8 A No

9 MR PHILLIPS Objection, Your Honor

10 THE COURT That's totally irrelevant Sustained

11 Q Why did you issue a bond on the Maolis's house?

12 MR PHILLIPS Your Honor objection He doesn't
13 issue bonds

14 Q Why did you suggest that the Maolis have a moisture
15 bond issued --

16 THE COURT Not the Maolis the plaintiffs

17 MR BLACKBURN Yea well the Maolis --

18 THE COURT Had it, but when they sold it

19 THE WITNESS Because I don't sell homes that are
20 synthetic stucco or hard stucco without a moisture bond
21 and a termite bond That's the way it is

22 Q Do you live in a synthetic stucco home?

23 A I do

24 Q Do you have your home inspected?

25 A I do

1 THE COURT No, sir No, sir His home doesn't have
2 anything to do with this litigation

3 MR BLACKBURN The reason I asked that Your Honor -

4 THE COURT Well --

5 (Whereupon, a bench conference was held)

6 Q Mr Lewis did you have ever any contact with the
7 Babaees after they bought the house?

8 A I did once

9 Q Tell me why they contacted you

10 A They asked an opinion about a gate at their house

11 Q And that's the only conversation you ever had?

12 A It is

13 MR BLACKBURN Thank you Mr Lewis I appreciate
14 your time

15 THE COURT Mr Lewis hang on one second The rules
16 allow Mr Babae s lawyers to ask you a few questions if
17 he wants to

18 MR BLACKBURN That's what I was going to tell him

19 Please answer any questions that Mr Phillips may
20 have Thank you

21 CROSS-EXAMINATION

22 BY MR PHILLIPS

23 Q Good afternoon, Mr Lewis My name is Sam Phillips
24 We've never met but we ve spoken on the phone a couple of
25 times

1 A Thank you Good to see you

2 Q Nice to put a face to the name You've been talked
3 about this week so your ears might have been warm

4 A Okay

5 Q I just have a couple of quick questions for you Not
6 only have you sold a lot of synthetic stucco homes, you've
7 sold a lot in the Wildewood neighborhood --

8 MR BLACKBURN Objection Your Honor

9 THE COURT Sustained You objected to it while ago
10 Why open it back up? Let's stick with this house

11 MR PHILLIPS Yes Your Honor

12 Let me show you a fax Do you recall preparing a fax
13 -- Let me strike that and ask you another question Do
14 you know who Charles Strickland is?

15 THE WITNESS I do

16 Q Do you recall Mr Strickland receiving a copy of the
17 CK report?

18 A I do not

19 Q Do you recall having any conversations with
20 Mr Strickland about revising the report he had prepared?

21 A No

22 Q You said that you -- In your course of business you
23 stay out of the maintenance and the inspections You let
24 your clients handle those?

25 A I did not order any inspections I don't interpret

1 inspections I don't know anything about them other than
2 what I see

3 Q And in this case you represented the Babaees and the
4 Maolis who were selling that house?

5 A Correct

6 Q Is it fair to say you were a conduit for information
7 going back and forth between them?

8 A Yes

9 Q And this transaction was four years ago?

10 A Yes

11 Q Is it possible that you passed on some information
12 back and forth that you may not have a recollection of
13 here?

14 MR BLACKBURN I object Your Honor This is pure
15 speculation -- possible

16 THE WITNESS It's possible

17 THE COURT I am going to let him answer it We all
18 forget things

19 THE WITNESS It is possible I have forgotten
20 something in my four years

21 Q When it comes to scheduling closings, I mean,
22 people's schedules change, that sort of thing Is delay
23 in a closing anything that's not typical?

24 A It is fairly not typical to delay a closing

25 Q Fairly not typical?

1 A Not typical If the closing is November 27, my
2 birthday, that's when it closes Now there are some
3 people that may have illness, can't do it, or we can't get
4 a bank Sometimes a bank does not have the money to do it
5 right that minute

6 Q That's probably more common now Sir, let me ask
7 you you said the bond process -- the bonds are paid for
8 at closing and then they show up in the mail sometime
9 after closing?

10 A I assume so I do not order the bond We -- The
11 bond -- The check for the bond is sent to wherever it
12 is - termite company, moisture company That's where the
13 check goes

14 Q And there was a check sent for a termite bond in the
15 Babae closing?

16 A It was the Clark's Termite folks put a bond on the
17 home

18 Q And you know Mr Clark, don't you?

19 A I do

20 Q Mr Clark has a pretty big termite company,
21 especially out in your neighborhood?

22 A He does

23 Q Did you ever see a copy of the Clark termite bond?

24 A I didn't see the bond I did not see the bond I
25 saw the termite -- what we call the letter the CL100

1 letter

2 Q And that -- Mr Clark's termite bonds protect the
3 Babae's house against termite damage, doesn't it?

4 A His bond does, yes

5 Q Does moisture bonds that you sell they're supposed
6 to protect the house against moisture and repair moisture
7 damage, aren't they?

8 A That's what it says they're supposed to do --
9 moisture free bonds

10 Q Just like a termite bond?

11 A I would assume They don't take care of termites,
12 though

13 Q Do they take care of moisture?

14 A They do They do

15 Q They do?

16 A They do

17 Q And when your clients -- and the Babae just like the
18 Maolis are both your clients -- if they had questions
19 about termite bonds or moisture bonds you would tell them
20 about them wouldn't you in your experience as a realtor?

21 A I ask them to always call the supplier -- the termite
22 company and the moisture company I don't interpret any
23 bonds I don't want to explain any bonds because I always
24 get it wrong

25 Q You give them a phone number?

1 A And that's it They call it

2 Q So, you ever seen the terms and conditions of a
3 Moisture Free Warranty bond?

4 A I have read it In the last couple of years I have

5 Q But that's not something you hand out to your
6 clients?

7 A Not typically

8 Q And do you recall providing any such document to the
9 Babaees?

10 A I don't recall providing them with that

11 MR PHILLIPS Sir I appreciate it It was nice
12 meeting you No further questions

13 THE WITNESS Thank you

14 THE COURT Mr Blackburn?

15 MR BLACKBURN None, Your Honor

16 THE COURT All right Mr Lewis, you may leave
17 Thank you for coming

18 THE WITNESS Thank you sir

19 THE COURT Did you get an invitation to come?

20 THE WITNESS I did I got an invitation

21 THE COURT Well you're uninvited now Thank you
22 Does Whitmore work with you?

23 THE WITNESS He's in competitive firm, but we've
24 been friends for 40 years I was in the army reserve with
25 him and he tried to get me to be a realtor 40 years ago

1 and I waited eight years

2 THE COURT Tell him I said hello

3 THE WITNESS I will Thank you, sir

4 THE COURT One more witness?

5 MR BLACKBURN The next one -- The one I - Well
6 one more, but it's going to take probably 45 minutes or
7 so

8 THE COURT That's fine I just wanted the jury to
9 hear how long it'll take

10 MR BLACKBURN I hope Your Honor

11 THE COURT I am just cutting up with you You can
12 take as long as you need

13 All right We're going to break for the afternoon

14 MR BLACKBURN One point Sam, that I could make I
15 don't want to take the jury's time --

16 THE COURT Well don't take it Come up here and
17 talk with me

18 MR BLACKBURN But I do want to address -

19 THE COURT No no

20 (Whereupon, a bench conference was held)

21 THE COURT All right We re going to break for the
22 evening If all goes according to plans, even if we have
23 two hours of testimony in the morning we will start the
24 arguments and my charge shortly thereafter I'll bring
25 lunch in You can eat while you deliberate We should be

1 through tomorrow We can have a different lunch if you'd
2 like a different sandwich

3 So, having said that -- These two are the hardest
4 people to please I have to work with them everyday
5 She's getting married in April

6 THE COURT REPORTER June

7 THE COURT June She s a lot happier She's a
8 great court reporter

9 Let s start at 9 30 We re going to stay here now
10 for a while to get the motions and all out of the way so
11 we won't hold y'all up in the morning Thank y all
12 Y'all have been great You have been paying attention
13 See you in the morning Don't deliberate Don t discuss
14 Thank you Everybody else remain seated

15 (Whereupon the jury exited the courtroom at 5 07)

16 THE COURT Does the Plaintiff have any motions it
17 would like to make at the conclusion of your case?

18 MR PHILLIPS No, Your Honor I do not

19 THE COURT And I would assume, Mr Blackburn, you
20 do?

21 MR BLACKBURN Yes, Your Honor, I do

22 THE COURT Without making the motions, tell me what
23 the motions will be

24 MR BLACKBURN The motions will be to dismiss - for
25 a directed verdict to dismiss their claims and if you give

1 me five minutes to get my stuff together

2 THE COURT Five minutes?

3 MR BLACKBURN Well two minutes

4 THE COURT Let me ask you this I assume that
5 you're going to make a motion for directed verdict as to
6 the first cause of action for fraud?

7 MR BLACKBURN Yes, sir

8 THE COURT The second cause of action for
9 constructive fraud?

10 MR BLACKBURN Yes sir

11 THE COURT The third cause of action on negligence,
12 negligent supervision?

13 MR BLACKBURN Yes, sir

14 THE COURT The fourth cause of action for negligent
15 misrepresentation?

16 MR BLACKBURN Yes Your Honor

17 THE COURT For the violation of the South Carolina
18 fair trade practices act?

19 MR BLACKBURN Yes, Your Honor

20 THE COURT And then they have another cause of
21 action for breach of warranty

22 MR BLACKBURN I am going to direct a verdict for
23 that Your Honor -- make a motion

24 THE COURT Well, y'all have had a long day I would
25 like to think -- I would like to do this, perhaps Let's

1 be back at 8 45 in the morning to do the motions That
2 gives you tonight to catch your breath and get organized
3 Let me just sort of give y'all a precursor for what I'm
4 thinking From my listening to everything, reviewing
5 everything, Mr Phillips --

6 MR PHILLIPS Yes, Your Honor

7 THE COURT -- it appears he may be successful in his
8 directed verdict on the fraud, negligent
9 misrepresentation -- everything except for the breach of
10 express warranty I am not saying that's how I am going
11 to rule but that's how I am thinking It seems like to
12 me that we got a breach of contract case At this stage
13 of the game I don't think that the evidence has shown
14 that -- The evidence could actually be viewed one way or
15 the other as far as the breach of express warranty but I
16 don't think that there's been enough evidence to warrant
17 going to the jury on fraud and all of those other causes
18 of action - unfair trade practices, et cetera

19 That's just how I feel now so you'll know how I feel
20 over the evening That leaves us with a clean express
21 warranty breach of express warranty case I think that's
22 what this is But, that's how I feel Y'all prepare your
23 arguments in accordance with that

24 Mr Blackburn, the way I do that when I am leaning
25 I'll let you briefly put the motions on the record but my

1 questions are going to go to him to tell me why I
2 shouldn't do it, basically

3 Now in that regard, do y'all have any proposed jury
4 charges you want me to consider?

5 MR BLACKBURN We do Your Honor, depending on --

6 THE COURT Well, obviously, depending on my rulings

7 MR BLACKBURN Right

8 THE COURT What I'd like for you to have for me
9 first thing in the morning is particularly your jury
10 charges on the warranty cause of action

11 MR BLACKBURN Yes sir

12 THE COURT And assuming that it goes to the jury on
13 the verdict - Strike that Assuming it goes to the jury
14 on the cause of action for express breach of warranty you
15 can both prepare proposed verdict forms and that would be
16 simple

17 MR BLACKBURN Proposed verdict forms?

18 THE COURT Well it is I find for the Plaintiff
19 blank dollars actual damages or we find for the Defendant,
20 basically what it would be

21 Before we leave this afternoon the co-Defendant who
22 would be Preferred Home Inspections, Inc , I have looked
23 through the file There is an order for default against
24 them?

25 MR PHILLIPS We filed a motion to hold them in

1 default Your Honor

2 THE COURT There's never been a damages hearing or
3 anything?

4 MR PHILLIPS No

5 THE COURT There is no judgment?

6 MR PHILLIPS We just asked for an entry of an order
7 of default Then, of course we'd schedule the damages
8 hearing pursuant to the rule

9 THE COURT They just never answered?

10 MR PHILLIPS Never answered, Your Honor and we've
11 had to litigate We've filed lawsuits against
12 Mr Strickland and his company before and we've sent a
13 courtesy copy of the complaint to his former -- his
14 carrier's lawyer in former cases and there's been no
15 response

16 THE COURT All right Now in the morning you've
17 got one -- your witness is?

18 MR BLACKBURN Mr McClure

19 THE COURT And he did the?

20 MR BLACKBURN He is my expert Your Honor

21 THE COURT He didn't do any of the inspections?

22 MR BLACKBURN He did He went out there with
23 Mr Burton He was actually hammering that thing in the
24 test substrate

25 THE COURT So you, basically, are going to put him

1 up, qualify him, and he can testify about what he found
2 out there and what his opinions are and what he thinks --

3 MR BLACKBURN Yes, as well as his opinions on the
4 other reports

5 THE COURT I am not going to let you pit witnesses
6 like that I have not let any of you do it all day long
7 That's for --

8 MR BLACKBURN That's for the jury

9 THE COURT -- the jury to determine If judges --
10 if the rules allowed us to let every expert say how bad
11 the other experts are we'd be here forever That's why
12 we have jurors They determine believability or
13 credibility

14 So I really think unless y'all really get
15 long winded in the morning we'll be through with testimony
16 in an hour hour and a half Then I am going to let you
17 make an explanation about in the Plaintiff's deposition
18 when he produced his records to you -- the records that he
19 produced is what you put up on the board and I will tell
20 the jury neither one of y'all are trying to mislead
21 anybody That's just Mr Phillips had the records that
22 your guy put in and you had the records that he put in and
23 that's for them to decide whatever weight they want to
24 give it We can do that very quickly

25 MR PHILLIPS Your Honor, if I might, though, I

1 mean, I think that goes -- Mr. Burton testified very
2 clearly. I asked him specifically is that a
3 representation of the document you saw and he said yes

4 THE COURT You can argue that all day long in
5 closing argument -

6 MR. PHILLIPS Thank you Your Honor

7 THE COURT -- as well as Mr. Blackburn I am just
8 going to simply tell the jury that neither one of my
9 lawyers are trying to -- my lawyers are trying to
10 mislead anybody. The depositions of the Defendant showed
11 that particular exhibit and I am going to allow
12 Mr. Blackburn to show what the deposition exhibit of
13 Mr. Babaee showed and that's just all I am going to
14 comment on. The jury gives it whatever weight if any,
15 they want to give it

16 MR. PHILLIPS And I --

17 THE COURT Y'all can argue it until your stucco
18 starts to melt

19 MR. PHILLIPS I just want to make sure it's on the
20 record. I am not saying that Mr. Blackburn had anything
21 to do with it. I misinterpreted what it said. I thought
22 it would kind of go to the witnesses --

23 THE COURT I am just going to give him that
24 opportunity and tell them why

25 MR. BLACKBURN Your Honor if I can call my client

1 to confirm whose handwriting that is on that document on
2 the exhibit to his deposition -- you know Mr Phillips
3 pulled out the report from his deposition and if I can
4 call Mr Burton to ask him does he recognize that writing,
5 and if he says that's his writing and explain why it's
6 there -- if I am allowed to do that Your Honor

7 THE COURT You're still in your case in chief and I
8 am not limiting you to any witnesses You can call
9 whoever you want to and ask them whatever you want to

10 MR BLACKBURN Thank you Your Honor

11 THE COURT It might just make it smell a little
12 more

13 MR BLACKBURN I know

14 THE COURT I don't mean smell It might draw
15 attention to it more Who knows? I don't know

16 MR BLACKBURN I'll sleep on it tonight

17 THE COURT Sure and discuss it with your client

18 MR BLACKBURN I will

19 THE COURT Anything else the I can for any of you?

20 MR BLACKBURN I don't believe so

21 MR PHILLIPS Nothing further from the Plaintiffs,
22 Your Honor

23 THE COURT Well Mr Phillips I am, obviously,
24 going to listen to you very carefully in the morning, but
25 you see where I am coming from on all of the causes of

1 action

2 MR PHILLIPS Yes, Your Honor I understand

3 THE COURT All right Thank y'all Y'all have a
4 very pleasant evening I'll see you at 8 45 in the
5 morning

6 (Whereupon, the proceedings were concluded for the
7 day and were reconvened on November 20 2008 as
8 follows)

9 THE COURT All right The Plaintiff had no motions
10 I assume Do you?

11 MR PHILLIPS No Your Honor just one concern The
12 excluded bit of evidence it was blown up into a
13 poster-size exhibit I think there were two versions of
14 it, and my client noticed it floating around the courtroom
15 during the trial yesterday We'd just like to have those
16 removed from the courtroom

17 THE COURT Well, I am not going to remove them from
18 the courtroom I'll put them back over there

19 MR BLACKBURN They've been over there

20 THE COURT All right Good morning

21 Mr Sheftman, are you now third chair?

22 MR SHEFTMAN We're specialized, Judge

23 THE COURT That's a good slot for you

24 Mr Blackburn?

25 MR BLACKBURN Your Honor, I have some exhibits that

1 I would like to go through in my closing argument

2 THE COURT No, sir We're doing motions now

3 MR BLACKBURN Yes, sir

4 THE COURT He doesn't have any Do you have any at
5 the close of the Plaintiff's case?

6 MR BLACKBURN Right And we made our motion on the
7 record yesterday that I made a motion for a directed
8 verdict and you -- You talking about that yesterday?

9 THE COURT I don't think you made the motion I
10 assume you're going to move for direction of verdict on
11 all causes of action in the complaint?

12 MR BLACKBURN Yes sir I am

13 THE COURT Here's what I would like to do I have
14 read your memorandum I would like -- or your pretrial
15 brief -- I'd like for you to make that part of the
16 record --

17 MR BLACKBURN Okay

18 THE COURT -- as to your argument on all causes
19 except for breach of warranty I'd like to hear your
20 argument as to why a directed verdict should be issued on
21 breach of warranty

22 MR BLACKBURN Your Honor, may I approach?

23 THE COURT Just make that a Court's exhibit That
24 will not go to the jury

25 THE COURT REPORTER Okay

1 (Whereupon, Court's Exhibit No 1 was marked for
2 identification only)

3 THE COURT Now, Mr Blackburn tell me -- You're
4 moving for direction of a verdict on breach of warranty
5 Just make your motion if you would please

6 MR BLACKBURN I am going to make a motion Judge,
7 for directed verdict on the Plaintiff's cause of action
8 for fraud

9 THE COURT No sir

10 MR BLACKBURN Just breach of warranty?

11 THE COURT Please listen to me Mr Blackburn

12 MR BLACKBURN Okay

13 THE COURT I am going to accept your brief as your
14 argument on all causes except for breach of warranty

15 MR BLACKBURN Okay

16 THE COURT That s good news for you

17 MR BLACKBURN Thank you Yes, sir

18 THE COURT Now let me hear you on the breach of
19 warranty

20 MR BLACKBURN For breach of warranty Your Honor,
21 if I may -- For breach of warranty we want to move to
22 direct a verdict on that cause of action because the
23 Plaintiffs failed to establish the elements of breach of
24 warranty, the breach of express warranty The existing
25 warranty -- We understand that, Your Honor

1 THE COURT Well, there is no question there is a
2 warranty in place in this trial

3 MR BLACKBURN That's right And the breach by
4 failure to conform to any terms of the warranty Your
5 Honor, I want to make a motion based on the Plaintiffs
6 would not allow us to comply with the terms of the
7 warranty My client wasn't given the opportunity to cure
8 the terms when they found out about issues when Mr Babae
9 contacted him Mr Babae breached the warranty Your
10 Honor

11 We did not breach the warranty, but when we found out
12 about the issues on January 11 2006 when Mr Babae sent
13 the report he sent what I call redacted -

14 THE COURT Whatever he sent, he sent

15 MR BLACKBURN He sent -- Yea that report

16 THE COURT Let me ask you this When he sent it as
17 I understand under the terms of the warranty your client
18 -- Strike that There was sort of two ways to remedy the
19 warranty You could go at it and make the repairs --

20 MR BLACKBURN Right

21 THE COURT - or if the homeowner did not want the
22 repairs then there would be a monetary compensation

23 MR BLACKBURN There was a little bit of both, Your
24 Honor

25 THE COURT Or a little bit of both

1 MR BLACKBURN Yes, sir

2 THE COURT And you wanted to do the repairs They
3 didn't want to and when you tendered the money to them
4 they refused to accept it?

5 MR BLACKBURN They refused to accept it Yes, sir,
6 Your Honor

7 THE COURT All right

8 MR BLACKBURN What I mean by a little bit of both
9 is like Mr Burton testified yesterday the terms of
10 warranty called for \$500 per occurrence and per the
11 Blackburn report that's been introduced by I think it s
12 Defendant s exhibit no 27 the Blackburn report identified
13 five areas that that could qualify under the terms of the
14 warranty

15 THE COURT And y all offered them \$2,500?

16 MR BLACKBURN Yes, your honor and part of the
17 warranty like Chris Burton said yesterday is we will go
18 out and hire our own independent contractor and pay the
19 independent contractor if we feel there are other repairs
20 beyond 2500

21 THE COURT And of course the Plaintiffs contend
22 that there are additional repairs that are needed, i e ,
23 they contend that the house needs to be, for lack of a
24 better term, stripped and reclad I think that's what it
25 called

1 MR BLACKBURN Exactly

2 THE COURT Well, doesn't that create an issue of
3 fact for the jury to determine? Number one we all agree
4 that there is a warranty, but number two whether or not
5 your client - Well strike that -- whether or not the
6 Plaintiff has proven by the preponderance of the evidence
7 that your clients breached the warranty and whether or
8 not -- if they breached the warranty whether or not they
9 refused and you have argued whether or not they refused to
10 allow your client to remedy the situation and if the jury
11 finds that they refused to do that, then obviously you
12 would win, but maybe they say that the breach was more
13 that what you offered to pay and they are entitled to have
14 it reclud

15 Aren't those all issues of fact that I cannot rule on
16 it as a matter of law?

17 MR BLACKBURN I would tend to agree with Your
18 Honor but as far as my client's willingness to step up to
19 the plate and comply with the terms of the warranty the
20 Plaintiffs would not allow them to The Plaintiffs just
21 wanted \$20,000 which was the limit of the warranty of the
22 first year and they said just give us \$20,000 and we'll go
23 away, and see but that's not the way the terms of the
24 warranty work, Your Honor I understand that could be a
25 question of fact

0800

1 THE COURT You have come a long way I think you're
2 going to bump out a lot of causes of action that's going
3 to leave us with a breach of warranty case but in all due
4 respect to you and your client at this stage of the game
5 Mr Burton I have to view the evidence in the light most
6 favorable to the Plaintiff That's the way we do it at
7 this point in the game

8 So, doing that I just think it's a factual issue as
9 to whether or not there was a breach and whether or not
10 the Plaintiffs refused to let you comply with the
11 warranty, whether or not they were injured, and if they
12 were how much I just think that's all for the jury to
13 decide, and I will respectfully deny the motion for
14 directed verdict on the breach of warranty cause of
15 action

16 MR BLACKBURN If I may and I understand your
17 ruling, Your Honor just for the record, the three
18 elements of the breach of warranty as far as the damages
19 would you like the hear that my position on the damages?

20 THE COURT I assume you are going to say they
21 weren't damaged

22 MR BLACKBURN They were not damaged by -- They were
23 not proximately damaged The damages they suffered were
24 not proximately caused by the breach

25 THE COURT Well that is a question of fact They

1 have introduced testimony that says that the only way it
2 can be repaired or be made dry would be to be strip and
3 reclad That's a question of fact So, I respectfully
4 deny your motion for directed verdict on that Thank you
5 You may be seated

6 MR BLACKBURN Thank you, Your Honor

7 THE COURT Mr Phillips?

8 MR PHILLIPS Yes Your Honor

9 THE COURT I will be more than glad to hear you on
10 your causes of action other than breach of warranty i e
11 the unfair trade practice act, your various fraud actions
12 breach of contract accompanied by fraudulent intent and
13 any other actions in the complaint

14 MR PHILLIPS Yes Your Honor At this time with
15 regard to the actions that Your Honor just mentioned I d
16 like to withdraw all of them except fraud and the South
17 Carolina Unfair Trade Practices causes of action

18 THE COURT Very well Tell me why I should not
19 direct a verdict on the fraud cause of action and the
20 unfair trade practice

21 MR PHILLIPS I will, Your Honor, and if I might I'd
22 like to hand up a copy of a case Devant versus Carlton
23 Motors Incorporated It is a decision of our court of
24 appeals and I believe it's instructive on both the fraud
25 and the unfair trade practices claim Your Honor the

1 Devant case dealt with whether there was a factual issue
2 to go to a jury on a fraud cause of action and an unfair
3 trade practices cause of action, and basically and
4 briefly, the facts of that case were Ms Devant was going
5 to purchase a limited edition mercedes and she had to put
6 in an order for that mercedes and she was told by the
7 dealer -- it was a mercedes car It was a Mercedes Benz
8 program but the local Greenville dealer which is the
9 Defendant Carlton Motor cars, they were to administer a
10 program for these first 7000 car buyers and and Ms Devant
11 is evidently a collector of cars and so she wanted to not
12 only place an order for the car she was to get promotional
13 materials from mercedes while she waited and the program
14 was designed by mercedes to keep its customers wanting the
15 car and interested in the car so they wouldn't go out and
16 buy some other car while they had to wait for these
17 limited edition cars to be manufactured

18 Now, the program itself was administered by the
19 Carlton Motor Cars and Carlton Motor Cars said yea we'll
20 order you this car and we'll do so in such a manner that
21 you get the promotional materials and it didn't happen
22 She got the car, but she didn't get the promotional
23 materials, and, in fact the Carlton Motor Cars actually
24 tried to rescind their deal with Ms Devant and then when
25 she protested they reinstated it

0803

1 So, we have actions very similar to what's going on
2 here We have a program that's advertised that s
3 administered instead of by two entities only by one and we
4 believe that the representations were not led up to I'll
5 talk about them specifically

6 THE COURT Well, now, what representation do you
7 claim -- What representation do you rely on in your cause
8 of action for fraud? What is the representation? That
9 they would maintain -- that they would have a dry home?

10 MR PHILLIPS Yes, Your Honor

11 THE COURT In the pamphlet?

12 MR PHILLIPS In this pamphlet they say they will
13 guarantee the home will remain dry It will guarantee
14 that it will stay dry today and for the life of the
15 warranty You've heard all that Your Honor

16 THE COURT If they come up with some problem they
17 will make it dry by their warranty under the terms of
18 their warranty

19 MR PHILLIPS That s correct, Your Honor but
20 they -- I think that s the easy part of it, but there are
21 other representations in this brochure and it comes down
22 to the three-step process that you've heard me harp on
23 The process is you get an inspection by a certified
24 moisture free warranty person That inspection reveals
25 problems just like a termite inspector You come out to

1 your house and you find you have termites You don't have
2 a bond The termite is not going to bond the house He
3 doesn't have an obligations to fix the house but what a
4 lot of the termites companies do are the same thing that
5 Moisture Free Warranty --

6 THE COURT They'll take exceptions

7 MR PHILLIPS Exactly You fix it You fix your
8 problem and you do it - and a termite company -- you
9 usually hire the termite company and in Moisture Free
10 Warranty's case they don't have repair contractors So,
11 you hire someone to do the repairs properly We'll come
12 out and look for it and now we'll take over it Just
13 like a termite bond Once we fix it we're -- and once we
14 bond your termite-free house --

15 THE COURT Then the warranty comes into place

16 MR PHILLIPS Yes sir

17 THE COURT And they have to live up to the terms of
18 the warranty

19 MR PHILLIPS That's right What this brochure does
20 not explain is that the repairs that you undertake to
21 repair your house and get rid of the moisture damage to
22 bring it up to code, that's not what they pay for to keep
23 it dry It is different It classic bait and switch
24 That's why Mr Burton only testified about the 700 claims
25 he had and then he went on to talk about the millions of

1 dollars that his customers pay to fix their houses I
2 don't pay that They pay it They pay it upfront and
3 they're promised in this brochure and it is a reasonable
4 expectation when Moisture Free Warranty says, quote The
5 Moisture Free Warranty is a seal of approval that the
6 house is dry and will stay dry during the term of the
7 warranty or we'll make it dry They don't -- and then the
8 terms and conditions show up sometime after the purchase
9 is made after the deal is done after the house is
10 closed, after the bonds are issued at the closing just
11 like the termite bond, and you find out that what was -
12 what it takes to get the warranty is not what the warranty
13 will do for you That is -

14 THE COURT What -- you know there are, what nine
15 elements of fraud, basically?

16 MR PHILLIPS There are, Your Honor I'll go
17 through them very quickly

18 THE COURT Well, I think you've shown that there is
19 a representation It is a material fact for the jury to
20 determine whether or not it's false whether or not it's
21 material but what evidence do we have in the record that
22 Mr Burton or his company had knowledge of its falsity or
23 reckless disregard of the truth or falsity? I mean, I
24 haven't seen any testimony in the record that Mr Burton
25 or his company was reckless or outright knew that what

1 they were claiming was to be false I mean I --

2 MR PHILLIPS Well, Your Honor the first thing is I
3 would say the reckless disregard as Mr Burton -- as I
4 discussed with Mr Burton during his testimony, the
5 average homeowner doesn't understand moisture warranty
6 content

7 THE COURT I agree with that

8 MR PHILLIPS Okay? And to them a dry house is a
9 dry house, but this brochure - It says several things
10 that are knowingly false Mr Burton was part of the
11 Dryvit class action settlement He makes a big deal of
12 this in his brochure We're trusted by the court's
13 contractors and homeowners nationwide and then they talk
14 about the Dryvit systems -- the largest manufacturer of
15 EIFS and how they had this class action settlement and we
16 were chosen -- quote The professionals of Moisture
17 Warranty Corporation were selected to oversee the
18 inspections and repair mandated by this class action
19 settlement

20 Your Honor, he stood here and he told you that he
21 changed the terms of his Moisture Free Warranty based on
22 the lawyers -- the plaintiff's lawyers asking him to lower
23 the moisture standard to something that was dry It's
24 wrong and it is knowing misrepresentation to say to people
25 we were selected by the Dryvit class action because of our

1 expertise, our knowledge, and our professionalism to a
2 advertise one program and then to give you something else
3 They know it They knew it was wrong then The jury has
4 heard the testimony and that's the knowing falsity

5 Your Honor, if you believe as a matter of law - and
6 you've certainly have the ability to do it but I would --
7 I would emphasize to you that if you direct a verdict on
8 the unfair trade practices claim you are saying that these
9 representations in here about being the administrator of
10 this class action, about having qualified repair people
11 when we heard evidence --

12 THE COURT You haven't brought anybody in here and
13 testified that they're not the administrators under the
14 class action for the warranty

15 MR PHILLIPS Your Honor no I didn't I am not
16 contesting They were the administrators but what
17 Mr Burton testified to is that it was a different
18 program It was a different program than what is
19 advertised in this brochure and what they are saying are
20 the terms and conditions that the Babaees must live by and
21 if you direct a verdict on the South Carolina Fair Trade
22 Practices you're saying that this is mere puffing and that
23 this brochure has no legal significance and I just would
24 submit to you --

25 THE COURT Well I am saying that under the unfair

1 trade practice you have to put in testimony that what
2 they've done is offensive to public policy which is
3 immoral, unethical, or oppressive

4 MR PHILLIPS Your Honor --

5 THE COURT Let me finish

6 MR PHILLIPS I'm sorry

7 THE COURT I just don't think we've had -- This case
8 just has not risen to the level of something that is
9 immoral, unethical or that unfair trade practice or
10 oppressive I mean, what -- I patiently or impatiently
11 have sat through this thing for three days and it's just a
12 typical breach of warranty case to me

13 MR PHILLIPS No Your Honor --

14 THE COURT These people hadn't I don't think --

15 MR PHILLIPS Your Honor it is the capability of
16 repetition It is the fact that I listened to testimony
17 from Mr. Burton that in half of the instances the people
18 he sells these warranties to are home buyers

19 THE COURT Well who else would it be?

20 MR PHILLIPS Home sellers, Your Honor -- people who
21 own the home

22 THE COURT I understand Sellers who are in the
23 home They're selling them warranties They've sold more
24 -- It's capable of repetition and that is -- With all due
25 respect, Your Honor that's the focus of the South

1 Carolina Unfair Trade Practices Act There are the cases
2 that talk about it being an empowering citizens to act as
3 independent attorney generals to go after practices that
4 are capable of repetition and there is caselaw that states
5 that once is enough

6 THE COURT Well, what do you think about the
7 argument made by the Defendant that you've taken the
8 position that this is an insurance matter and that
9 insurance is not --

10 MR PHILLIPS Your Honor --

11 THE COURT -- under the uniformed Unfair Trade
12 Practices Act?

13 MR PHILLIPS And that's a correct statement of law,
14 but that s an incorrect statement of Judge Cooper's order
15 and it s silly If -- This is is not an insurance policy
16 It is not regulated by the Department of Insurance and if
17 were I would move to amend my complaint to conform to the
18 evidence and we'd go forward on bad faith, but I didn't
19 say that What I said in my brief was and what Judge
20 Cooper said in his order was is that this is like an
21 insurance policy because it's not like a traditional
22 warranty I didn't buy my cellphone and it was delivered
23 to me with a warranty for the product It is something
24 you purchase like you purchase car insurance for and my
25 only point was that in my unconscionability argument you

1 can't -- you can't put in an arbitration provision in an
2 insurance policy It is unconscionable to have the
3 equivalent

4 I didn't say it is an insurance policy Judge Cooper
5 didn't say it I said it was like an insurance policy
6 It is like an insurance policy So, I mean, if this was
7 an insurance policy and it is approved by the South
8 Carolina Department of Insurance you know having heard
9 about the stamp of the Georgia Department of Insurance
10 repeated testimony on that they would have a South
11 Carolina stamp but it's not an insurance thing If it
12 were I would have argued bad faith, and if -- you know,
13 if that were - if that had been established by
14 testimony -- and, Your Honor there is no testimony that
15 this has anything to do with insurance, but if there were
16 then I would simply move to amend my complaint to conform
17 to the facts of the case

18 THE COURT I'll accept your argument on that -- that
19 it's not insurance What else do you want to tell me?

20 MR PHILLIPS Your Honor, it is as my colleague
21 reminded and I believe he is right the keystone of this is
22 the potential for repetition You heard Mr Buddy Lewis
23 who they called as a witness get up there and say pretty
24 typical of what real estate agents say, Hey I don't know
25 anything about maintenance I don't know anything about

1 inspections They have liability issues

2 Again this brochure -- It states it clearly Your
3 Honor Realtors look to the Moisture Free Warranty to
4 give them the protection they need to sell these houses,
5 and Mr Lewis who is a nice man who has sold a lot of
6 expensive houses who lives in the Babaee's neighborhood
7 and represented him, he said it all Hey, I don t talk
8 about these houses Because he knows He knows that
9 they're bad

10 He has to give them something to say I heard about
11 stucco, I know it's bad I am no expert but here is the
12 Moisture Free Warranty You re covered Your house is
13 dry and it will stay dry under the terms of the warranty
14 It's going to be repeated They sell these things It s
15 got to stop and only a money judgment from this court is
16 good because this isn t insurance It's not regulated by
17 the Department of Insurance

18 The bait and switch wouldn t work there Georgia has
19 different laws Georgia has different building
20 techniques You heard Mr Flaherty testify to it They
21 don t use this cavity face insulation that we use So,
22 every wall has a moisture vapor retarder -- not the
23 plastic barrier It is a retarder And you think this is
24 complicated -- this case has been complicated? If we got
25 into that --

1 THE COURT No, I didn't say it was complicated I
2 just said it s tried my patience

3 MR PHILLIPS It would really try your patience if
4 we started talking about perm rates and how moisture moves
5 through there There s competent evidence in the record
6 that this doesn't work in South Carolina They re going
7 to keep trying to sell it The unfair trade practices
8 claim, frankly, to me is the most -- and I know it s not
9 my opinion I think the evidence Your Honor, supports
10 that the South Carolina Unfair Trade Practices Act because
11 of its requirement for repetition is the strongest cause
12 of action that is supported by the evidence that you ve
13 seen in this courtroom

14 THE COURT Thank you

15 MR PHILLIPS Yes, sir

16 THE COURT I respectfully disagree with you I just
17 do not think there is any evidence in the record that the
18 Defendant acted with reckless disregard with truth or
19 falsity and I don't think it rises to the level of conduct
20 which the Unfair Trade Practices Act tries to preclude
21 So I am going to direct a verdict on the causes of action
22 for fraud and unfair trade practices I ll send the
23 breach of warranty case to the jury Off the record

24 (Whereupon a discussion was held off the record)

25 THE COURT Have y'all got proposed charges on breach

1 of warranty and or the verdict form? I think the verdict
2 form would be very easy

3 MR BLACKBURN Judge, I talked to Mr Buddy last
4 night about getting some in the office We've got Judge
5 King's book

6 THE COURT No, sir I don't need that

7 MR BLACKBURN You don't need it?

8 THE COURT No We have our own charges

9 MR PHILLIPS Proposed charge Your Honor

10 MR BLACKBURN Do you have a copy for me?

11 MR PHILLIPS If you have Judge Anderson's book, you
12 have them

13 MR BLACKBURN Can you refer me to the section?

14 THE COURT Gentleman, I would just charge my own

15 MR PHILLIPS Your Honor I would propose one
16 additional charge

17 THE COURT Hold on one second I am going to charge
18 as follows In this case the Plaintiff claims the
19 Defendant breached a contract which is a warranty that
20 existed between them They have to prove the existence of
21 the warranty or contract I'll define what a contract is
22 is an agreement between two parties, offer of acceptance
23 or rejection which is really not the issue here and then
24 I'll go into what breach is and damages which is,
25 basically what y'all have handed up here to me I'll do

1 interpretation of the contract damages

2 What else Mr Phillips?

3 MR PHILLIPS Your Honor two other proposed charges
4 based on cases One is the Starkist case, a fairly old
5 case where some seed is sold pursuant to a contract and on
6 the bag itself has certain limitations and disclaimers and
7 the Court held that kind of unilateral modification of a
8 contract is improper after the sale has been consummated
9 So I would ask for a charge on that I would also ask
10 for a charge on the recent Auto Owners case where I
11 believe that the Court took judicial notice of the fact
12 that you require a strip and reclad in order to find
13 damages in a stucco house It was a case where Auto
14 Owners was challenging coverage and they claimed that
15 their insured was an EIFS applicator, and, therefore they
16 had no liability for the removal of the EIFS -- only the
17 repair of the underlying damage They also claimed that
18 because there was discrete areas of damage on the house
19 they shouldn't be responsible for a full strip and reclad

20 The Supreme Court rejected that argument and held
21 that the testimony -- judicially recognized the testimony
22 of the expert who said that you can't find all of the
23 damage through probing and whatnot and you have to strip
24 it to find the damage and then even though that the
25 insured's product had to be removed, it was incidental to

1 repair the damage and, therefore, the insured was
2 responsible for all of the damage

3 So, I would ask for the two charges and that's what
4 I propose

5 THE COURT I am not going to charge it I think
6 it's a charge on the facts Just put that in the record
7 so you'll be protected

8 MR PHILLIPS Thank you, Your Honor If possible I
9 would ask the Court to make a Court's exhibit the
10 proposed charge

11 THE COURT Okay Hand it to the court reporter

12 MR PHILLIPS Thank you sir

13 (Whereupon Court's Exhibit No 2 was marked for
14 identification only)

15 THE COURT Proposed verdict form?

16 MR SHEFTMAN Your Honor, I think that you've made
17 that very simple in this case

18 (Whereupon a break was taken)

19 MR PHILLIPS Your Honor might I approach? I
20 handed you up a proposed jury form

21 THE COURT Proposed what?

22 MR PHILLIPS Proposed form to the jury I believe
23 it comports with your ruling and -- a verdict form

24 THE COURT Does that suit you? That's what you gave
25 me, wasn't it?

1 MR PHILLIPS I think there was another version

2 MR BLACKBURN I gave you one of these that said --
3 yea I agree with this, Your Honor

4 THE COURT Both of you agree with that?

5 MR PHILLIPS Yes sir Sir, and you might have
6 said it I apologize if I missed it What was your
7 ruling on -

8 THE COURT Whoa, whoa, whoa I got to have that

9 MR BLACKBURN I'm sorry

10 MR PHILLIPS Would you like for me to hand it to
11 the court reporter?

12 THE COURT No sir I want it I have to charge
13 it

14 MR BLACKBURN Judge just so we're clear on the
15 charge of damages just for the record I d like to submit
16 to you that we take the position that the damages are
17 limited to the terms of the warranty because this is a
18 breach of warranty claim and that the damages in this case
19 are - that are related to the warranty but are not
20 related to proximate caused by the stucco So, the
21 contract damages aren t a strip and reclad because they're
22 not proximately causing the Plaintiff's damages The
23 damage in this case are limited to the terms of the
24 warranty

25 MR PHILLIPS Your Honor, the terms of the

1 warranty -- and I'll get back to my original point on your
2 ruling on the Starkist charge The terms of the warranty
3 are the brochure because that's all they got before they
4 bought this thing The terms and conditions and
5 limitations that Moisture Free Warranty tried to
6 unilaterally impose after the deal was done are
7 irrelevant

8 MR BLACKBURN Your Honor --

9 THE COURT Here is my charge on damages If you
10 find the Defendant breached the express warranty you must
11 decide what damages the plaintiff suffered The measure
12 of damages for the breach of an expressed warranty is the
13 difference between the value of the product at the time
14 and place that the product was given and the value the
15 product would have been if it had been as the Defendant
16 warranted it should be unless special circumstances show
17 proximate damages in a different amount

18 MR PHILLIPS Acceptable Your Honor

19 MR BLACKBURN Thank you, Your Honor

20 THE COURT In other words Mr Blackburn

21 MR BLACKBURN Yes Your Honor

22 THE COURT -- it says the difference between the
23 value the product would have been if it had been as the
24 Defendant warranted You can certainly argue what - you
25 can argue that the warranty limited it to so forth

1 questions

2 MR BLACKBURN Yes, Your Honor

3 DIRECT EXAMINATION

4 BY MR BLACKBURN

5 Q Ron can you tell the members of the jury exactly
6 what you do?

7 A Well I'm a licensed general contractor and have been
8 in multiple different states, but presently I do moisture
9 intrusion and construction defect analysis I also own a
10 warranty company and provide consulting to different
11 product manufacturers and different extenuating conditions
12 with construction

13 Q Tell the jury about your experience in construction

14 A Essentially, it started when I was 19 years old I
15 got married and shortly after that I went into
16 construction I became a licensed general contractor in
17 California In 1975 I went from just basically, home
18 repairs to new type construction and owned a large cabinet
19 facility that did upper-end interiors in shopping centers
20 and things like that We would build product and send it
21 out to these locations and we'd have crews that would go
22 out and put it in

23 That moved into the commercial end which involved a
24 lot of restaurants We built 52 restaurants, did a lot of
25 work in multi-story buildings -- Orange Commerce Center

1 Wilshire plaza For example, I do did a lot or work for
2 MGM studios Lorimar Telepictures and a lot of production
3 type kitchens and those types of things

4 That was up in the late 80's Into the early 90's I
5 ended up moving from Los Angeles area to Charlotte, North
6 Carolina I took a few years off and then in 1995 I
7 acquired a contractor's license in North Carolina and went
8 really directly into the field that I'm presently in which
9 is moisture intrusion and construction defect analysis and
10 that really stemmed from evaluations of stucco systems in
11 particular -- EIFS which we're talking about here and up
12 to date done evaluations on over 7000 structures including
13 multiple different types of cladding systems -- hardcoat
14 stucco systems, block et cetera

15 Q Have you ever been qualified as an expert at trial?

16 A Yes

17 Q Have you ever given a deposition regarding
18 construction?

19 A Oh, yes hundreds Oh I shouldn't say hundreds, but
20 many

21 Q Many?

22 A Yes

23 Q How many times have you been qualified at trial as an
24 expert in construction?

25 A As many times as I ve been at trial and I don't know

1 I don't recall exactly how many times It's been very
2 few Most of our cases get settled in settlement
3 conference

4 THE COURT Hold on a second Sir can I help you?

5 UNKNOWN MALE SPEAKER Yes I m looking for Mr
6 Brooks Shealy I was told that he was down here in trial

7 THE COURT You ll have to go outside I need a
8 Bailiff on that backdoor

9 UNKNOWN MALE SPEAKER I apologize

10 THE COURT Your apology is accepted I understand

11 Q Ron, are you experienced in moisture intrusion for
12 residential construction?

13 A Yes that s actually what I do specialize in It s
14 just not residential but it includes commercial and
15 industrial as well

16 Q Explain to the jury what that means It basically --
17 it basically takes into consideration concerns with
18 different types of structures the interfacing of
19 materials and things like that that allow water to
20 infiltrate into buildings and it entails not just the
21 determination of that water but the effects of that water
22 and it also involves a lot of determining the source of
23 that water and who might be responsible for that in the
24 interfacing of trades and materials together

25 It also involves moisture movement through walls from

1 a standpoint of natural gas which you probably know as
2 humidity transferring through walls in vapor transmission
3 to interiors and the effects of that aspect on buildings
4 as well

5 Q Have you ever been qualified as an expert in moisture
6 intrusion?

7 A In every case that I've had I have never been
8 disqualified, and again, most of these get settled in
9 settlement conference but those at trial I have never had
10 an exclusion

11 Q I see And how many homes have you inspected for
12 moisture intrusion in your career?

13 A As I said somewhere -- I lost count a long time ago
14 but somewhere in excess of 6000 somewhere between six or
15 7000

16 Q Okay And what do you normally do as part of your
17 moisture intrusion analysis?

18 A Well, it depends on the type of structure They vary
19 between structures For example, exterior finishing
20 systems like we re talking about here are the easiest to
21 do evaluations on and those just basically, include
22 electronic testing which enables us to either get readings
23 from the exterior through certain types of meters or
24 penetration tests which will give us actual moisture
25 readings which will vary depending upon the type of

1 material that you're taking that reading from, but based
2 upon that reading and the consistency of the structure
3 inside there you make certain determinations on as to what
4 the physical conditions are and what moisture readings may
5 be evident at that time

6 Q And as far as vapor transmission, are you experienced
7 with vapor transmission?

8 A Very much so, yes

9 Q How are you experienced with vapor transmission?
10 What is it?

11 A You're asking me what vapor transmission is?

12 Q Yes

13 A Vapor transmission is, for example you have -- In
14 layman's terms you have humidity in the air If you live
15 in a house for example that has an air conditioning
16 system you may have noticed that when you have that air
17 conditioner on you have condensate that runs off of that
18 In other words you have liquid that's running off It
19 may go into a drain or something like that but you're
20 taking the liquid out of the air on the inside of that in
21 order to cool it

22 What's happening is that's occurring the liquid in
23 gas form is trying to move from the outside in the form of
24 humidity towards the inside of that building where it's
25 reduced So what you have the that liquid that's

1 transferring gas form through different types of materials
2 as it's entering into inside and, obviously, different
3 things can occur In construction it would relate to what
4 those type of materials are and what the pressure
5 conditions are and what the temperature conditions are

6 Q Have you ever had any training with regard to vapor
7 transmission?

8 A I have had substantial amount of training, yes

9 Q Would you please tell the jury what training you ve
10 had regarding vapor transmission?

11 A Aside from just basic study I was involved in what
12 was called the rough class action lawsuit that's in North
13 Carolina I was a member of a -- I was part of a
14 four-member team that was involved in architect and
15 engineering -- a forensic engineer and a general
16 contractor I was the part of the general contractor but
17 in part of that one of the areas of requirements in that
18 group was that we all intermingled our trade so we
19 understood what the other one was thinking it needed to
20 know, and in part of that I did a lot of work with an
21 engineering firm out of Chicago which was called Wrath,
22 Wrath, and Johnson

23 Rath's Rath's, and Johnson had set up mock-ups of
24 structures that you could put different types of materials
25 in and you could create the conditions of vapor movement

1 through those and in that process you could use different
2 types of materials and you could determine what the
3 evaporative rates are, what the diffusion rate is in
4 different types of materials or compounding those
5 different types of materials, too You would come up with
6 numbers that would be used in those, and you could
7 accumulate those numbers and determine different things
8 about those, but the long and short of it was to end up
9 understanding in how those things functioned in real-world
10 conditions

11 Q Ron, I am handing you Plaintiff's exhibit no 1
12 Were part of your training in vapor transmissions related
13 to what's been identified as Plaintiff's exhibit no 1?

14 A Yes it was

15 Q And please tell the jury what Plaintiff's exhibit
16 no 1 is

17 A That's a panel of EIFS which we've been talking about
18 here This one happens to be adhesively applied to an
19 oriented strandboard substrate

20 Q As part of your vapor transmission experience did
21 that include vapor retarders or vapor barriers?

22 A Yes It included both vapor retarders and what
23 typically would be termed as a vapor barrier

24 Q Tell the jury what type of training experience you've
25 had with vapor retarders and vapor barriers

1 A What kind of what?

2 Q Experience that you've had

3 A Well the experience is there is a difference between
4 a vapor barrier and a vapor retarder A vapor retarder is
5 simply that It retards the movement of that gas form
6 through it A vapor barrier is one that stops it I
7 don't know if you've heard the term dewpoint, but dewpoint
8 is typical to this If you, for example, in your bathroom
9 you take a shower the glass on your window is a vapor
10 barrier In other words, liquid will not transfer through
11 it in gas form, although your curtains hanging on the
12 front of it are That's a vapor retarder It reduces it
13 very minimal but it allows it to transfer through it

14 So, what happens when you take a shower your drapes
15 aren't wet but your window is That s the difference
16 between a vapor retarder and the vapor barrier The vapor
17 retarder is the shade or the blind or the curtains, but
18 the vapor barrier is the glass That is what we call the
19 dewpoint and that s what would -- that caused that gas to
20 turn in liquid form There are extenuating conditions
21 with that, too and it goes on to beyond that where you
22 have colder conditions and that becomes solid material
23 which would be what we would call snow or ice or anything
24 like that

25 Q How many depositions have you given regarding vapor

1 retarder or vapor barriers?

2 A Depositions, basically, with that -- What you have to
3 understand when I answer this is that we deal with very
4 few It s the least of anything we deal with only because
5 it s extremely rare but probably three or four times

6 Q Okay Have you ever been qualified as an expert in
7 the field of vapor transmission?

8 A Yes, I have

9 Q How many times?

10 A One time

11 Q How about vapor retarder or vapor barriers?

12 A Well that s pretty much consistent with the moisture
13 intrusion construction defect analysis

14 Q Okay Any other experience with vapor transmission
15 that you d like to tell the jury you have?

16 A Only that the one particular case that I was
17 qualified in went to appeal In that case the Defendant
18 lost -- the Plaintiff lost that and so it went to appeal
19 and that appeal was based upon the fact that they didn t
20 feel that I was qualified

21 MR PHILLIPS Your Honor I don't see the relevance
22 of this

23 THE COURT Sustained Do you want me to qualify him
24 as an expert?

25 MR BLACKBURN I am Your Honor I'm moving

1 through

2 MR PHILLIPS Your Honor we'll stipulate if he can
3 move on

4 MR BLACKBURN Okay Do you stipulate that he is
5 considered to be qualified as an expert in construction?

6 MR PHILLIPS Yes

7 MR BLACKBURN Do you consider -- Do you stipulate
8 that he is considered to be an expert with regard to
9 moisture intrusion?

10 MR PHILLIPS Yes

11 MR BLACKBURN Do you stipulate that he is
12 considered to be qualified as an expert in vapor
13 transmission and vapor retarder?

14 MR PHILLIPS Yes yes

15 MR BLACKBURN Okay Do agree he will be qualified
16 as an expert with vapor -- with barrier systems?

17 MR PHILLIPS Yes

18 MR BLACKBURN Do you stipulate that he ll be
19 qualified as an expert in remediation of EIFS?

20 MR PHILLIPS Yes

21 MR BLACKBURN Do you stipulate that he can be
22 qualified as an expert in hardcoat stucco systems?

23 MR PHILLIPS Your Honor --

24 THE COURT Do you stipulate he can testify as an
25 expert in this case regarding the issues of --

1 MR PHILLIPS I'll stipulate that he is an expert as
2 to the issues in this case

3 MR BLACKBURN That's those six areas I just
4 outlined

5 THE COURT You just went through them You're doing
6 good

7 MR BLACKBURN Thank you, Your Honor

8 THE COURT Ladies and gentlemen we'll qualify him
9 in the area of construction practice specifically dealing
10 with EIFS and related problems as we've all heard
11 throughout the case He'll be allowed to give opinion
12 testimony, and I will tell you at the conclusion of the
13 case how you treat expert's opinions and the weight you
14 can give them or not give them or whatever you want to

15 Move along

16 Q Ron, have you ever inspected the Plaintiff's home?

17 A Yes I have

18 Q When was that?

19 A Oh, golly I don't remember the actual date It's
20 been --

21 THE COURT Look at your reports

22 THE WITNESS Many months ago

23 THE COURT Give him the reports so we can move
24 along

25 Q I am going to hand you what's been previously marked

1 Defendant's no 63 and ask you if you recognize
2 Defendant's exhibit no 63?

3 A This is a group of photographs that I took on an
4 investigation that I did out there -- the date on this
5 which was Wednesday, August 6, 2008

6 Q Okay And what was the purpose of your investigation
7 of the Babaee home?

8 A It was to analyze it from a standpoint for moisture
9 intrusion issues

10 Q Okay I want to set this up just so Your Honor can
11 see it as I'm going through with the jury What I am
12 showing you, Ron, that's been previously marked as
13 Defendant's exhibit no 1 is from the Flaherty report Do
14 you recognize what's depicted in this photograph?

15 A Yes I do

16 Q Okay Did you investigate the front elevation of the
17 Babaee's home?

18 A Yes, I did

19 Q How many areas of moisture did you find during your
20 investigation?

21 A Are you talking in that specific location?

22 Q Yes in this specific location, front elevation left
23 half

24 A None

25 Q None Okay And you investigated -- Did you

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1 investigate the front elevation, the right half, during
2 your inspection?

3 A Yes, I did

4 Q And how many areas of moisture intrusion did you find
5 in that area?

6 A One

7 Q One And which one was that?

8 A It's the lower portion of that red box It looks
9 like a red box, but lined by C

10 Q What is your opinion as to the cause of the notes and
11 depiction --

12 MR PHILLIPS Objection, Your Honor He is pitting
13 witnesses

14 Q Tell us about what your opinion about what is causing
15 the damage in that area?

16 THE COURT That's not the way you ask it

17 Q Do you have an opinion about the causation --

18 THE COURT Let me try it this way

19 Sir, do you have a opinion with a reasonable degree
20 of professional certainty in the area that you've been
21 qualified more likely than not -- ask more likely than not
22 what, Mr Blackburn?

23 MR BLACKBURN About the cause of damage in the area
24 you identified in your inspection on the right elevation
25 of the front of the house?

1 THE WITNESS Yes, I do

2 Q What is that?

3 A That relates to vapor movement from liquid that's in
4 the ground underneath that area

5 THE COURT Vapor movement from -- I m sorry?

6 THE WITNESS The evaporation of liquid that's
7 underneath the house right in that location

8 Q Is it related to anything else?

9 THE WITNESS There is a past relationship there and
10 it relates to an issue with an area that appears to have
11 not have had an original kickout flashing when the
12 building was built There was some damage that occurred
13 in that wall It appears at least the best that I can see
14 at this point that a portion of that was repaired -- the
15 upper portion of it but the lower portion did not appear
16 to have been repaired and so, we had extenuating
17 conditions with a prior problem that left some evidence of
18 deterioration there and we had an ongoing problem that
19 occurred after that which related to a substantial amount
20 of water that was underneath that house that was rising in
21 vapor form back up into that corner

22 MR BLACKBURN Your Honor, I am going to introduce
23 Defendant s exhibit no 3 previously identified and ask
24 you --

25 THE COURT What's the exhibit?

1 MR BLACKBURN Defendant's exhibit no 2 I m
2 sorry Defendant's exhibit no 2 Are you familiar with
3 this left elevation photograph?

4 THE WITNESS I believe that is the left side of the
5 house, correct? And --

6 THE COURT Well, is it or isn't it? Let's all get
7 on the same page

8 MR BLACKBURN Okay

9 THE WITNESS Yes that is correct It was on an
10 angle that was a little hard for me to see, yes

11 Q During your inspection did you find any evidence of
12 moisture intrusion on the left elevation of Mr Babae's
13 house?

14 A No, I did not

15 Q And the rear elevation -- Judge, you want me to turn
16 it so you can see it?

17 THE COURT No sir

18 Q On the rear elevation left half on Defendant's
19 exhibit no 2, did you find any evidence of damage in that
20 area?

21 A I like to use the word moisture intrusion

22 Q Moisture intrusion

23 A But, yes, I did find it in the boxed area as
24 identified on that exhibit

25 Q Okay Any other areas?

1 A On that particular elevation no

2 Q In your opinion what is the cause of that moisture
3 intrusion?

4 A There is - If you look at the copper roof over the
5 top of that there is that white EPS foam detail that's an
6 articulation detail, and what they've done -- and I don't
7 want to confuse people, but there is a flashing detail
8 that was modified there at one time Typically, the
9 flashing details are going to return from the copper back
10 behind the EIFS system, but since they came along at a
11 later date and did a modification to that what they did is
12 they returned that flashing detail back up on the face of
13 the stucco

14 If I could - They returned it back onto the face of
15 the stucco and then they put this EPS foam detail over the
16 top of it and that was actually decorative sure but it
17 also acted as a counter-flashing for that and which was
18 not well done and, so, a crack occurred in the side of
19 that and water was able to now flow in there and right
20 back behind that flashing and right off that end and right
21 straight down into that wall

22 Q Did you do any testing of that area?

23 A Yes, I did

24 Q In fact what we did is we took physical moisture
25 readings at the center of this wall and then took a

1 measurement there and then went up here and actually built
2 a little clay dam at that point We use clay dams a lot
3 of times to establish localizing water into a specific
4 area so we can test that joint, and that's what we did at
5 this point here -- introduced water into there and it
6 immediately pegged that meter indicating that that is
7 where the flow of water was coming from that was entering
8 in the lower portion

9 Q Any other areas of moisture intrusion you found on
10 the right elevation -- the rear elevation left half?

11 A No

12 Q Now, let's go to the rear elevation right half Did
13 you find any evidence of moisture intrusion on the rear
14 elevation right half during your inspection?

15 A The location is hard to see, but it was in line with
16 the floor band of the floor at the first step off the end
17 of the tile back

18 Q Okay I'll put this up here for you, Ron so you
19 can --

20 A It was about - You have a deck surface here and back
21 behind this you can't see it but you got steps going down
22 In line with that which is a floor band which is the floor
23 system right underneath these doors that continues on down
24 and right beyond that first step down is where there was
25 indication of water infiltration

1 Q Okay No other areas on the rear elevation right
2 half of moisture intrusion?

3 A No

4 Q Okay And now, let s look at the last elevation of
5 the Plaintiff's home depicted on the right elevation on
6 27 Did you inspect that area which is the right
7 elevation of the Plaintiff s home?

8 A Yes I did

9 Q Did you find any evidence of moisture intrusion on
10 that side of the Plaintiff's house?

11 A No, I did not

12 Q Thank you In your professional opinion what was the
13 cause of the damages you observed?

14 A I m sorry?

15 Q In your professional opinion what was the cause of
16 the damages that you observed?

17 A The cause of the damage that I observed?

18 Q Yes

19 A Was moisture infiltration specifically at the floor
20 band related to a flashing problem at that area, an
21 articulation detail over the copper roof on the -- by the
22 rear door and an evaporation situation occurring at the
23 front interface between the garage and the house

24 Q In your professional opinion was the - did you
25 observe a vapor barrier on the Plaintiff's home?

1 A Yes, I did

2 Q In your professional opinion is the vapor barrier
3 that you observed a cause of the damages to the
4 Plaintiff's home?

5 MR PHILLIPS Object to leading, Your Honor

6 THE COURT Well, it's not the proper way to ask an
7 expert his opinion

8 THE COURT Do you have an opinion to a reasonable
9 degree of professional certainty in the area that you re
10 qualified that more likely than not -- Go ahead Finish
11 it up

12 Q The vapor barrier resulted in damage to the
13 Plaintiff's home?

14 A No it did not

15 Q How do you know -- in your professional opinion what
16 is your basis for that statement that it wasn't?

17 A Well typically any of the ones that we ve ever
18 observed there always has to be what we call a bulk water
19 situation and that's, typically for example, the worse
20 condition you can have for bulk water and transfer of
21 vapor for brick buildings actually because the brick is
22 able to saturate and hold water in bulk form That
23 increases the vulnerability of exposure to that condition

24 In this particular situation we don't have sufficient
25 bulk water in there to be worried about that number one,

1 but, number two, there is no extenuating conditions
2 associated with it To give you an example the one area
3 that we opened up, the dewpoint in that wall like the
4 glass on your window is the plastic membrane on the
5 inside The dewpoint always occurs from the inside out,
6 and, so if there was a moisture problem it was indicated
7 in this wall at any point it would show up at the plastic
8 membrane just like the glass at the wood-frame members of
9 that wall, and at least the areas were opened up We
10 could see those connection points at the location where we
11 had the highest quantity of moisture as well and there was
12 no - There was no indication of moisture at either the
13 plastic membrane or its backing to a wood-frame member

14 Typically, we would expect to see if there was water
15 that had displaced there from evaporation that it would at
16 least start to deteriorate its connection point with the
17 wood-framing Also we did not look on the inside of the
18 house but there had been no complaints or there was no
19 indication that there was any indication on the inside
20 walls of the house

21 MR PHILLIPS Objection, Your Honor He's
22 testifying to hearsay

23 THE COURT If you didn't see it, sir how can you
24 testify about it?

25 Q We'll move on Ron --

1 THE WITNESS I am saying that I had not seen it and
2 there was no indication --

3 THE COURT Did you inspect the inside?

4 THE WITNESS I did not inspect the inside

5 THE COURT Then how can you tell us there is nothing
6 in there?

7 THE WITNESS No I am saying I had no received no
8 indication that there was a problem on any inside walls

9 THE COURT Go ahead

10 THE WITNESS So assuming that there was no
11 indication of anything on the inside walls that would be
12 the first indication that somebody would say there is a
13 vapor problem in this wall because around light switches
14 and plugs and things like that you would see a darkening

15 THE COURT Sir, did you inspect the inside of the
16 house?

17 THE WITNESS No, I did not

18 THE COURT Well, please don't testify about what
19 you could have expected on the inside of the house

20 THE WITNESS Okay

21 MR BLACKBURN We can move on

22 Ron, as an expert in the field of moisture intrusion
23 what is your position on moisture readings --

24 MR PHILLIPS Objection Your Honor

25 THE COURT What is your position what?

1 MR BLACKBURN What is your position on moisture
2 readings?

3 MR PHILLIPS Not a proper question Your Honor

4 THE COURT What do you mean by position on moisture
5 readings?

6 MR BLACKBURN Well, position -- What do you believe
7 moisture readings tell you?

8 MR PHILLIPS Your Honor, still not a proper
9 question

10 THE COURT I'll allow that

11 MR BLACKBURN Thank you, Your Honor

12 THE COURT Moisture readings of what? 100? 10?
13 20?

14 THE WITNESS Well I'll define -- Actually I think
15 the relevance to the question is what we define --

16 THE COURT Do you understand the question?

17 THE WITNESS I m sorry sir?

18 THE COURT Do you understand that question?

19 THE WITNESS I understand it to the extent I believe
20 what he is asking me is --

21 THE COURT No, that s not the way we do business

22 You've got to ask a question that your witness can
23 understand and that I can understand

24 MR BLACKBURN I'm sorry

25 THE COURT What does a moisture reading of 20

1 indicate? What does a moisture reading of 15 indicate?
2 What does a moisture reading of a range between X and Y?

3 Q Can you answer those questions the Judge posed to
4 you Ron? I am just saying - Your Honor I can repeat
5 it Judge What does a moisture reading of 20 indicate to
6 you?

7 A Well it doesn't indicate too much of anything,
8 really We don't use moisture readings as a primary
9 factor making a determination of conditions We realize
10 that moisture readings have significance from a condition
11 as it is right at that moment but we don't know what the
12 long-range effects of those are in a drying process or
13 something like that In our reports we always say that
14 moisture readings have not near the significance value
15 that the issue really relates more to an understanding of
16 moisture infiltration its effect on the structure and
17 related sources and things like that

18 I'll give you an example of what I'm talking about
19 When water first enters into a wall it always goes in at
20 100 percent Depending on when you check it after that
21 time it is going to keep reducing down down, down until
22 it gets into a range of maybe 8 or 9 or 10 percent
23 depending on where it's at So, it's all an issue of
24 where you happen to catch it in there and that's really
25 not relative to construction defects because unless it has

1 caused some damage it's really not really relevant

2 So, if I have a situation where I have low moisture
3 and damage, that means something If I have high moisture
4 and no damage, well that means something else So we
5 have to analyze it from a standpoint of the effects not
6 just from a number

7 Q What about a moisture concentration of 25 percent?

8 THE COURT What about it?

9 Q Well, as far as a moisture concentration level of
10 25 percent, in your professional opinion what does that
11 mean?

12 A That typically means -- It's kind of a breaking point
13 before we're getting into a point where we have what we
14 called fiber saturation in wood and retained fiber
15 saturation can cause the deterioration of the wood What
16 numbers below that retain will not affect the structural
17 integrity of the wood

18 Q In your professional opinion at what number as far as
19 moisture concentration levels occur will damage occur?

20 A In answering the question it's always retained
21 numbers So if I - in the range of 28 to 30 percent
22 plus we have -- That's when we will have retained
23 saturation and that will break down the cellular structure
24 of the wood and start what you would call dry rot

25 Q During your inspection of the Plaintiff's home, did

1 you inspect the windows?

2 A I inspected every window

3 Q Okay And are those windows identified in
4 Defendant's exhibit no 63?

5 A Yes, they are

6 Q Did you find any evidence of moisture intrusion on
7 the windows that you inspected during your inspection?

8 A There is the one window in question at the rear of
9 the door which I think has been identified as having
10 moisture underneath that Excluding that one --

11 Q I m sorry Just for the record you're talking
12 about -- Which elevation are you talking about, Ron?

13 A We re talking the rear elevation left half
14 Underneath the copper roof there is there is a window off
15 off to the right of that, there is high moisture content
16 and deterioration at the base of that window I am
17 contributing that to that water that's running off in
18 aggressive form from that copper roof above although
19 short of actually doing some physical testing on that I
20 cannot exclude that 100 percent from a problematic
21 condition itself

22 I dare say that it's not, but in the case of all of
23 the rest of the windows on the entire house I can say that
24 none of those are a problematic condition

25 Q What is your opinion about the condition of the

1 windows of the Babae house?

2 THE COURT He just said they were not problematic --

3 MR BLACKBURN Okay Thank you

4 THE COURT -- in his opinion

5 Q Mr Phillips said in his opening statement there are
6 two different types of stucco, hard coat and EIFS, and
7 that hardcoat stucco homes do not have problems Do you
8 agree with that?

9 A Absolutely not They have the same exact problems

10 Q And how do you base that opinion?

11 A I base that opinion on the fact that when I moved
12 here from California the understanding in California --
13 I ve had a vast amount of experience in dealing with
14 hardcoat stucco Hardcoat stucco went on basically
15 everything When I moved here and started doing analysis
16 on EIFS I had looked at them a short period of time and
17 understanding what the problems were with them I said if
18 they re doing the same thing in the hardcoat stucco they
19 have the same exact problems there

20 In the community that I lived in in Charlotte I
21 started investigating some of the houses around and found
22 out that we were having the exact same problems with
23 hardcoat stucco and that information was then reported to
24 the city The city through the State Department of
25 Insurance enacted what was called the stucco task force in

1 Mecklenburg County

2 MR PHILLIPS Your Honor I object to the relevance
3 THE COURT I agree Sustained We are trying the
4 case here in Columbia South Carolina -- not Charlotte,
5 not California

6 Q And, Ron, with regard to vapor retarder, is it your
7 professional opinion that the vapor retarder -

8 MR PHILLIPS Objection Your Honor, asked and
9 answered

10 THE COURT Well, he hadn't asked the question
11 Mr Blackburn when you ask an expert his opinion --
12 Do you have an opinion to a reasonable degree of
13 professional certainty that most probably or more likely
14 than not and then you ask the question

15 MR BLACKBURN I was just trying to save words, Your
16 Honor

17 THE COURT Well you can't save words because the
18 rules require that Let s do this

19 Mr Expert sir when he asks you an opinion from
20 henceforth on it will be preferenced with this phrase Do
21 you have a opinion with a reasonable degree of
22 professional certainty that more likely than not or most
23 probably

24 So, all of your questions dealing with opinions I ve
25 asked it in that manner so you can just ask him do you

1 have an opinion Will that help?

2 MR BLACKBURN Yes, Your Honor Thank you

3 THE COURT Thank you

4 Q As far as the vapor retarder, in your professional
5 opinion --

6 THE COURT I have already given the preamble Just
7 ask him the opinion now

8 Q Is the vapor retarder a cause of damages that you
9 observed on the Babaee house?

10 A I found no evidence that the -- vapor retarder and or
11 vapor barrier had any effect on the residence

12 Q In your professional opinion do you -- Do the damages
13 you observed necessitate in your professional opinion a
14 strip and reclad of the Babaee home?

15 A None whatsoever

16 MR BLACKBURN Ron please answer any questions

17 Mr Phillips may have for you

18 CROSS EXAMINATION

19 BY MR PHILLIPS

20 Q Good morning, Mr McClure

21 A Good morning sir

22 Q I apologize I got lots of depositions here You've
23 been hired by Moisture Free Warranty to be an expert in
24 this case?

25 A Yes I have

1 Q How much are they paying you an hour?

2 A \$185

3 Q And they ve paid you to make at least three visits to
4 the Babaee house haven t they? Put it this way, you've
5 been there at that house three times when I ve been
6 present Have you been there any other times?

7 A I believe I was there twice but no I haven t been
8 there any more than that

9 Q On what occasion did you build a clay dam? Let me
10 ask you -- Let me strike that question, Your Honor I
11 apologize Have I been there every time you've been at
12 the Babaee house?

13 A Yes

14 Q On what occasion did you build a clay dam when I was
15 present?

16 A Now that I'm thinking about that typically we do
17 use a clay dam which is just a piece of clay that retains
18 water I don't think that I actually recall using that
19 now I just simply put the water on it

20 Q I understand Let's go back to my original question

21 A Okay

22 Q You have been on the clock traveling from your home
23 in North Carolina to the Babaee residence on you can
24 recall two occasions to do an inspection?

25 A Correct

1 Q How many depositions have you given in this case?

2 A One In this case?

3 Q In this case Think again Let me refresh your
4 memory

5 A Okay

6 Q You asked to have your deposition taken on a certain
7 date in Charlotte I wasn't available so I sent a
8 colleague of mine Charlie Krawczyk He took your
9 deposition once and at that deposition you told him you
10 were unaware of the Moisture Free Warranty program didn't
11 you?

12 A Pretty much, yes

13 Q And so we let you study up on it and I took your
14 second deposition Do you recall that?

15 A No, I don't Actually, I do a lot of depositions I
16 got a lot of cases going So, I don't recall that
17 bringing back to memory right now It's been sometime
18 ago

19 Q I apologize but if I told you I recall taking your
20 deposition you wouldn't --

21 THE COURT Show him the transcript so he can refresh
22 his memory

23 THE WITNESS I recall taking the deposition with you
24 and I recall taking it with your colleague as well that
25 you brought it back up to me

1 Q Thank you, sir And those were both, again, paid
2 visits or paid exercises for Moisture Free Warranty?
3 Moisture Free Warranty paid you to give those deposition?

4 A I am not sure Did you not pay me? I may have been
5 paid by them I couldn't tell you I was paid for in any
6 case

7 Q All right And then you've been here for the whole
8 trial?

9 A That's correct

10 Q And Moisture Free Warranty has paid you to be here
11 for the trial?

12 A I hope they will

13 MR BLACKBURN I object to this line of questioning
14 Asked and answered relevance

15 THE COURT Well it is relevant but all experts are
16 paid Move along

17 Q All right You testified earlier about your
18 observation of a repair -- a previous repair of the front
19 kickout location I don't believe the jury can see these
20 photos so let me show you one of them It is a little
21 bigger

22 THE COURT Mr Phillips, we don't need to make those
23 comments about what they can see and can't see

24 MR PHILLIPS I apologize, Your Honor

25 THE COURT We've come a long way this week Let's

1 don't get off on the wrong foot this morning

2 Q Let me show you Plaintiff's 7 Do you recognize
3 that?

4 A Yes I do

5 Q That's the front?

6 A Correct

7 Q Is that the front knockout location where my hand is?

8 A Yes

9 Q All right You testified earlier that it was your
10 belief that there had been a previous repair here?

11 A I believe so but I believe that was in response to
12 your expert had cut that open and could identify that a
13 repair had been made

14 Q Okay So you didn't know that repair was there until
15 you were in the courtroom and heard my expert testify to
16 that?

17 A Not a physical repair to the wall I believed that
18 there had been a modification to at least the knockout
19 flashing and possibly the valley end flashing up around
20 the corner

21 Q But you heard Chris Cooper testify about it

22 I am not trying to pit witnesses, Your Honor That's
23 the basis of his testimony

24 THE COURT That's what he just said

25 Q As an expert when you looked at that you couldn't

1 tell that that house had already been repaired once could
2 you? You couldn't tell until it was cut open and
3 Mr Cooper showed you the photograph?

4 MR BLACKBURN Objection Your Honor, relevance

5 THE COURT It is certainly relevant We've been
6 talking about a the cut-out all week Overruled

7 THE WITNESS I presumed it had been repaired based
8 on the fact that I knew that the flashing had been
9 installed at a later date which was typical in all of
10 these homes and the fact that the conditions inside of the
11 wall were indicative of the fact that it had been repaired
12 prior to that

13 Q When you formed and when I deposed you regarding your
14 theory about moisture vapor at that time you were unaware
15 of the repair?

16 A I may have been unaware --

17 MR PHILLIPS Asked and answered Your Honor

18 THE WITNESS -- of the repair but I still used the
19 conditions that I found inside the wall to direct me
20 towards the fact that we had an extenuating problem
21 unrelated to the flashing

22 Q So, you've seen, though, now the fact that there is a
23 moisture barrier that goes down underneath that kickout
24 and goes down to right above where the damaged area was
25 found?

1 A There is a barrier material

2 Q There is a barrier material?

3 A Yes

4 Q And you've seen pictures of the wood behind that
5 barrier material that is pristine that is in the same
6 condition as my little exemplar exhibit 1?

7 A Correct

8 Q All right And you've seen my bags of evidence that
9 below that barrier was not in such good condition It is
10 wet?

11 A And some behind your barrier

12 Q All right Well, could you show me a picture of
13 that? Do you have -- Your pictures just got entered into
14 evidence Could you show me a picture of that?

15 A It was one of your photographs by Mr Cooper

16 Q Okay Now, did you see it from sitting back in the
17 back part of the courtroom?

18 A I don't know whether I saw it there or I saw it on a
19 desk, but I did see a picture -- a photograph of the
20 approximate 2-foot square that had been removed from there
21 and also I could see from the original cut that was made
22 of the 3-inch approximate diameter hole that was very
23 immaterial at that location I think it's in the plastic
24 bag down here

25 Q Now, 2-foot hole which is depicted here in

1 Plaintiff's exhibit 22 and which is physically present as
2 Plaintiff s 38 - that's a little bit bigger than 2 feet
3 square wouldn't you say?

4 A I am just --

5 Q Just guessing I understand

6 A It is 2-foot wide probably and however high I don't
7 know I wasn't, unfortunately, available or there at that
8 time

9 Q That's fine You see the remnants of that moisture
10 barrier there, correct?

11 A Yes

12 Q You see how the damage --

13 THE COURT Mr Phillips, my juror on the very back
14 is having to look around you

15 MR PHILLIPS I apologize

16 THE COURT She is a lot more important to see it
17 than anybody else

18 MR PHILLIPS She is, Your Honor and I apologize,
19 and I'll try to make it a little easier for her

20 That's some dry wood up there correct?

21 THE WITNESS It's dry wood up where

22 Q Where my pen --

23 A Not necessarily no I can see that there is some
24 dry wood over to the left with reasonable certainty over
25 here

1 Q Okay And that s the bottom edge of the moisture
2 barrier, right?

3 A No No May I?

4 Q Sir this is not --

5 THE COURT No He can explain his answer

6 THE WITNESS The original vapor barrier that s down
7 there -- you can see remnants of it in all these
8 locations You can see where it was here It went across
9 here Now, when you took it apart this portion tore out
10 probably connected to the bottom of that It's not here
11 now There is one piece that is left and it s in the
12 plastic bag down there and that s at the penetration
13 point that was up in here

14 Q This is the piece You show where that is

15 Your Honor, I'll state for the record that
16 exhibit 38 -- the bag was destroyed when I opened it in
17 court yesterday So I have put it for convenience into a
18 new trash bag and I will -- That's the original bag and
19 I ll let the witness look There is nothing left in -- It
20 is not a magic trick There is nothing left in the bag

21 THE WITNESS I m talking about those bags

22 THE COURT Why did you let him open that?

23 MR PHILLIPS We have --

24 THE COURT Wait a minute Don't throw it

25 THE WITNESS You just dumped it all over here

1 MR PHILLIPS Opps I m sorry

2 THE COURT That's why we don t like to throw things

3 Q Now that we have Plaintiff s 15 and 16 and you
4 understand these are Bill Flaherty's cuts?

5 A Of where?

6 Q No, sir That's not my question Those are?

7 A I want Bill Flaherty s --

8 THE COURT Sir -- sir he asks the questions

9 Now start over and ask a very intelligible question
10 and clean that mess up, Mr Phillips, that you made

11 Mr Foreman I m glad that is not evidence in the
12 kind of cases you try

13 MR PHILLIPS I am too Your Honor Your Honor, I
14 apologize

15 THE COURT That's okay

16 MR PHILLIPS I tell you that from now I ll use a
17 different type of ziplock evidence bags

18 THE COURT Well and handle them more gently

19 Q All right Mr McClure, I am going to line these up
20 in order These are the exhibits that were removed from
21 under there You show me where other where the
22 moisture barrier was

23 A There was a bag that I looked at the other day that
24 had a cut-out in it Where is the bag that had cut-out of
25 that?

1 Q Sir, please just answer my questions

2 THE COURT Hold on one second Are there any other
3 bags in evidence that we've been dealing with here this
4 week? Show them to him

5 Q There are 15 and 16 Test cuts from Bill Flaherty

6 A This was out of this location?

7 Q Sir --

8 THE COURT No, sir Mr Phillips what you got in
9 your hand, Mr Witness? What number?

10 THE WITNESS Where did this come from?

11 THE COURT No, sir let me ask the thing

12 THE WITNESS I m sorry

13 THE COURT Now, come on Give me the number of that
14 bag

15 THE WITNESS It is no 1

16 THE COURT Thank you Where did no 1 come from if
17 you know?

18 MR PHILLIPS I don't know, Your Honor

19 THE COURT Is it marked on the bag?

20 MR PHILLIPS It is marked on Mr Flaherty's report
21 that has been produced for a year

22 THE COURT REPORTER I think it's 15

23 THE COURT It is exhibit 15

24 Q Exhibit 15 and exhibit 16 are the cuts from

25 Mr Flaherty's -- Sir, maybe this will help I don t know

1 which bag it is I honestly don't I can tell you this
2 and I'll tell the jury --

3 THE COURT Now you ask questions

4 Q Mr McClure take a look at the cut Do you think I
5 have oriented it in the same manner that it was taken off
6 the house?

7 A Yes right through here

8 Q Okay And then that s Mr Flaherty's cut -- that
9 hole right there?

10 A Correct

11 Q I'll represent to you Plaintiff s 15 or 16 is a
12 collection of that cut Now, isn t his cut --

13 MR BLACKBURN Your Honor I am going to object

14 THE COURT Hold on What is your objection?

15 MR BLACKBURN Pitting witnesses

16 THE COURT Nobody is pitting anybody right now He
17 is just locating where the cut came from When you pit
18 witnesses you ask him does he agree with the other
19 witness That has not been asked

20 Q Let me go back to my demonstration This is the
21 upper edge of that cut, correct?

22 A Correct

23 Q This is a vapor barrier that runs right next to this
24 That's what Mr Flaherty cut into isn t it?

25 A Where the --

1 Q Sir please answer my questions

2 A It is vapor retarder It is a weather barrier and
3 the weather barrier is running at this line here across
4 this way When he bored that hole in there and he took
5 that sample out, he took out a sample piece of this
6 material This is in line up in here This is damage
7 that s going up back behind that membrane, and all I'm
8 saying is I asked to see that sample piece to answer your
9 question because I believe that there was a piece of this
10 barrier material that was part of that

11 THE COURT All right gentlemen Where is that
12 sample or is it in evidence?

13 MR PHILLIPS It is one of those two, Your Honor

14 THE WITNESS It may be no 1

15 THE COURT All right If it is -

16 THE WITNESS And he will have to verify no 1 with
17 that report to verify whether that was his test number
18 one

19 Q Mr McClure -

20 THE COURT He is going to examine you like he wants
21 to He doesn't have to do anything

22 Q I am going to be very clear Look at 15 You see a
23 3-inch hole cut in Plaintiff's 15?

24 A Yes

25 Q Does it have a black piece of paper in it?

1 A Yes

2 Q That you call weather barrier?

3 A Yes

4 Q Take it out

5 THE COURT Please

6 Q Please Sorry sir Do you believe that that piece
7 of evidence came from roughly this area on this picture?

8 A I believe it came in line with this which came out of
9 here which is right in here somewhere right

10 Q All right

11 A And in any case you can see how this is torn up here
12 and there is remnants of it coming down into here It is
13 important if I had been there to be able to see that I
14 believe what I would have seen is that material right
15 across here

16 Q That s your opinion and you have no evidence of that?

17 A Unfortunately I wasn't there so I wasn't able to be
18 afforded that opportunity

19 Q Let me ask you what you did have an opportunity --

20 THE COURT You may have a seat, sir Now,

21 Mr Phillips, let's get to be a little more polite, okay?

22 MR PHILLIPS I apologize, Your Honor

23 THE COURT If you're through with the bags -- you
24 already got a mess up there - let's ease them back down

25 in that box

1 MR PHILLIPS Yes sir

2 THE COURT So that witness doesn't have to deal with
3 that

4 MR PHILLIPS Your Honor, would you like me to
5 return that to --

6 THE COURT No, sir We'll do that in a little bit
7 in order to save time

8 MR PHILLIPS Thank you, sir

9 THE COURT Are you okay with all of that up there?

10 THE WITNESS I'm okay I got this far

11 THE COURT All right Mr Phillips Move along

12 MR PHILLIPS Yes sir I've done too much work,
13 Your Honor I apologize My mouth is dry

14 All right Mr McClure, it is your testimony as I
15 understand it that the moisture damage that's depicted in
16 Plaintiff's exhibit no 22 comes from moisture in the
17 ground?

18 THE WITNESS All the evidence that is available to
19 me at this point indicates that that is what it is, yes

20 Q You've been in the crawl space of the Babae home
21 essentially on the other side of that wall?

22 A Correct

23 Q And I was there with you --

24 A Yes, you were

25 Q -- doing the inspections? I'll have you take a look

1 at Plaintiff's exhibit 23 Is that a fair and accurate
2 representation of the block foundation and that sill plate
3 or band sill that's on the reverse side -- on the crawl
4 space side of the Babaee house?

5 A I think it s very limited I think there are much
6 better photographs depicting it

7 THE COURT No, sir Please just answer the
8 question

9 Q Is it a fair and accurate representation, sir?

10 A Of a portion of it, yes

11 Q So it is your testimony that moisture vapor from the
12 crawl space passed through all of that wood leaving it in
13 this condition and accumulated itself here and caused
14 that? Is that your testimony?

15 A That s correct If you'll show me --

16 Q Sir, your lawyer can ask you that

17 A I m sorry

18 Q Where is the access to the crawl space? If you think
19 of the Babaee home as a rectangle and in one -- such as
20 this exhibit and let's say the area that we crawled to is
21 here where did we enter?

22 A We entered rear left corner of the house

23 Q Back there?

24 A Way back there

25 Q Way back there

1 A Yea

2 Q And we crawled?

3 A Yes

4 Q All right So, from the condition of my suit and
5 your clothes we know how much water was in that crawl
6 space, don't we?

7 A Yes, we do

8 Q All right If that is actually being caused by
9 moisture in the crawl space why isn't all of the
10 perimeter of this house in the exact same shape?

11 A Because, typically what you'll find in houses that
12 have at least rising vapor from ground it'll go up to the
13 frame structure but the areas that we typically find that
14 you have the most accumulation of the liquid is in the
15 dead corners So straight walls maybe have vents through
16 them or something like that They dispense with that
17 vapor much more readily than those that are enclosed
18 corners

19 Q So a vent such as maybe this that's right next to
20 that that would have helped prevent that condition? Is
21 that what you testified to?

22 A It's not right in the corner Actually if the vent
23 was right in the corner it would have helped, but in this
24 particular case the vent is lower than the framed
25 structure of the floor So, it's like taking and putting

1 a cap on a kettle The vapor will rise up It ll spill
2 off the sides but it ll still hover within that space
3 from the frame structure on that rear photograph That's
4 why you see what's occurring to that substrate underneath
5 that floor and you see the paper of that insulation which
6 is stuck to that That s because of accumulation of vapor
7 and liquid that's adhering to the bottom of that floor
8 system and you can almost see the frame structure of those
9 floor joists as well What's occurring there is the
10 accumulation of liquid on the side of that and it diffuses
11 it and it goes on there unequally because of the fact that
12 the insulation is not even on that

13 So that s evidence -- clear evidence of the rising
14 vapor that is occurring in floor system as well at that
15 location and that s right at that location as well

16 Q So, this particular corner of this house sucks all of
17 the moisture from the crawl space and it concentrates
18 right here because the vent is a couple of feet to the
19 side Let me ask you this

20 THE COURT Was that a question?

21 MR PHILLIPS Strike it, Your Honor

22 Let me ask this You testified earlier that humidity
23 is pulled from the outside into a house and then it's
24 reduced to condensate by the air conditioning system

25 THE WITNESS Well, yes When you have a transfer of

1 liquid through a wall, it's -- a lot of that's due to
2 pressure Unequalization because you have mechanical
3 systems inside which are essentially dehumidifying that
4 interior That turns to liquid form that s drained back
5 out of the house into condensate

6 Q The moisture from the outside sucked into the inside
7 of the house?

8 A Yes

9 Q In your opinion to a reasonable degree of
10 professional certainty is it possible that this area of
11 moisture --

12 THE COURT That's not a proper question More
13 likely than not

14 Q More likely than not Is it more likely than not
15 that this extreme area of moisture is being sucked into
16 the house by the process you just determined and is doing
17 this slight amount of moisture damage here rather than the
18 reverse?

19 A Absolutely not Impossible Not going from the
20 outside in That's coming from the inside out

21 Q I understand Mr Blackburn asked you to critique
22 what I said in the opening about hardcoat and EIFS stucco
23 Let me ask you as an expert do you know when hardcoat
24 stucco products were developed?

25 A Probably a thousand years ago

1 Q Been around a long time?

2 A Oh, yes

3 Q Haven't been banned?

4 A No hardcoat stucco has never been banned

5 Q How long has EIFS been around -- barrier EIFS the
6 product that we're looking at right here?

7 A Golly maybe since the -- Well, it's been used in
8 the 60's and 70's So long time

9 Q Since the 60 s or 70's?

10 A A number of years, yea

11 Q And you made mention of the Ruff case that you were a
12 member of I think that was Ruff versus Parex and Dryvit
13 and all the major manufacturers of EIFS in North Carolina?

14 A A number of them yes

15 Q They lost that case didn't they the EIFS
16 manufacturers?

17 A No they did not lose that case

18 Q There was not a Ruff settlement where homeowners
19 could apply for money and be paid for just this kind of
20 damage That s not losing the case They settled They
21 settled on it because it was cost effective for them to do
22 that because they had a product out there that was very
23 good and they wanted to continue selling it

24 Q I understand Thank you for clarify that for me
25 Let me ask you this Shortly thereafter North Carolina

1 banned the product in the construction of woodframed
2 residential houses in North Carolina, didn't it?

3 A Yes it did

4 Q Do you consider that a loss to the manufacturers?

5 A Pardon me?

6 Q Would you consider that a loss? Having your product
7 banned in an entire state because it doesn't work, would
8 you consider that a loss?

9 A I would consider it a loss to a certain degree

10 Q Thank you, sir

11 A There are many extenuating conditions related to
12 that And it wasn't banned in those states It's still
13 used

14 Q I'm sorry, sir Maybe I wasn't clear Is barrier
15 EIFS used as a cladding on residential wood-frame -- let
16 me use a different term Is barrier EIFS still being
17 applied to houses in North Carolina that are made out of
18 wood -- wooden structures like what is depicted in this
19 exhibit Plaintiff's 23?

20 MR BLACKBURN Your Honor, I would object to this
21 line of questioning How is it relevant to the breach of
22 warranty claim here in the Babaee house?

23 THE COURT Because your client opened the door about
24 his knowledge of the North Carolina settlement and his
25 involvement in it It goes to credibility

1 Q Could you answer sir, or I can repeat the question

2 A It is banned to answer your question yes

3 THE COURT And it is further relevant because you
4 brought it up, Mr Blackburn about the comparison in
5 Mr Phillips opening statement

6 MR BLACKBURN Yes Your Honor

7 THE COURT Move along, Mr Phillips

8 MR PHILLIPS Your Honor I m done Thank you

9 THE COURT Thank you for following my instructions
10 Mr Blackburn anything on redirect?

11 MR BLACKBURN Nothing, Your Honor

12 THE COURT Thank you You may step down sir Next

13 witness

14 Mr Sheftman?

15 MR SHEFTMAN No sir

16 MR BLACKBURN Your Honor, the Defendant rests

17 THE COURT Thank you Anything in reply?

18 MR SHEFTMAN Can we have on minute Your Honor
19 please?

20 THE COURT You may

21 MR SHEFTMAN Thank you Your Honor

22 THE COURT Not -- I don't think they want you over
23 there

24 MR SHEFTMAN We don't want you over here You
25 can't come to this meeting

1 MR BLACKBURN When you said "one minute," I
2 thought you were going up to the bench

3 MR PHILLIPS Your Honor I appreciate Mr Sheftman
4 brought a point to my attention

5 THE COURT Now, wait a minute Are you making a
6 speech or what? Are you going to call anything in reply?

7 MR PHILLIPS I will I'd like to call Mr Babae
8 in reply

9 THE COURT You may You know what reply is limited
10 to

11 You're still under oath Mr Babae

12 FARIBORZ Z BABAEE after being previously duly
13 sworn, testified as follows

14 BY MR PHILLIPS

15 Q Mr Babae given what you know about the condition
16 of your house, what is it worth?

17 A The condition that it's in right now I would think
18 it's worth a lot less than we brought it perhaps in less
19 in value of 220 or \$230,000

20 Q Is that what you believe it's worth - 220 to
21 \$230,000?

22 A No It s --

23 MR BLACKBURN Your Honor --

24 THE COURT Hold on

25 MR BLACKBURN Asked and answered and Mr Babae

1 doesn't have any real estate experience He doesn't have
2 a basis for his opinion of the value

3 THE COURT Mr Sheftman, you can't stand up He is
4 the guy

5 MR PHILLIPS Your Honor -

6 THE COURT The law is very clear that a homeowner
7 can testify about a value of his property

8 Q As the owner of the home in this lawsuit, Mr Babae,
9 give me a dollar figure for what you think it's worth

10 A I believe it's worth \$480 000

11 MR PHILLIPS Thank you sir That s all Your
12 Honor

13 I m sorry Just to refresh the jury s memory what
14 you did you pay for it?

15 THE WITNESS We paid \$700 000

16 MR PHILLIPS Thank you, sir

17 THE COURT You can cross him on that and that alone

18 MR BLACKBURN Your Honor, I have nothing further

19 THE COURT Thank you You may step down

20 MR PHILLIPS Sir now the Plaintiffs are finished

21 THE COURT Pretty close to my representation with
22 the help of the lawyers I ve got to do motions --

23 everybody They won't take very long because we spent 45

24 minutes this morning before y all got here doing all that

25 So let's go ahead and take a quick break Don t discuss

1 publish it?

2 THE CLERK I can State of South Carolina, County
3 of Richland, 2006-CP 40-7215, Fariborz Babaei and Malihe
4 Babaei versus Moisture Warranty Corporation d/b/a Moisture
5 Free Warranty and Preferred Home Inspections, Inc

6 Do you the jury find the Defendant Moisture
7 Warranty Corporation breached its warranty that it issued
8 to the Plaintiffs? Yes

9 State the amount of damages you find has sustained as
10 a result of Defendant's breach of the warranty 140,000
11 Signed number 164 Mark Moore Foreperson, November 20
12 2008

13 Mr Foreman, is this your verdict and the verdict of
14 the entire jury?

15 THE FOREPERSON Yes ma'am

16 THE COURT Anything from the Plaintiff for the jury
17 before I dismiss them?

18 MR PHILLIPS No, Your Honor

19 THE COURT Thank you

20 MR BLACKBURN Just post-trial motions at this
21 time --

22 THE COURT No sir Mr Blackburn, listen to me
23 Anything for the jury?

24 MR BLACKBURN No, Your Honor

25 THE COURT Thank you Mr Foreman and ladies and

1 five One sister is a nurse and one brother is a doctor
2 and my mom is a doctor and two sisters-in-laws are
3 doctors We are all very close They're there, and my
4 wife -- we're going up tomorrow, but he's ready and it's
5 just tough to let him go Thank you for asking He s had
6 a good life He's been a great Dad Y'all have a
7 wonderful week Thank you very much

8 (Whereupon the jury exited the courtroom at 3 42)

9 THE COURT Mr Blackburn, I can do it one of two
10 ways You can make your post-trial motions now or you can
11 I ll give you 10 days to do it and we can hear them I'll
12 be in Bamberg, Aiken between now and Christmas and we can
13 find one morning to come back and do them or I'll do it
14 however you'd like Sometimes lawyers like a few extra
15 days to get their thoughts together and make them or I'll
16 be glad to entertain them now The choice is yours

17 MR BLACKBURN Judge, the the Defendant accepts your
18 grant of 10 days to make post trial motions

19 THE COURT Please bear in mind that the rules say 10
20 days So, don't let it slip up on you

21 MR BLACKBURN I won t

22 THE COURT I know that you won't

23 Let me thank both of you very much All cases are
24 tough All trials are tough Y'all both were very
25 prepared and obviously knew your cases backwards and

1 STATE OF SOUTH CAROLINA

2 COUNTY OF RICHLAND

CIRCUIT COURT
2006-CP-40-7215

3
4 FARIBORZ Z BABAEE and
5 MALIHE BABAEE,
6 Plaintiff,

7 -vs-

TRANSCRIPT OF RECORD

8 MOISTURE WARRANTY CORPORATION,
9 et al,
10 Defendant

11 Heard on Wednesday, January 21, 2009
12 Aiken, South Carolina

13 BEFORE

14 THE HONORABLE DOYET A EARLY III

15 APPEARANCES

16 Counsel on Behalf of the Plaintiff
17 Robert B (Sam) Phillips, Esq

18 Counsel on Behalf of the Defendant
19 Mark Phillips, Esq

20
21
22 Cheri L Young, RPR
23 Circuit Court Reporter
24 P O Box 1154
25 Aiken, SC 29802-1154

0871

APP_0883

1 ON WEDNESDAY, JANUARY 21, 2009 AT 10 48 A M

2 THE COURT We're on the record for Babae versus
3 Moisture Warranty Corporation, 06-CP-40-7217 (sic) I am
4 considering the Defendant's post trial motions is that
5 correct?

6 MR SAM PHILLIPS Correct

7 MR PHILLIPS That's right, Your Honor

8 THE COURT There's a seat right there

9 MR SAM PHILLIPS Thank you

10 THE COURT Mr Kodman, let him share your desk

11 MR KODMAN I offered, Judge

12 MR SAM PHILLIPS He did, Your Honor

13 THE COURT Be careful sitting over there

14 MR PHILLIPS Your Honor, may it please the
15 Court Very briefly on behalf of the Defendant on the
16 post trial motions

17 The Court knows that I wasn't involved in this
18 trial but certainly I've had quite a bit of involvement
19 with defending stucco and moisture treated litigation on
20 many of these issues

21 As I understand things, the Court before trial,
22 whether it was Judge Cooper or Judge Early, specifically
23 limited this case to the warranty claim, the contractual
24 warranty claim between the Plaintiffs and my client

25 And the four corners of that claim are laid out

0872

APP_0884

1 very specifically You got them in our post trial motion
2 as Exhibits A and B And I know they were both admitted
3 in the trial, the authorization certificate for the
4 warranty, and the terms of the warranty, Your Honor

5 The first motion we have is for judgment not
6 withstanding the verdict And very simply, this -- we
7 believe that the verdict or judgment really ought to be
8 entered on behalf of Moisture Warranty Corporation as a
9 matter of law

10 And the reason is, Judge, that the Plaintiff
11 failed to comply with the warranty The warranty
12 specifically allows the discretion, at the discretion of
13 the Defendant, Moisture Warranty Corporation, the ability
14 to come make repairs to the house, or if -- the discretion
15 was to Moisture Warranty Corporation, then to pay on
16 claims up to the maximum on an entire claim, entire year's
17 claim of \$20,000 And by the terms of the warranty is
18 \$500 per incident of moisture intrusion

19 Mr Bah-bee' (phonetically), as I understand is
20 the pronunciation of his name, instead demanded that he
21 get the entire \$20,000 and would not accept the repairs
22 that were tendered by Moisture Warranty Corporation

23 So our first ground under post trial motions,
24 Your Honor, is judgment not withstanding the verdict as a
25 matter of law because the Plaintiff failed to satisfy

0873

APP_0885

1 conditions precedent That is, to accept the terms of the
2 warranty, to accept the repairs that were tendered by
3 Moisture Warranty Corporation or accept the moneys that
4 were tended under the warranty by Moisture Warranty
5 Corporation, all exclusive of the arbitration that was
6 provided for which is not here for today but for another
7 day, if necessary

8 The law we cited, very simple contract law, Your
9 Honor, that a party that wishes to compel another to
10 fulfill the terms of the contract must first take, must
11 make his part of the agreement precedent Cannot proceed
)12 against the other without actual performance of the
13 agreement on his part by way of tender refusal

14 So our very simple position is, Judge, that we
15 ought to have judgment notwithstanding the verdict based
16 on the Plaintiff's failure to satisfy what he was supposed
17 to do under the warranty, specifically to accept the
18 repairs which in the discretion of Moisture Warranty
19 Corporation were offered, or the moneys that were offered
20 by Moisture Warranty Corporation pursuant to the warranty

21 Your Honor, the second ground is for a new trial
22 absolute, for the Court to act as a 13th juror And
23 specifically for the Court to find that the judgment that
24 was rendered by the jury was not supported by the
25 evidence

0874

APP_0886

1 The terms of the warranty limited a claim, any
2 claims under a calendar year, Your Honor, to \$20,000 total
3 relief And that is assuming that Moisture Warranty
4 Corporation had not offered the repairs to the house or, I
5 guess, not offered the repairs at the individual locations
6 of damage

7 So what we've asked the Court to do is, the
8 Court, of course, under the law, has the right to hang
9 this jury And we feel then that the Court ought to
10 consider strongly if it does not give judgment not
11 withstanding the verdict, to give relief as the 13th
12 juror

13 The trial judge can hang the jury by refusing to
14 agree with the jury's unanimous verdict in casting his or
15 her vote against it, and where a new trial is necessary
16 based on the facts or the verdict's not supported by the
17 evidence or is inconsistent or shows the jury has some
18 confusion

19 So, if, Judge, under the facts, the evidence, the
20 witnesses, the circumstances --

21 THE COURT Mr Phillips, I'm very familiar with
22 the law on that --

23 MR PHILLIPS Go ahead

24 THE COURT No I'm not cutting you off, but I
25 think your better arguments are over on the nisi

0875

APP_0887

1 remittitur

2 MR PHILLIPS That's where I was heading next

3 THE COURT Okay

4 MR PHILLIPS Judge, under the remittitur we're
5 asking that the Court consider reducing the verdict

6 The outside terms of this contract would have
7 limited relief under one year's claims to \$20,000, under
8 the entire life of the contract to \$60,000 We believe
9 that the 20 would be more appropriate under the four
10 corners of the warranty, Your Honor

11 THE COURT Well, the second motion or the second
12 grounds on the motion that were filed by trial counsel was
13 that remittitur be reduced to 60,000 That was number
14 two

15 MR PHILLIPS 60,000 being the outside edge of
16 that contract, Your Honor

17 THE COURT That's correct

18 MR PHILLIPS And that, we think, should be the
19 absolute maximum

20 And finally, Your Honor, I understand that the
21 Court did not admit the specific documentary evidence that
22 the Plaintiff had already negotiated and received relief
23 for the synthetic stucco problems or the ability to
24 remove, or re-clad the house even before he bought the
25 house, knowing that he was buying a house with synthetic

1 stucco

2 And we ask that even if the Court didn't admit
3 that evidence during the case in chief, it ought to
4 consider that evidence by way of setoff That's \$110,000,
5 which would reduce the verdict, under my argument, to
6 \$30,000 down from 140

7 THE COURT Well, in that regards, Plaintiff made
8 a motion in limine prior to the trial concerning the
9 \$110,000 I don't have the transcript, but it was my
10 recollection that my ruling was based mainly on a 403
11 analysis, that it was more prejudicial than probative, and
12 that I would deal with that \$110,000 depending on what the
13 verdict was

14 But I felt like if the 110 came into the trial it
15 would be very prejudicial to the Plaintiff And I hope I
16 stated that in my ruling, but that was my thinking
17 anyway

18 So I am concerned about the \$110,000, whether or
19 not it should be set off And I think that's your
20 strongest argument or your strongest position So if you
21 want to elaborate a little bit more on that, I'll be glad
22 to hear you

23 MR PHILLIPS It's very simply, Your Honor, to
24 me it would be almost like a multi-fault personal injury
25 accident where a payment by a co-defendant prior to trial

0877

APP_0889

1 that got that co-defendant out of having to go to trial,
2 would not be admitted during the trial. Certainly it
3 would be considered after a verdict. And that's to me
4 where we are right now.

5 The \$140,000 verdict is clearly outside of the
6 contemplation of the contract and it clearly awarded the
7 Plaintiff consequential damages, that is, presumed damage
8 underneath the synthetic stucco system. That amount was
9 already tendered to the Plaintiff, given to the Plaintiff
10 by way of a reduction of the purchase price.

11 THE COURT: At the very end of the contract in
12 between the seller and the purchaser, and if I remember
13 correctly, that document said \$110,000 reduction was for
14 the repairs that needed to be done.

15 MR. PHILLIPS: Specifically, repairs or
16 replacement. So, Your Honor, as far as we're concerned
17 that part of the case, at least, has been settled in part
18 as, both against Moisture Warranty Corporation and it's
19 clear the Plaintiff has received those moneys.

20 THE COURT: So would that be simply by way of a
21 setoff? That's not a nisi remittitur where a new trial
22 would be granted unless they accepted the setoff, or
23 what's your position on that? Is it simply just a setoff
24 on the verdict or is it, if you don't accept the setoff,
25 I'll give you a new trial, or do you want to think about

1 that and put it in your --

2 MR PHILLIPS If we can follow it up, but I
3 think we're going to have ten days as we discussed

4 Your Honor, just to me as a matter of law, the
5 Court can consider that as one of the grounds for the
6 reduction of the verdict

7 THE COURT There would be a simple reduction but
8 not, if you don't accept the reduction you get a new
9 trial It's not nisi remittitur, it'd just simply me --
10 well, I'm just thinking out loud

11 MR PHILLIPS Again, Your Honor, at least my
12 reading of the warranty is that the maximum exposure of
13 Moisture Warranty Corporation would be \$20,000 which is
14 the amount of -- as stated very plainly on both that
15 authorization certificate for the warranty and on the
16 warranty itself, is that any aggregation of claims within
17 a year can be, at most, \$20,000

18 THE COURT Well, I guess the reason for the
19 \$60,000 in the motion is for the three-year period?

20 MR PHILLIPS That's the entire policy If you
21 live the life of the warranty, it would allow up to
22 \$60,000

23 THE COURT Thank you, Mr Phillips

24 MR PHILLIPS Yes, sir

25 THE COURT Now, the other Mr Phillips

1 MR SAM PHILLIPS Sam Phillips for the
2 Plaintiff, Your Honor, for the court reporter

3 Your Honor, what the Defendant is inviting the
4 Court to do is to go back in and rule in their favor on
5 contested evidence reports

6 This case was very simple My client bought a
7 house based on representations in the warranty and then
8 found out that the repairs that the warranty offered
9 couldn't be done in South Carolina by a contractor with
10 insurance

11 The whole case was then about the consequences of
12 that The consequential damage of not getting the repair
13 envisioned by the warranty but getting a stripped re-clad,
14 taking the stucco off, repairing the damage, the
15 underlying moisture damage which the warranty specifically
16 excluded, and then putting it back The whole case was
17 built on that consequential damage

18 As an alternative measure of damage, we put on
19 evidence of the diminution in value of the home And both
20 of those numbers came out to be 240-some odd dollars
21 (sic)

22 THE COURT \$240,000

23 MR SAM PHILLIPS \$240,000 The jury -- and
24 that was the only evidence about those repairs There was
25 no evidence put on by the Defendant that those repairs

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APP_0892

1 would have cost a hundred and some-odd thousand They
2 merely claimed that they were limited to a couple thousand
3 dollars under the warranty

4 The jury heard the question and was given a
5 general verdict form, a verdict form that was drafted by
6 the Defendant It didn't ask what was the basis of the
7 contract

8 Moisture Warranty Corporation is here arguing
9 today, oh, these limitations that are contained in these
10 documents that Plaintiff specifically argued at trial
11 weren't the basis of the bargain, weren't the basis of why
12 they purchased the moisture -- or they agreed to purchase
13 a home that had a moisture-free warranty That's a
14 contested fact

15 For you to rule differently, you'd have to go in
16 and deconstruct how the jury reached its verdict And
17 that's inappropriate when you have a general verdict form

18 Additionally, there was argument about the
19 reduction in the price of the house And there was a
20 reduction in the amount that the Plaintiff sought of
21 approximately \$100,000 And as the Court well knows,
22 Jackson, Brigg and other cases, a jury's verdict cannot be
23 second-guessed by a Court because it doesn't calculate to
24 a mathematical certainty It only has to show a
25 reasonable certainty that the jury's verdict was based on

1 the evidence And here it was

2 THE COURT You agree with me that we kept, I
3 kept among your motions, your motion, the \$110,000 out?

4 MR SAM PHILLIPS You did, Your Honor Defense
5 counsel during his closing argument, though --

6 THE COURT Before you go into that --

7 MR SAM PHILLIPS Yes, sir

8 THE COURT -- do you agree with me that my
9 reasoning was the 403 analysis, that it was more
10 prejudicial than probative?

11 MR SAM PHILLIPS I do, Your Honor

12 THE COURT Okay Go ahead

13 MR SAM PHILLIPS Your Honor, the -- there were
14 several other arguments I would allow in my brief as to
15 all issues except as to the setoff because the Court has
16 indicated that they're interested in that

17 As I set forth in my brief, the Black's Law
18 Dictionary of setoff is a defendant reducing their
19 liability based on another cause of action they have
20 against the plaintiff

21 Mr Phillips made reference to a multi-car
22 accident situation Well, yeah, all of those people have
23 claims against each other It all rises out of the same
24 occurrence

25 Moisture free warranty was not a party to the

0882

APP_0894

1 purchase of this house They have no direct cause of
2 action arising from what the Babaees paid for the house
3 So whether that house was a million dollars or whether
4 they got it for free, it doesn't matter

5 They warranted that the house would be dry and it
6 wasn't They warranted that they would make repairs that
7 weren't authorized in South Carolina They breached that
8 warranty and as a consequence my client has to strip and
9 re-clad the house, a repair that's not contemplated by the
10 warranty

11 If the Defendant wanted the jury to rule on what
12 comprised the contract as they're asking the Court to do
13 here today, they could have asked the jury special
14 interrogatories, what makes up the parties' agreement
15 They didn't

16 They proposed the verdict form They could have
17 asked, what component of damages, are these actual
18 damages is this the benefit that would have been obtained
19 under the contract, the actual damages or are these the
20 consequential damages that Plaintiff has argued through
21 two expert witnesses and the Plaintiff himself And they
22 didn't

23 They now want you to go back and second-guess the
24 jury's verdict and determine what facts they relied on in
25 reaching it and how they calculated it And that's -- I

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APP_0895

1 would respectfully submit that that is inappropriate

2 It's certainly no basis for a setoff This is,
3 if anything, and I don't believe that this is the case, I
4 think that it's a separate transaction

5 And just to go back, and I don't want to re-argue
6 the case because I know it was a lengthy trial but, Your
7 Honor, the document that we excluded, we asked the Court
8 to exclude, talking about \$110,000 for the repair and
9 replacement of stucco, was drafted by the real estate
10 agent after -- and he testified at trial that once
11 Mr Babae had an inspection that said there may be
12 problems with this house, he called the seller and said,
13 we have a problem

14 So then there's -- and there's other problems
15 besides the stucco Mr Babae testified that they spent
16 over \$60,000 or approximately \$60,000 in other repairs,
17 and that they did not believe that the stucco needed to be
18 repaired because of the moisture free warranty That
19 document, not only was it prejudicial but it was also
20 contested

21 The issue of the price reduction made it into the
22 record anyway So, if anything, that money is a
23 collateral source because it comes from a third party who
24 is not a part of that transaction And as a collateral
25 source, it simply can't be the basis of the setoff because

0884

APP_0896

1 of the collateral source

2 THE COURT Thank you

3 MR PHILLIPS Very briefly

4 THE COURT Very briefly

5 MR PHILLIPS Your Honor, just reminding myself,
6 and if the Court please, that the Plaintiff proceeded
7 under breach of warranty The warranty on its face says,
8 very plainly, that it's limited to \$20 000 per year or
9 \$60,000 over the full term of the warranty It says that
10 very boldly on its first page in both instances

11 So, again, I have to try to turn our attention
12 back to the warranty which is what the Plaintiffs tried to
13 proceed on which is what they did proceed on So the
14 maximum, as I understand this warranty, could have been
15 \$20,000 per occurrence or per claim in a calendar year

16 And just finally, very quickly, out of the
17 \$110,000 I understand that that's a point of interest,
18 even if it was a collateral source, it was -- I don't
19 agree it's a collateral source but that's probably one
20 reason the Court excluded it evidentiarily

21 But I still think it can consider it now
22 Certainly it can consider the Plaintiff's claim of
23 diminution of value They basically got compensated for
24 the diminution before they even closed on the first of the
25 house

0885

APP_0897

1 THE COURT Thank you both very much As we
2 stated in chambers, I expect proposed orders on your
3 positions which have been -- I said ten days back there,
4 but obviously if you get to the office and you got
5 problems with that, let me know and I'll extend that
6 time

7 Thank you for your, both your memos and your
8 arguments

9 MR SAM PHILLIPS Your Honor, would you like
10 those proposed orders sent in electronically or paper
11 copy?

12 THE COURT Both

13 MR SAM PHILLIPS I'm sorry, Your Honor I
14 haven't practiced with you before, Word or Word Perfect?

15 THE LAW CLERK Word, please

16 THE COURT I knew that but I just wanted to see
17 if she knew it

18 MR SAM PHILLIPS Thank you Appreciate it,
19 Your Honor

20 THE COURT Thank you both very much Have a
21 nice day

22 END OF PROCEEDINGS 11 07 A M

23 CERTIFICATE OF REPORTER

24 I, Cheryl L Young, Registered Professional Reporter,
25 and Official Court Reporter for the State of South

0886

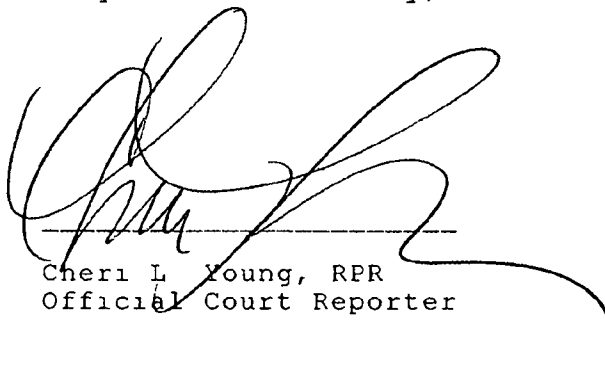
APP_0898

1 Carolina, do hereby certify that the foregoing transcript
2 of proceedings heard on Wednesday, January 21, 2009, in
3 Aiken, South Carolina, was reported by me using machine
4 shorthand and realtime computer-aided translation and is a
5 true, accurate and complete transcript of the proceedings
6 had and evidence introduced in the hearing of the matter

7 I do further certify that I am neither of kin, counsel
8 nor interest to any party hereto

9 I have hereunto set my hand this Monday, the 30th day
10 of March, 2009

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Cheri L. Young, RPR
Official Court Reporter

0887

APP_0899

Wood Moisture Content

This leaflet describes the practical meaning to the homeowner of readings from a wood moisture meter

The wood moisture content (WMC) of wooden members of the substructure of residences being sold in the state is routinely being disclosed in the closing process of the sale to buyers. The reading is usually provided by pest control operators and is included in or near the termite letter (form CL 100 Official South Carolina Wood Infestation Report)

The notation such as WMC 18 is usually meaningless or at the most a curiosity since seldom is there a question or interpretation of the notation. But the disclosure is highly significant.

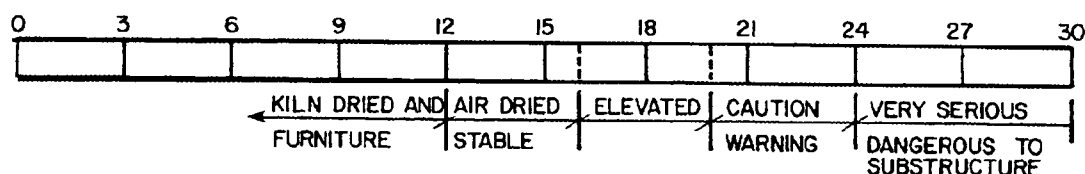
South Carolina suffers extensive moisture damage in residences across the state stemming from multiple causes. The problem is so widespread and the damage so costly to repair that pressure for disclosure of conditions has led to the reporting of substructural wood moisture content.

Following here is an interpretation of the meaning

WMC Wood Moisture Content Weight of water expressed as a percentage of oven dry weight of wood water in intermolecular regions of cell wall. Full fiber saturation (fsp) ranges from 28-31 percent depending on temperature and kind of wood.

Scales Meanings

Below 12	Readings in this area are gathered from kiln or oven dried woods and furniture grades of wood and represent very dry conditions
12-16	Readings are common to construction grades air dried lumber and healthy residential substructures (beneath first floor in crawl spaces). These are the readings desired.
16-20	Readings indicate a possible elevated level of wood moisture. Such readings should alert the homeowner to look for a source of excess moisture in the crawl space and to be sure that foundation vents are opened for continuous year round ventilation. The excess moisture source should be corrected if found.
20-24	Readings indicate a serious problem somewhere. The excess moisture source must be immediately corrected and the situation carefully monitored until the WMC returns to the 12-16 range.
25-30	Actual and often extensive damage is evident when readings reach this level. The substructure may show decayed areas ranging from small to very large of rotten floor joist, sills, and subflooring. Often this is the too late level of reading for correcting problem situations without repair costs in the thousands of dollars.



	A	B	C	D	E	F	G	H
1	JOB NAME	TYPE	BUILDER			DATE	SQFT	
2	Babae Res	DEFS	PSC LLC			07/09/08	6122	
3	LOCATION						5432 wall	
4	Cola						690cmu	
5		MATE	MATERIAL	MATERIAL	LABOR	LABOR		Schedule
6	ITEM	QUANTITY	TAXED UNIT	TOTAL \$	AN HOU	TOTAL \$	TOTAL \$	of
7	Mobilization							values
8	PERMIT, DUMP, PJ	3	1200 00	\$3600	2	\$38	\$3638	
9				\$0		\$0	\$0	
10				\$0		\$0	\$0	\$5430 45
11	Landscape, deck protection, erect scaffold							
12	SCAFFOLD	6	1500 00	\$9000	200	\$3840	\$12840	
13	Landscape	1	2000 00	\$2000		\$0	\$2000	
14	Protection			\$0		\$0	\$0	
15	Plastic (20X100 6 MIL)	4	85 00	\$340	40	\$768	\$1108	
16	Tear off /Misc demo							
17	Siding removal		0 50	\$0		\$0	\$0	\$23802 99
18	Stucco removal	5432	1 25	\$6790		\$0	\$6790	
19	tool rental	1	200 00	\$200	2	\$38	\$238	
20	waterproof deck sheath demo			\$0		\$0	\$0	
21	Rail/column removal (shore)		250 00	\$0		\$0	\$0	
22	rear patio 1 concrete demo			\$0	65	\$1248	\$1248	\$2218 51
23	tile demo	853	2 00	\$1706		\$0	\$1706	
24				\$0		\$0	\$0	
25				\$0		\$0	\$0	\$2546 27
26	Install flashings							
27	Pull/wrap windows	1	500 00	\$500	220	\$4224	\$4724	
28	KICK OUTS	10	25 00	\$250	10	\$192	\$442	
29	PERMA BARRIER	12	30 00	\$360	40	\$768	\$1128	
30	DRIP BEAD (PIECE)	20	7 00	\$140	8	\$154	\$294	
31	step FLASHING	62	8 00	\$496	21	\$403	\$899	
32	misc flash/curf	3	150 00	\$450	80	\$1536	\$1986	\$14138 51
33	Install moisture Barrier							
34	TYVEK STUCCO WRAP	7	132 50	\$928	42	\$806	\$1734	
35	BUTTON CAPS	4	45 00	\$180		\$0	\$180	
36	TYVEK STUCCO TAPE	14	12 00	\$168	14	\$269	\$437	
37				\$0		\$0	\$0	\$3508 51
38	Cladding installation							
39	Stucco	1	58945 00	\$58945		\$0	\$58945	
40	concrete at rear patio	1	150 00	\$150	20	\$384	\$534	
41	Planks			\$0		\$0	\$0	
42	Trim		1 00	\$0		\$0	\$0	
43	tile replacement rear patio	853	14 00	\$11942		\$0	\$11942	
44				\$0		\$0	\$0	\$106598 51
45				\$0		\$0	\$0	
46	Painting			\$0		\$0	\$0	
47	Caulk (tube)	120	5 94	\$713	60	\$1152	\$1865	
48	Paint Interior		2300 00	\$0		\$0	\$0	
49	Paint exterior	1	4500 00	\$4500		\$0	\$4500	
50				\$0		\$0	\$0	

0889

APP_0901

	A	B	C	D	E	F	G	H
51				\$0		\$0	\$0	
52				\$0		\$0	\$0	
53				\$0		\$0	\$0	
54				\$0		\$0	\$0	\$9499 70
55				\$0		\$0	\$0	
56	Fixtures, soffit, or deck replacement			\$0		\$0	\$0	
57	VINYL SOFFIT		1300 00	\$0		\$0	\$0	
58	Components	1	200 00	\$200	60	\$1152	\$1352	
59				\$0		\$0	\$0	
60				\$0		\$0	\$0	
61				\$0		\$0	\$0	
62	Carpentry			\$0		\$0	\$0	\$2017 91
63	Flashing at foudation 350	1	1100 00	\$1100	120	\$2304	\$3404	
64	Insulation		350 00	\$0		\$0	\$0	
65	Decks 409 sf @ \$15 per sf		6135 00	\$0		\$0	\$0	
66	Plumbing panels		200 00	\$0		\$0	\$0	
67	Install waterproof deck		2500 00	\$0		\$0	\$0	\$5080 60
68	Install rails		150 00	\$0		\$0	\$0	
69	Install screen porches		250 00	\$0		\$0	\$0	
70	Install window/door trim		1500 00	\$0		\$0	\$0	
71				\$0		\$0	\$0	
72				\$0		\$0	\$0	\$0 00
73				\$0		\$0	\$0	
74				\$0		\$0	\$0	
75	Allowances			\$0		\$0	\$0	
76	Electrical		2000 00	\$0		\$0	\$0	
77	Plumbing		2000 00	\$0		\$0	\$0	\$0 00
78	HVAC		2000 00	\$0		\$0	\$0	
79	Engineering/consulting fees		30000 00	\$0		\$0	\$0	
80	Window adjustment/repair		2000 00	\$0		\$0	\$0	\$0 00
81	FEMA compliance lower level		10500 00	\$0		\$0	\$0	
82				\$0		\$0	\$0	
83				\$0		\$0	\$0	
84	Other			\$0		\$0	\$0	\$0 00
85	DECK			\$0		\$0	\$0	
86	PLYWOOD EPS	1	150 00	\$150	3	\$58	\$208	
87	clean up	1	100 00	\$100	60	\$1152	\$1252	
88				\$0		\$0	\$0	
89	Misc			\$0		\$0	\$0	
90	gas	1	350 00	\$350		\$0	\$350	\$2700 90
91	Contingency	1	5000 00	\$5000		\$0	\$5000	
92	Motel	40	65 00	\$2600		\$0	\$2600	
93	Per diem	107	15 00	\$1605		\$0	\$1605	
94				\$0		\$0	\$0	\$13738 81
95			0 00	\$0		\$0	\$0	
97				\$114462	1067	\$20486	\$134949	\$191281 64
99				MATS	MH	LABOR	COST	
101			PRICE/SQFT		GM		JOB TOT	
102			32 90		33 %		\$201416	

0890

	A	B	C	D	E	F	G	H
1	BUILDER	PSNC		ARCHITECT		TAKEOFF DA	07/09/08	
2	JOB NAME	Babaee		ADDRESS	cola	PLANS DATE		
3								
4	WALWID	WALHIT	WINWID	WINHIT	LNFTTRM	WINSQFT	GROSFT	NETFT
5	10 75	21	3	5	16	15	225 75	210 75
6	10 75	21	3	5	16	15	225 75	210 75
7	3 5	21	3	5	16	15	73 5	58 5
8	3 5	21	3	5	16	15	73 5	58 5
9	15	21	3	5	16	15	315	300
10	15	21	3	5	16	15	315	300
11	3 25	21	1	6 25	14 5	6 25	68 25	62
12	3 25	21	1	6 25	14 5	6 25	68 25	62
13	3	11	1	6 25	14 5	6 25	33	26 75
14	3	11	1	6 25	14 5	6 25	33	26 75
15	6	11	3	6 25	18 5	18 75	66	47 25
16	6	11	3	6 25	18 5	18 75	66	47 25
17	6 5	10 5	5 25	9 75	30	51 1875	68 25	17 0625
18	6 5	10 5	4	5 5	19	22	68 25	46 25
19	2 5	10 5	3	5	16	15	26 25	11 25
20	2 5	10 5	1	5 5	13	5 5	26 25	20 75
21	7 5	10 5	3	5 5	17	16 5	78 75	62 25
22	18 75	12	1	5 5	13	5 5	225	219 5
23	3 5	12 75	5	5	20	25	44 625	19 625
24	25	19	3	6 75	19 5	20 25	475	454 75
25	3	6	4	4	16	16	18	2
26	35 5	13	9	5 5	29	49 5	461 5	412
27	20 5	19	1 5	2	7	3	389 5	386 5
28	5	1	7 5	2	19	15	5	10
29	7	1	1 5	8	19	12	7	5
30	10	4	7 5	8	31	60	40	20
31	4 75	12	12	5 5	35	66	57	9
32	24	20 25	6	5 5	23	33	486	453
33	17 25	20 25	1	6	14	6	349 3125	343 3125
34	15 75	20 25	3	6	18	18	318 9375	300 9375
35	13	20 25	1	6	14	6	263 25	257 25
36	51	1	6	5 5	23	33	51	18
37	4 25	4	5	3 5	17	17 5	17	0 5
38	4 25	4	2	6	16	12	17	5
39	4 25	4	2	6	16	12	17	5
40	4 25	4	0	0	0	0	17	17
41	4 25	4	0	0	0	0	17	17
42	4 25	4	0	0	0	0	17	17
43	18 75	21	0	0	0	0	393 75	393 75
44	6	3	0	0	0	0	18	18
45	21	21	0	0	0	0	441	441
46	8	4	0	0	0	0	32	32
47	8	4	0	0	0	0	32	32
48	8	4	0	0	0	0	32	32
49	8	4	0	0	0	0	32	32
50	0	0	0	0	0	0	0	0

0891

APP_0903

	A	B	C	D	E	F	G	H
51	0	0	0	0	0	0	0	0
52			690 188		635 5 672 4375	6104 625	5432 1875	
53			BLK TOT		LNFTTRM	SOFTWIN	GROSWALFT	NETWALFT

0892

APP_0904

PRIME SOUTH
General Contractors
NC License #54317
SC License # G 108826

Proposal

Fariborz & Malihe Babaee 133 Beaver Dam Rd Columbia, SC 29223	Work to be performed at
	133 Beaver Dam Rd Columbia, SC
	Date of Proposal 07/10/08

We hereby propose to furnish all the materials labor insurance and equipment necessary for the completion of
Babaee Res Retrofit

All material is guaranteed to be as specified and the above work is to be performed in accordance with any drawings and specifications supplied and the above work is to be completed in a substantial workmanlike manner for the sum of

Two Hundred One Thousand Four Hundred Fifteen and 0/100 Dollars (\$201 415 00)

Draw Schedule

-Draw for work completed on FRIDAY, for payment on FRIDAY of the following week-

The above Base Price is based on the following scope of work

- 1 Building permits schedule inspections coordinate trades and supply job schedule
- 2 Supply complete job documentation at end of job including detailed pictorial guide of job process material literature and warranty information building permit and other job documents
- 3 Supply project management and full time job site supervision Thoroughly inspect all phases of construction
- 4 Maintain a safe and clean job site on a daily basis Supply dumpster and sanitary facilities
- 5 Remove all equipment unused materials and trash at end of job
- 6 Build scaffold per OSHA safety standards and allow for safe entrance access
- 7 Protection of sidewalks porches and other adjacent surfaces
- 8 Remove & reinstall exterior wall components necessary for construction such as lights outlets etc
- 9 Remove existing stucco from exterior framed walls and clean & vacuum yard and landscape
- 10 Remove windows/doors and install membrane pan flashing beneath windows/doors and reinstall existing windows/doors
- 11 Install head flashing at windows and doors seal sides of windows to weather barrier
- 12 Replace roof flashing with heavy gauge 5 aluminum step flashing
- 13 Install stainless steel kick-out flashing over waterproof membrane at roof line terminations Copper at copper roof
- 14 Remove foam at/behind porch/patio to install stainless steel flashing curbed and sealed into porch/patio at bottom of wall
- 15 Install Tyvek weather barrier with Tyvek tape on the seams correctly interfacing with all flashings windows doors etc
- 16 Install cement board hard coat stucco system or conventional hard coat stucco system to framed walls Aesthetic trim details to be EPS

\$201 415



SEE PAGE 2 FOR ADDITIONAL ITEMS

Contract Number 426631107



Proposal for 133 Beaver Dam Rd
Columbia SC

Page 1 of 3

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APP_0905

CONTINUED FROM PAGE 1

- 17 Install sealants around windows doors and other wall penetrations
- 18 Paint eaves handrails adjacent to house and door brick mold with Duration paint by Sherwin Williams
- 19 Cut rear patio slab 1' away from wall to access damaged outer band make repairs apply Sonneborn HLM 5000 to wood before concrete is repoured remove and replace all tile on patio with similar tile Install curb flashing
- 20 Repair landscape

Add to the proposal for the following (These items are not included with base proposal)

\$16 000 +/- Estimated wood rot and ancillary damage This is an estimate based on a visual inspection of wall details which may promote water intrusion Work not included in the scope of work listed above will be an additional charge in accordance with the change order provision in this contract This estimate may also vary due to unpredictable termite damage Lump sum agreements exclude termite damage repairs

Prime South guarantees installation compliance with product manufacturer(s) specifications and guarantees new construction to be in compliance with all applicable state and local codes

Contract Number 426631107

Turn to the next page for notes and signature lines

Proposal for 133 Beaver Dam Rd
Columbia SC

Page 2 of 3

0894

APP_0906

Notes regarding this agreement

Prime South has attempted to include all items necessary for the completion of the proposed work without additional costs. However, any alteration or deviation from the proposed work that involves extra costs will become an extra charge over and above the estimate. Change order items which are subcontracted from **Prime South** will include a twenty percent contractors fee. Change order items performed by **Prime South** will be a charge of \$40 per man hour plus material cost unless a lump sum price is arranged. Change orders may also include equipment rental, port a john and dumpster fees and travel expenses.

All agreements and schedules are contingent upon weather, accidents, or delays beyond our control. Owner to carry fire, tornado, and other necessary insurance upon the above work. Owner to supply water and electricity.

This proposal may be withdrawn by us if not accepted within 30 days.

Note the pay schedule on Page 1. If this schedule is not acceptable, contact **Prime South** and a new schedule will be arranged. Failure to adhere to this payment schedule may cause delays in the completion of your work.

Landscape may be damaged during the construction. **Prime South** will attempt to minimize this damage; however, **Prime South** will not pay to repair or replace these items unless otherwise agreed upon.

Prime South is not responsible for pictures and other objects inside that may fall during construction. These items should be removed by the owner before the work begins.

Windows with wood rot damage can sometimes be repaired on the job site. This can save money and time in lieu of ordering new units. Window wood rot may reoccur due to the design of some windows. Windows removed and reinstalled for the purpose of sill pan flashing installation may have fogging occur in the glazing due to seal leakage depending on existing conditions of the window after reinstallation.

Some roofs may not tolerate construction traffic. **Prime South** will attempt to protect the roof; however, some shingle scarring may occur.

Alarm systems may need to be rewired due to remediation. This will be an additional charge unless prior arrangements have been made. If your house has an alarm system, please make arrangements with **Prime South** before work begins.

Nail pops or cracks on the interior may occur depending on the condition of the existing sheetrock and the extent of the repairs to the walls. These repairs are addressed in the proposal in the allowance for wood rot and ancillary damages.

The construction process may require delivery trucks or other vehicles to be on the driveway. Occasionally, some fluids from these vehicles may leave spots or stains on the driveway. Poorly constructed driveways could crack due to construction traffic. **Prime South** will not assume liability for items of this nature.

Notice of Right to Cancel: You have the right to cancel this contract without any cost to you within three business days of the execution of this contract (the date which you sign the acceptance provision of this contract). You may use any written statement that is signed and dated by you and states your intention to cancel. You must notify us of your intention to cancel no later than midnight of the third business day at 1410 St Andrews Rd, Ste 280, Columbia, SC 29210.

Respectfully submitted, _____

Chris E. Cooper for Prime South of the Carolinas LLC

Acceptance of proposal

Contract Number 426631107

The above prices, specifications, and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above. Please place this job in your tentative schedule.

Date _____ Signature _____

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.



Page 1 of 2 Pages

Seal

0896

APP_0908

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		No exclusions apply
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		



Seal

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



0897

APP_0909

MoistureFree Warranty



AUTHORIZATION CERTIFICATE

411014 01

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

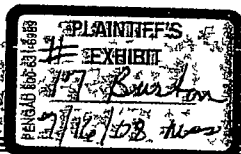
The homeowner is required to perform normal maintenance on the home during the term of the warranty. This maintenance is limited to normal painting or caulking and cleaning and maintenance of the drainage systems (such as gutters and downspouts) that may be necessary to protect the home from moisture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



Page 1 of 2 Pages

0898

Seal

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. 01 Page 11 Kickout location and area below (30% readings)
2		
3		
4		
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7		
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10		
11		
12		
13		



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



0899

APP_0911

PERFORMANCE EXTERIORS Inc

8300 Prince Valiant Drive
Waxhaw NC 28173
704 309 6386 fax 704 243 0031
perext@earthlink.net

Proposal

To **Moisture Warranty**
Attn: Tim McClain

Job **Fred Babaee**
133 Beaver Dan Rd
Columbia SC 29223

Performance Exteriors proposes to do the following

- Caulk the flat tops of all the trim at the perimeter of the home Price \$575.00
- Caulk behind two kickouts Price \$172.00
- Investigate the potential for damage as per page 8 Price \$230.00 If damage is present and the wall needs to be opened for repair the price to repair that wall with all the trims and returning it to as new condition will be an additional \$5,193.00
- The wall in page ten of the report will cost \$230.00 to open up and investigate for damage if damage is discovered it will be an additional cost of \$3,243.00 This will be to blend the wall in only To skim coat the entire wall is not feasible
- If hidden damage is discovered during construction it will be priced out at a rate of fifty five dollars per man hour plus materials
- We will match color and texture as close as possible but we can not be held liable for slight discoloration The new colors generally blend in after a short amount of time
- We will be cautious of the plants and shrubs but sometimes they get in the way of construction and slight damage may occur but we cannot be held liable if this should occur
- All work is warranted for a period of one year for workmanship
- All compliments and complaints must be in writing
- Payment is due in full upon completion

If you would like to schedule this work please sign below and fax back to us

Owner or owner's agent

-- --

Date

--

0900

Babaee 00524

APP_0912



SERVICES, INC

HOME INSPECTION & CODE CONSULTANTS

781 4991

PO BOX 465

IRMO SC 29063

November 8 2004

Mr Fred Babaee
133 Beaver Dam
Columbia SC 29223

Re Maoli/Babaee Residence
133 Beaver Dam

Mr Babaee

At your request we performed a moisture mapping survey on the above mentioned property on November 2 3 and November 5 2004. You requested that we perform a non intrusive and an intrusive moisture content survey for water intrusion and for possible structural damage. We did both of these services – doing the intrusive survey on the areas where in our judgment we were likely to find water intrusion and damaged substrate. We also wanted to limit our intrusive readings to minimize the holes that are necessary for the intrusive survey.

The following are the areas that all EIFS Manufacturers stress must be followed for the barrier EIFS system to function properly:

Some of the items have not been done on this residence making it a non conforming installation:

- 1 Step and kick out flashing where roof and vertical wall meet
- 2 Flashing at chimney crickets and dormers
- 3 Flashing where deck and vertical wall meet
- 4 Insulation boards shall butt tightly and any gaps shall be filled with slivers of insulation board
- 5 Joints in insulation board are off set from joints in sheathing substrate
- 6 At penetrations insulation board edges shall not coincide with the corners of the opening
- 7 A system expansion joint is required at all floor lines in wood frame construction changes in substrate – at abutment of dissimilar materials and where expansion joints exist in framing substrate
- 8 Back rod and sealant at expansion joints and around wall penetrations

0901

Babaee 00220

Mr Fred Babae
133 Beaver Dam
Page 2
November 8 2004

- 9 Reinforcing mesh shall be back wrapped behind insulation board at system terminations
- 10 Reinforcing mesh applied into wet base coat and shall be fully imbedded
- 11 Reinforcing mesh shall be hidden by proper thickness of base coat
- 12 Sealant and backer rod shall be installed at all caulk joints

Our survey was conducted using a non intrusive capacitance meter (Tramex) and an intrusive type resistance meter (Delmhorst) Our findings are included in this report Please note that the readings recorded on the picture graphs are from the non-intrusive capacitance meter The intrusive type readings are recorded under the picture graphs and are identified by grid number and the condition of the substrate H= Hard M= Medium and S= Soft Note also that there may be some areas where there were high surface moisture content readings and low moisture content intrusive readings at the same location This is due to the fact that the Tramex meter was designed with a protective factor that will allow a false positive reading as opposed to a low moisture content reading There is a low intrusive content reading due to thick lamina nails screws and metal flashing It should be noted that the intrusive moisture content readings may not appear in some areas where high surface moisture readings were recorded for the following reasons

- 1 The intrusive reading was recorded on another picture graph
- 2 In an area such as a window where high intrusive readings were recorded on either the left or right side
- 3 Where the intrusive readings were consistent with the surface readings or
- 4 Where we felt due to our knowledge and experience the intrusive readings were consistently low from the surface moisture readings at the through wall penetrations

Some of the quoins on corners are at or below grade and must be removed or cut back for proper termite contract Some areas have EPS and stucco down to top of concrete hiding joint where different pours occur These also need cutting back

We were not given any information by the current homeowner The Real Estate Agent has knowledge of the Builder of this residence We recommend that a repair system be implemented using the same Manufacturer s product as the original installation We noted some areas that repairs have been made previously that colors of finish are not close to matching We also noticed some areas where kick out flashing has been added and finish matches more closely

0902

Babae 00221

APP_0914

Mr Fred Babae
133 Beaver Dam
November 8 2004
Page 3

We recommend the following areas be addressed

- A Page 2 - F 9 G 9 H 9 G 3 G 2 Make a test cut because of medium substrate
- B Page 3 - All areas where substrate is noted as medium and soft Make a test cut
- C Page 5 - Test cut areas where substrate is noted medium and soft
- D Page 6 - D-9 where substrate is soft This is under a window
- E Page 7 - Medium and soft substrate
- F Page 8 - Substrate soft and 24 6 intrusive moisture reading
- G Page 9 - All medium and soft substrate areas
- H Page 10 - Areas with intrusive moisture readings above 19% and medium and soft substrate areas
- I Page 11 - A-7 A-6 and E 4
- J Page 12 - H-11 and H-8
- K Page 13 - H 4 and F 4
- L Page 15 - C 9, C 6 E 9 and soft substrate areas

It is generally accepted that wood when removed from kiln has 19% moisture content Any intrusive moisture readings with 20% or above readings corrective action should be done A test cut should be done by stucco applicator/repair person before removing cladding in those areas

Thank you for offering CK Services, Inc the opportunity to perform this inspection for you If you have any questions regarding this inspection please call us at (803) 781 4991 We would be happy to discuss them with you

Respectfully submitted



Frank Clark
CK Services, Inc
Home Inspector License #000159

0903

Babae 00222

On-Site EIFS Moisture Evaluation Form

Homeowner MacLin / Babaee

Date 1/9/2/04

Page 1 of 15

Job Number 20041005



Homeowner

MacLin / Babaee

Homeowner Address

233 BEAVER DAM COLUMBIA, SC 29223

Date of Inspection

Nov 2, 345, 2004

Present Weather Conditions

Clear

Ambient Air Temperature and Relative Humidity

Date of Last Measured Rainfall

Moisture Meters Used for Investigation

Non Intrusive Meter

Intrusive Meter

Net Square Feet EIFS Area

0904

Babae 00223

APP_0916

On Site EIFS Moisture Evaluation Form

Homeowner Martin / Babae

Date 1/12/05
Page 1 of 15
Job Number 2281005



Homeowner

Martin / Babae

Homeowner Address

233 BEAVER DAM COLUMBIA, SC 29223

Date of Inspection

Nov 2, 395, 2005

Present Weather Conditions

Clear

Ambient Air Temperature and Relative Humidity

Date of Last Measured Rainfall

Moisture Meters Used for Investigation

Non Intrusive Meter

Intrusive Meter

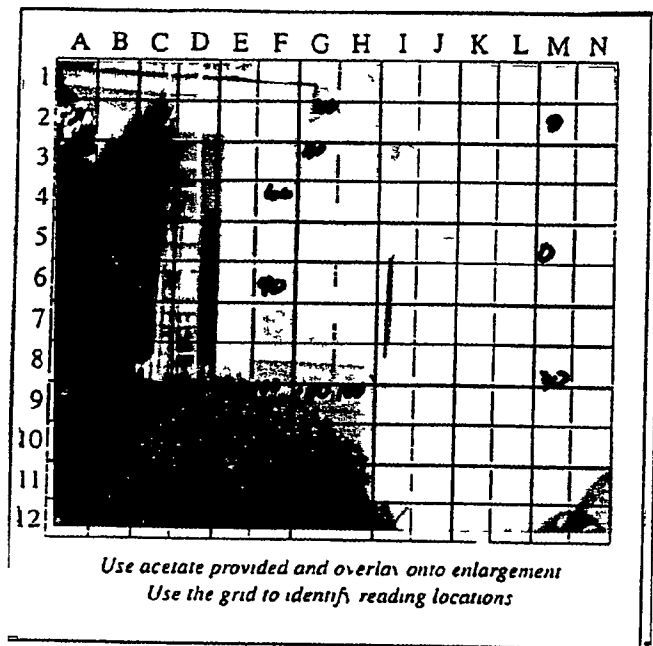
Net Square Feet EIFS Area

0905

Babae 00224

APP_0917

On Site EIFS Moisture Evaluation Form

Homeowner BABAEEDate 11-02-11
Page 2 of 11

North South East West Elevation
(circle one)

Grid No	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes
4	113	H (M) S	H M S		
44	113	H (M) S	H M S		
49	113	H (M) S	H M S		
63	110	H (M) S	H M S		
61	113	H (M) S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		

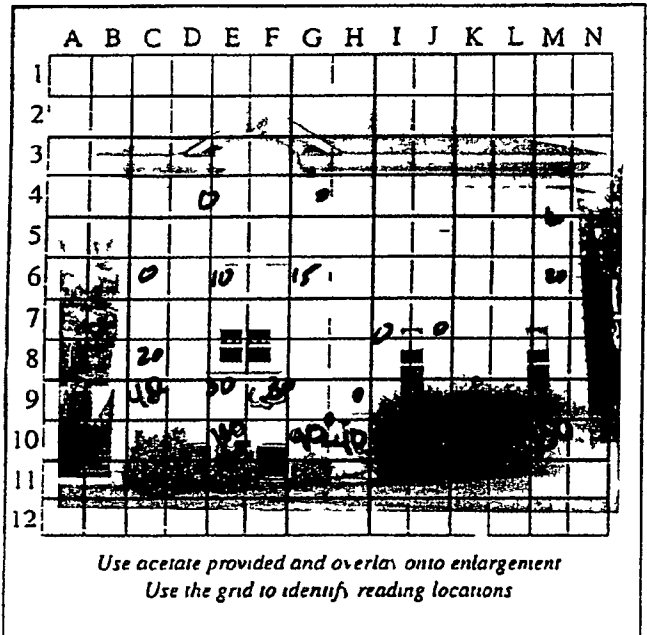
BP	Blow Penetration	F	Flashing Seal	NK	No Kickout	FS	Failed Sealant
BS	Back Slopes	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Detailation	GH	Gap/Hole	PI	Pest Infestation	MV	Mesh Visible
DL	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	Window Detailation

A partial moisture survey has been completed for selected areas of the EIFS cladding. The data reflect conditions at the time of the survey and are not conclusive indicators of future performance.

0906

Babaee 00225

APP_0918



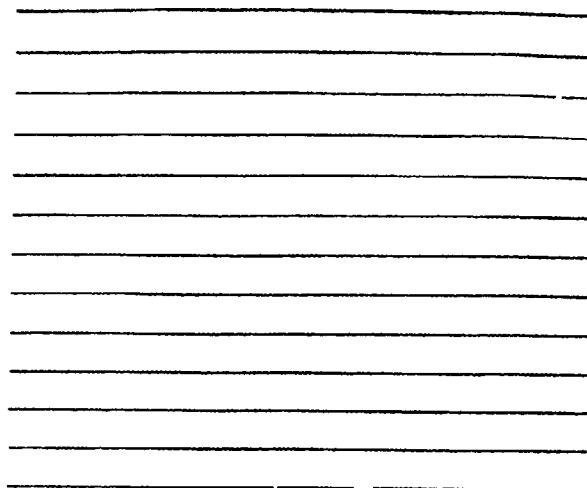
North South East West Elevation
(circle one)

Grid No	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes		
C4	13.5	H (M) S	H (M) S				
E10	10.4	H (M) S	H (M) S				
G10	13.0	H (M) S	H (M) S				
H10	10.8	H (M) S	H (M) S				
I10	11.4	H (M) S	H (M) S				
J10	7.9	H (M) S	H (M) S				
K10	8.2	H (M) S	H (M) S				
M10	12.3	H (M) S	H (M) S				
L10	13.1	H (M) S	H (M) S	SC			
F4	8.1	H (M) S	H (M) S				
		H (M) S	H (M) S				
		H (M) S	H (M) S				

BP	Beam Penetration	FI	Flashing Issue	NK	No Kickout	FS	Failed Sealant
BS	Back Sloped	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Deformation	GH	Gap/Hole	PI	Pest Infestation	WV	Mesh Visible
DL	Delamination	WV	Mesh Visible	SC	Surface Cracking	WD	Window Deterioration

A partial moisture survey has been completed for selected areas of the EIFS cladding. The data reflect conditions at the time of the survey and are not conclusive indicators of future performance.

Date 11/21/04
Page 44 of 11

[illegible]

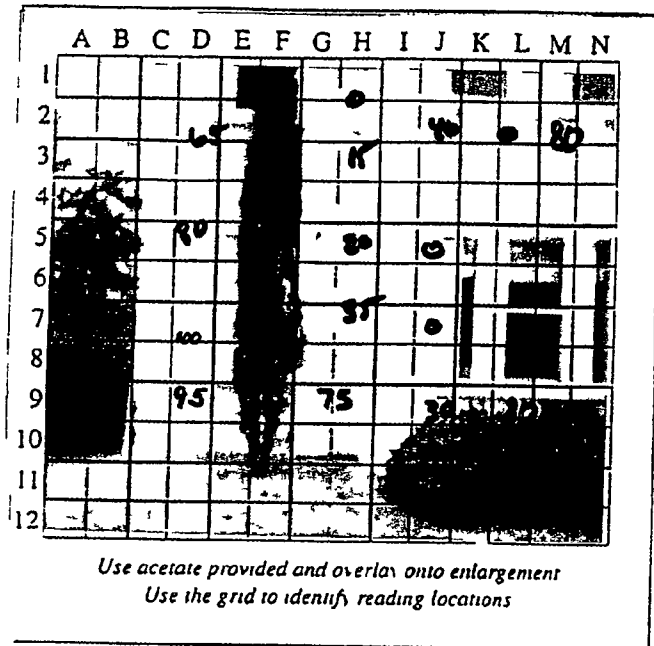
BP	Bulk Penetration	FI	Filled Sealant	NK	No Kickout	FS	Fillet Sealant
BS	Bulk Sealed	FS	Filled Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Detention	GH	Gap/Hole	PI	Pest Infestation	MV	Mesh Visible
DL	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	Window Deformation

As it is moisture sensitive, the data is not completed for selected areas of the EIFS cladding. The data reflects conditions at the time of the survey. The data is not conclusive for claims of future performance.

Babae 00227

APP_0920

On Site EIFS Moisture Evaluation Form

Homeowner BabaeDate 10-2-04
Page 5 of 6North South East West Elevation
(circle one)

Grid No.	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes
D-9	95	(H) M S	H M S		
D-7	82	(H) M S	H M S		
D-5	85	H (M) S	H M S		
D-2	98	H (M) S	H M S		
D-4	98	H (M) S	H M S		
D-9	95	H (M) S	H M S		
D-2	87	(H) M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		

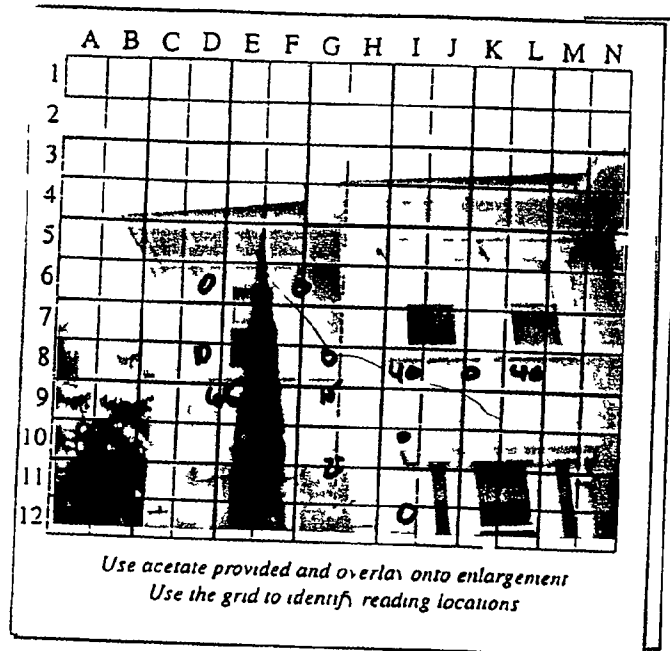
BP	Blank Penetration	F	Failed Sealant	NK	No Kickout	FS	Failed Sealant
BU	Blank Slope	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Detection	GH	Gap/Hole	PI	Pest Infestation	MV	Mesh Visible
DL	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	Window Detection

A part of moisture survey has been completed for selected areas of the EIFS cladding. The data reflect conditions at the time of the survey. The data are not conclusive. The colors of the EIFS cladding are performance.

0909

Babae 00228

APP_0921

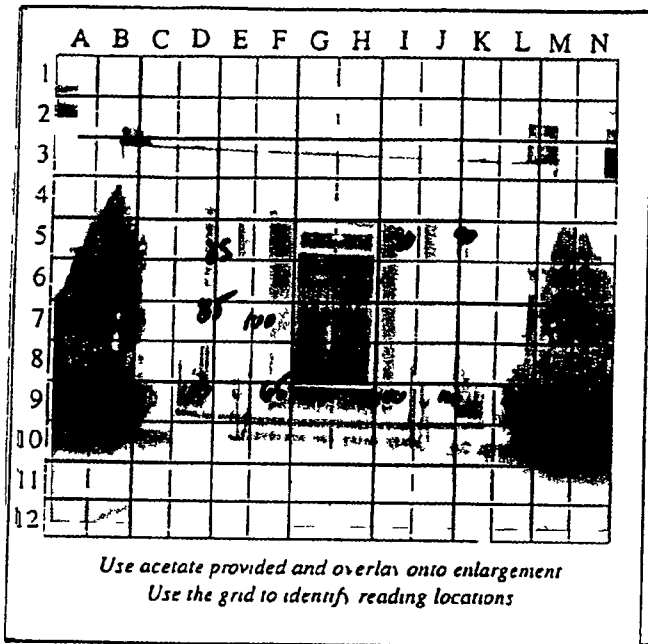


North South East West Elevation
(circle one)

Grid No	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes
1	42	H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		

BP	Beam Penetration	FI	Flashing Issue	NK	No Kickout	FS	Failed Sealant
BS	Back Siding	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Deformation	CH	Gap/Hole	PI	Pest Infestation	MV	Mesh Visible
DL	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	Window Deformation

Aspirant must re-examine this completed to site and areas of the EIFS cladding. The data reflect conditions at the time of the inspection and are not conclusive. This is a performance.



North South East West Elevation

(circle one)

Grid No	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes
D9	114	H M (S)	H M S		
E9	113	H M S	H M S		
D7	110	H M (S)	H M S		
E7	99	H M S	H M S		
I9	112	(H) M S	H M S		
S9	116	(H) M S	H M S		
E5	78	(H) M S	H M S		
K5	88	(H) M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		

BP	Beam Penetration	FI	Failed Sealant	NK	No Knockout	FS	Failed Sealant
BS	Beam Splayed	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Detail on	GH	Gap/Hole	PI	Pest Infestation	MV	Mesh Visible
DL	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	Window Detail

A partial moisture survey has been completed for selected areas of the EIFS cladding. The data reflect conditions at the time of the survey and are not conclusive indicators of future performance.

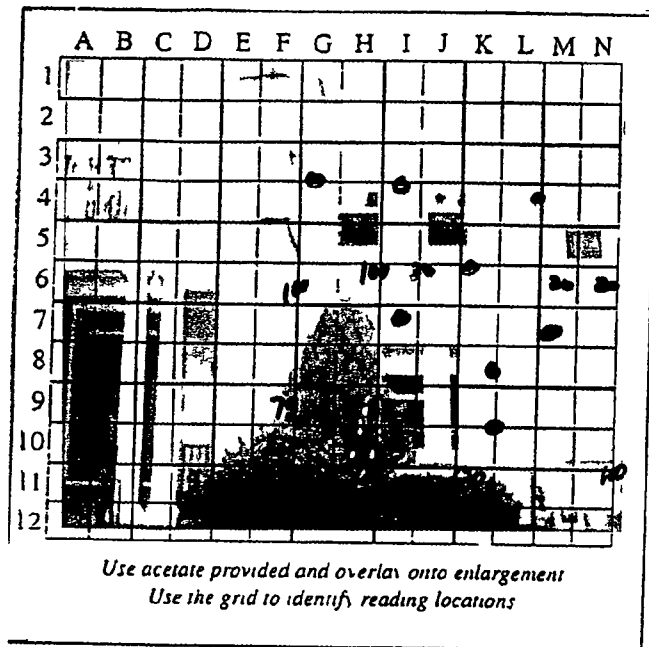
Date 02/24/
Page 3 of 1

[illegible]

Grid No	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes
E7	246	(H) M S	H V S		
G7	'97	H M (S)	H M S		
L7	81	H V S	H V S		
		H M S	H V S		
		H M S	H V S		
		H M S	H V S		
		H M S	H V S		
		H V S	H V S		
		H M S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		
		H V S	H V S		

BP	Beam Penetration	FI	Failed Insulation	NK	No Kickout	FS	Failed Sealant
BS	Back Slope	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Detachment	CH	Cap/Hole	PI	Pest Infestation	MV	Mesh Visible
DL	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	Window Deformation

The data reflect conditions at the time of the audit.



North South East West Elevation
(circle one)

Grid No	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes
11	98	H (M) S	H M S		
11	106	H M S	H M S		
14	86	(H) M S	H M S		
11	113	(H) M S	H M S		
11	113	H M S	H M S		
16	113	(H) M S	H M S		
14	113	H (M) S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		

BP	Bump Penetration	F	Failed Sealant	NK	No Kickout	FS	Failed Sealant
BS	Back Slope	TS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Detachment	CH	Gap/Hole	PI	Pest Infestation	MV	Mesh Visible
DL	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	Window Detachment

A partial moisture survey has been completed for selected areas of the EIFS cladding. The data reflect conditions at the time of the survey. This is not an intrusive moisture survey or a full performance evaluation.

0913

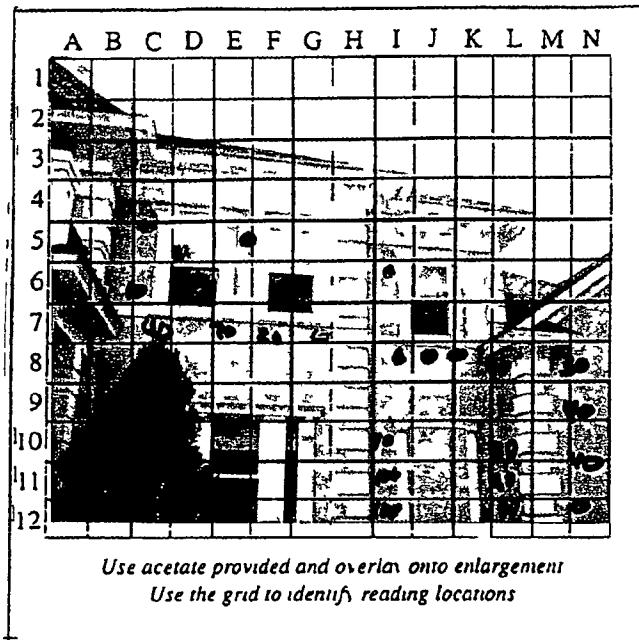
Babaee 00232

APP_0925

On Site EIFS Moisture Evaluation Form

Homeowner BabaeDate 01-24
Page 10 of 3

①

North South East West Elevation
(circle one)

Grid No	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes		
-10	99	(H) M S	H M S				
L11	400	H M (S)	H M S				
L12	259	H M (S)	H M S				
I12	123	H (M) S	H M S				
E11	189	H (P) S	H M S				
I-10	92	(H) M S	H M S				
E-7	-6	H (M) S	H M S				
-9	110	(H) M S	H M S				
		H M S	H M S				
		H M S	H M S				
		H M S	H M S				
		H M S	H M S				

BP	Beam Penetration	=	Flashing Issue	NK	No Kickout	FS	Faded Sealant
BL	Back Sloped	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Detail Location	GH	Gap/Hole	PI	Pest Infestation	MV	Mesh Visible
DL	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	Window Detail Issue

A partial moisture survey has been completed for selected areas of the EIFS cladding. The data reflect conditions at the time of the survey. These data are not conclusive indicators of future performance.

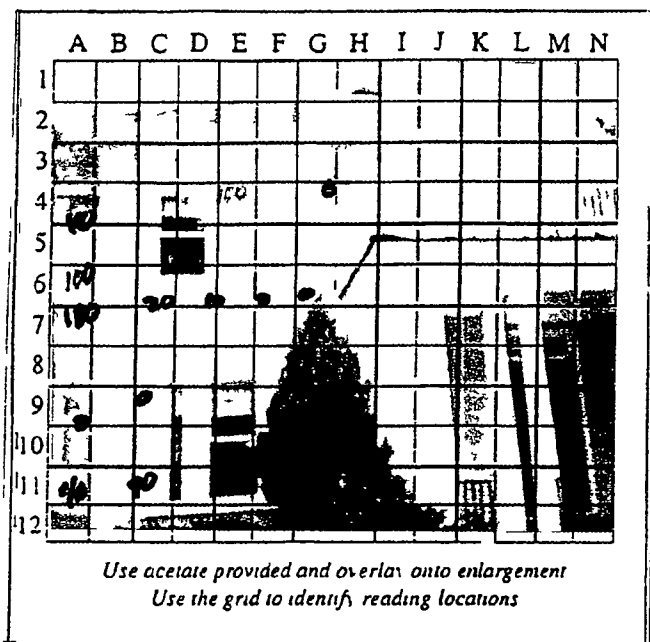
0914

Babae 00233

APP_0926

Homeowner *BABAE*

Date 11-2-24
Page 11 of 11

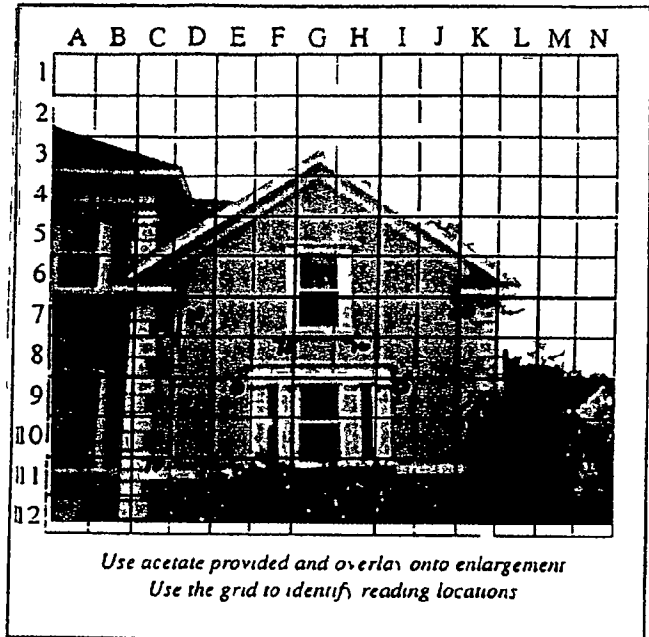


North South East West Elevation
(circle one)

[illegible]

Partial moisture survey has been completed on selected areas of the EIFS cladding. The data reflect conditions at the time of the survey. The data are not conclusive indicators of the performance.

On Site EIFS Moisture Evaluation Form

Homeowner BABAEEDate 02/01/12
Page 12 of 1

North South East West Elevation
(circle one)

Grid No	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes
L11	103	(H) M S	H M S		
L11	100	H (M) S	H M S		
L10	100	(H) M S	H M S		
L10	112	(H) M S	H M S		
L7	88	(H) M S	H M S		
L8	82	(H) M S	H M S		
L8	85	H M (S)	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		

BP	Beam Penetration	-	Flash & Seal	NK	No Kickout	FS	Failed Sealant
BS	Back Sloped	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Detection	GH	Gap/Hole	PI	Pest Infestation	MV	Mesh Visible
D	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	Window Detection

Partial moisture survey has been completed for selected areas of the EIFS cladding. The data reflect conditions at the time of the survey. These are not conclusive indicators of future performance.

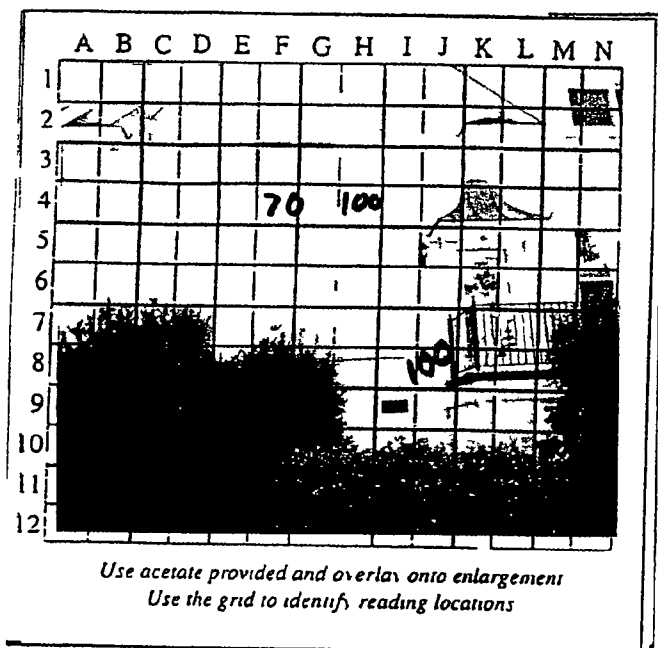
0916

Babae 00235

APP_0928

Homeowner BADAZZ

Date 8/2/04
Page 13 of 13



North South East West Elevation
(circle one)

Gnd No	Intrusive Read no	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes
J8	H61	A M S	(A) M S		
H-4	H73	(B) M S	(H) M S	(L1)	
F-4	I13	H (M) S	H (M) S	WD	
		H M S	H V I S		
		H M S	H V I S		
		H M S	H V I S		
		H M S	H V I S		
		H M S	H V I S		
		H M S	H V I S		
		H M S	H V I S		
		H M S	H V I S		
		H M S	H V I S		
		H M S	H V I S		
		- M S	H V I S		

B-P	Beam Penetration	=	Fastening Issue	NK	No Knockout	T-S	Failed Sealant
BL	Balloon Slopes	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Detailation	CH	Gap/Hole	PI	Pest Infestation	MV	Mesh Visible
DL	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	V-nail Delamination

Report all moisture levels which have been sampled for selected areas of the EIFS cladding. The data reflect conditions at the time of the inspection and are not an indication of long-term performance.

0917

Babae 00236

APP 0929

On Site EIFS Moisture Evaluation Form

Homeowner BABAE

Date 1/22/20
Page 14 of 1

Use acetate provided and overlay onto enlargement
Use the grid to identify reading locations

North South East West Elevation
(circle one)

Grid No	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes
5	110	H M S	H M S		
7	94	H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		

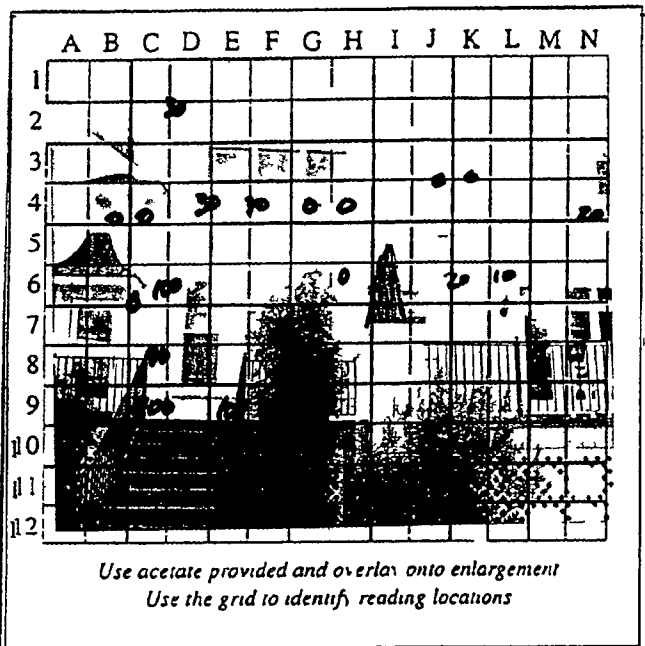
BP	Blow Pipe Test	FI	Failed Sealant	NK	No Crackout	FS	Failed Sealant
B-	Back Sides	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Detail	GH	Gap/Hole	PI	Pest Infestation	MV	Mesh Visible
D-	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	Window Detail

This report is a moisture survey only. It is not intended to be used for structural analysis or to determine the performance of the EIFS cladding. The data reflect conditions at the time of the survey.

0918

Babae 00237

APP_0930

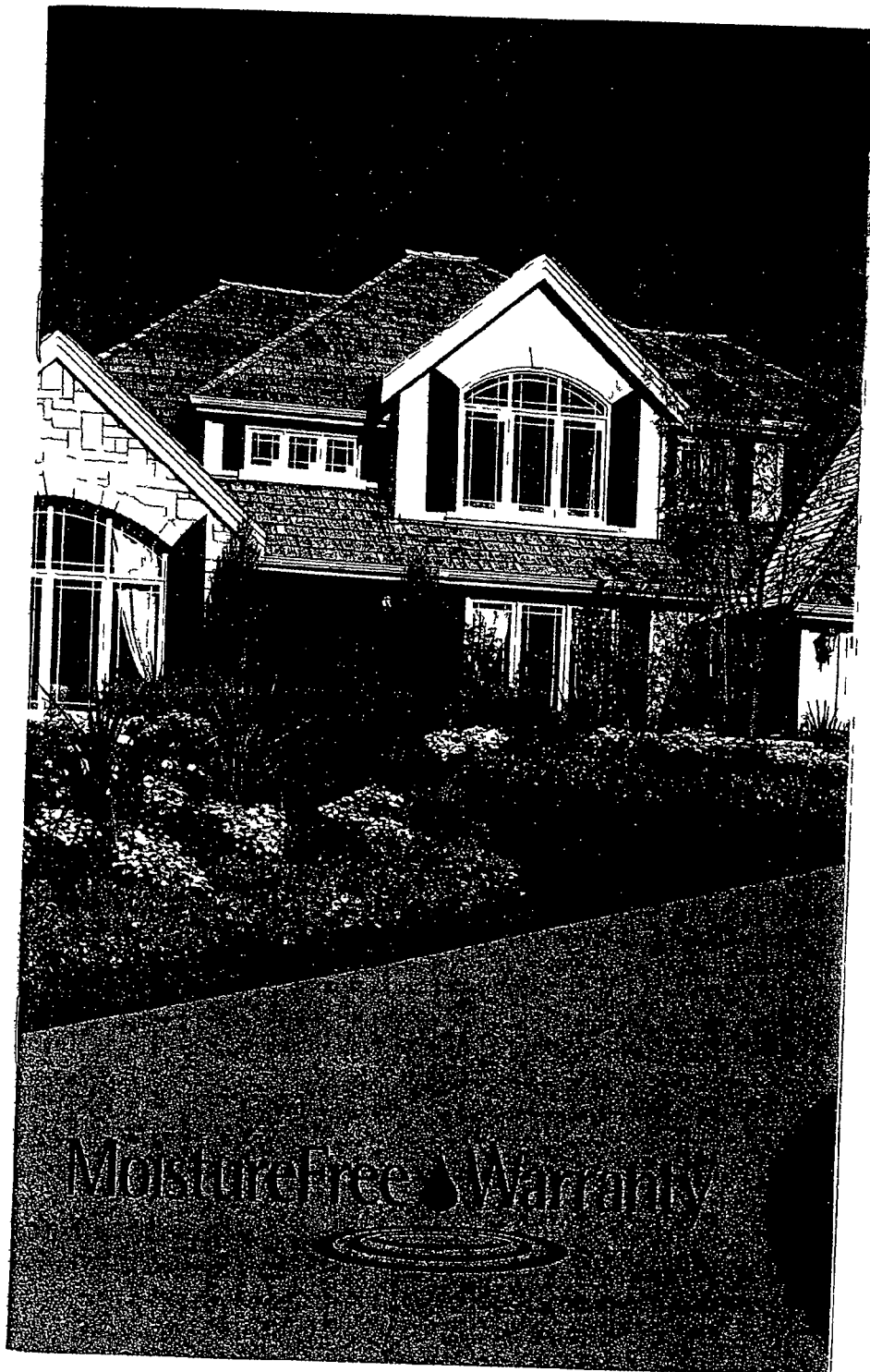


North South East West Elevation
(circle one)

Grid No	Intrusive Reading	Sheathing Base Condition	Framing Base Condition	Observation Code	Observation/General Notes
C4	209	H M (S)	H M S		
C8	90	H M (S)	H M S	SC	Crack by window
C6	353	H M (S)	H M S		
E4	201	H M S	H M S	SC	Crack on bottom right corner - 6" window
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		
		H M S	H M S		

BP	Beam Penetration	FI	Flashing Issue	NK	No Kickout	FS	Failed Sealant
BS	Back Sloped	FS	Failed Sealant	NS	No Sealant	GH	Gap/Hole
DD	Door Deterioration	GH	Gap/Hole	PI	Pest Infestation	MV	Mesh Visible
DL	Delamination	MV	Mesh Visible	SC	Surface Cracking	WD	Window Deterioration

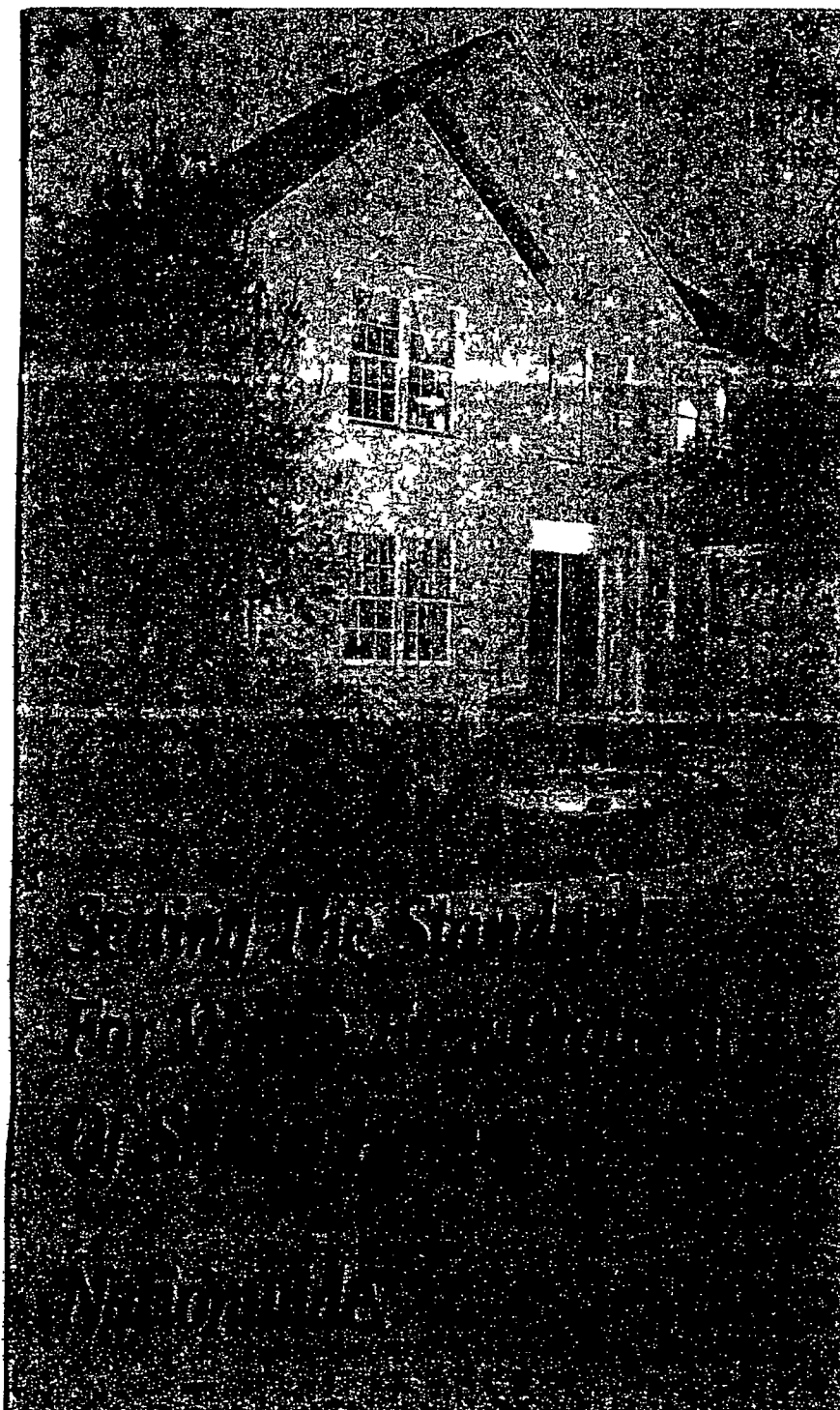
A partial moisture survey has been completed for selected areas of the EIFS cladding. The data reflect conditions at the time of the survey and are not conclusive indicators of future performance.



0920

APP_0932

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



0922

APP_0934

The MoistureFree Warranty is the only warranty available 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 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.



Why MoistureFree Warranty?

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.

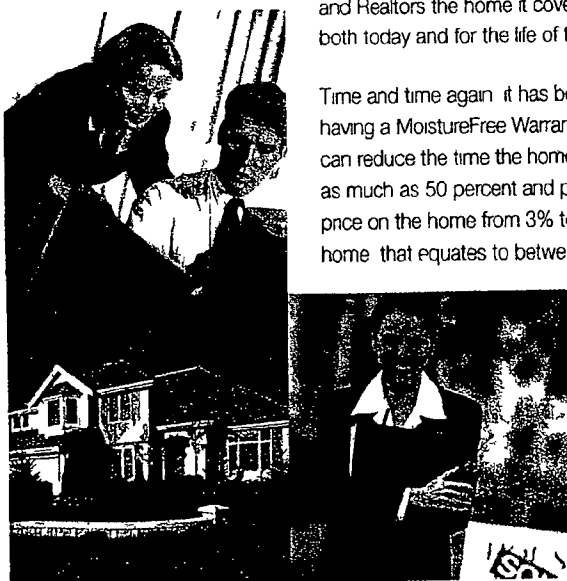
What Realtors Or Home Sellers Should Know

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!

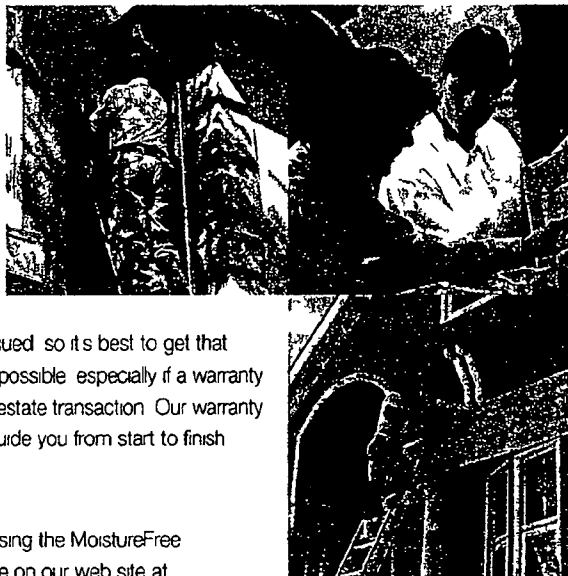


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APP_0936

Three Easy 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

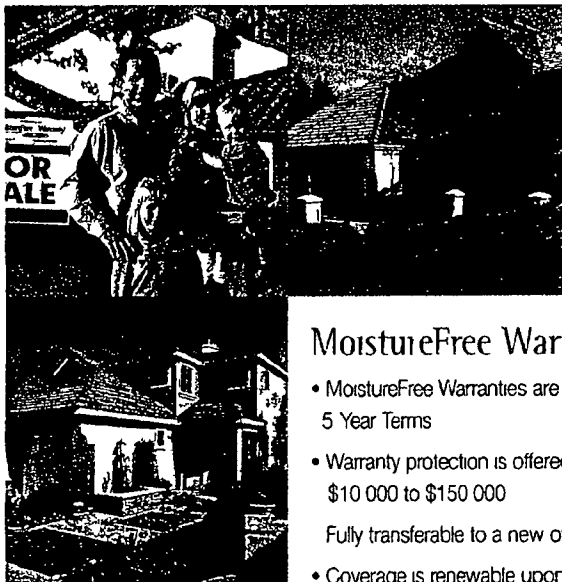
The inspection is reviewed by one of our Warranty Specialists. If repairs are necessary to meet warranty requirements we are available to guide you through the repair process and will even provide you with a list of contractors in your area who are familiar with our repair standards. If repairs are required 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.



MoistureFree Warranty Protection

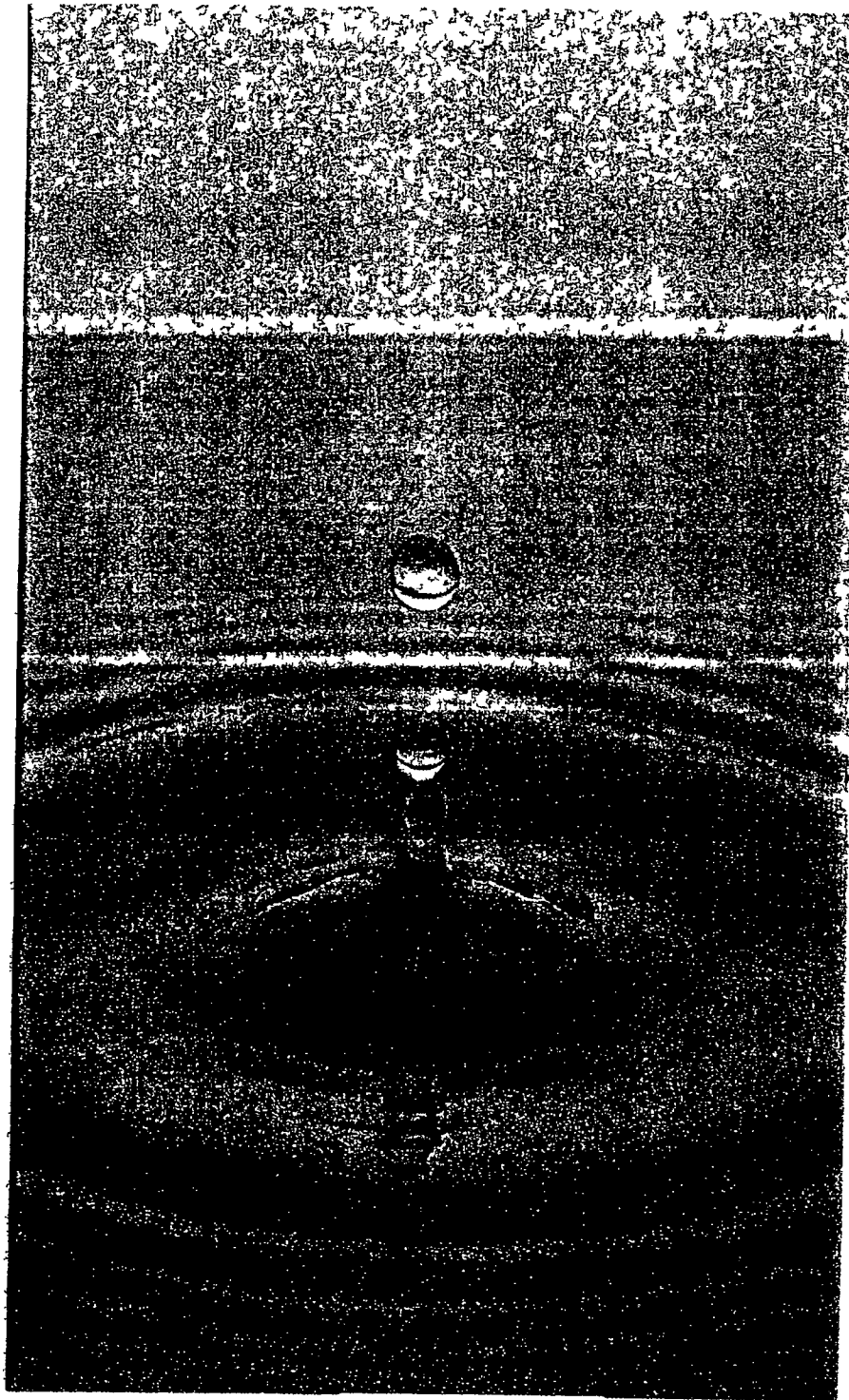
- MoistureFree Warranties are available in 1, 3, and 5 Year Terms
- Warranty protection is offered in amounts ranging from \$10,000 to \$150,000
- Fully transferable to a new owner
- Coverage is renewable upon re-certification

Trusted By The Courts, Contractors, And Homeowners Nationwide

A national class action settlement involving Dryvit Systems, the largest manufacturer of synthetic stucco, was settled in early 2003 to address the concerns of thousands of stucco homeowners nationwide. The good news is that the courts, the attorneys, contractors, and homeowners agree: moisture problems in stucco homes can be fixed and these beautiful homes can offer a lifetime of enjoyment to their owners. Contingent upon that success, however, is that the inherent problems facing these homes must be addressed correctly. The professionals at Moisture Warranty Corporation were selected to oversee the inspections and repairs mandated by the class action settlement. You can get the peace of mind the largest stucco manufacturer is providing for its homeowners nationwide: the MoistureFree Warranty.

If You're Worried About Moisture Problems And Want To Protect The Value Of Your Largest Investment Call Us

Thousands of stucco homeowners throughout the country are entrusting the professionals at Moisture Warranty Corporation to solve their moisture problems. Time is not on the side of a stucco homeowner. Ignoring or denying there is a moisture problem only causes the problem to get worse. By stopping and addressing the problem now, you can put the worry behind you and look forward to many years of enjoyment in your beautiful stucco home.



0927

APP_0939



The MoistureFree Warranty has saved me again and again! As a buyer's agent primarily 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

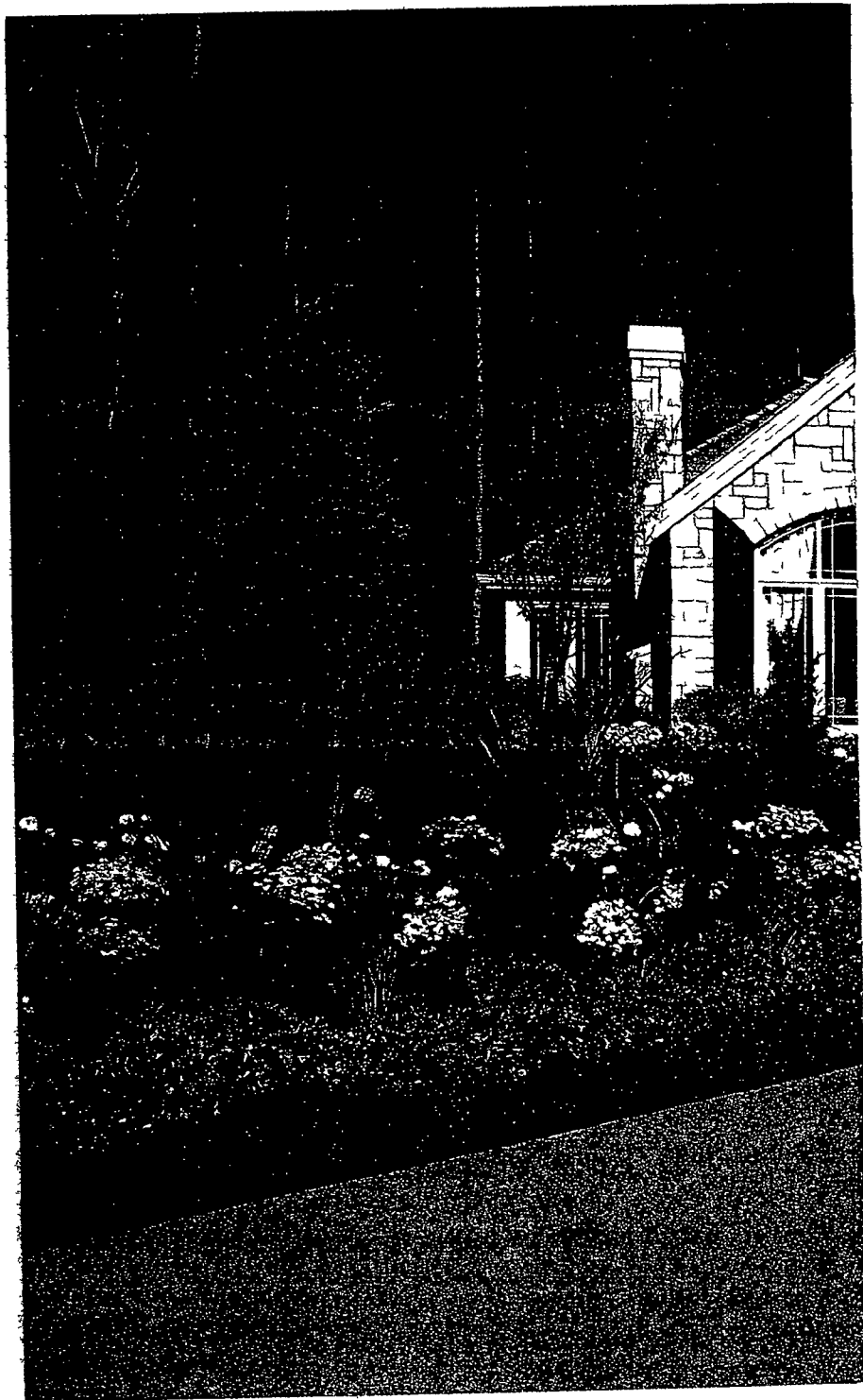


1-800-400-8679 or www.moisturewarranty.com

20306 North Main St • Cornelius NC 28031 • Fax 704 896 3426
info@moisturewarranty.com

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APP_0940



0929

APP_0941





800 400 8679 ▲ w

0930

APP_0942



TO	FROM
Amy [Buddy Lewis]	Claire Hammett
COMPANY	DATE
	11/11/2004 2 28 28 PM
FAX NUMBER	NO OF PAGES (w/COVER)
803-788-3100	3
FOR PROPERTY	PHONE NUMBER
133 Beaver Dam Road	800-400-8679 extension 154
RE	FAX NUMBER
Invoice and Letter of approval	704-896-0339

When the work is complete and documentation is sent to us, I can
remove the exclusion.
Call me if you have any additional questions.
Thank you.

CLAIRE HAMMETT
20306 North Main Street
Cornelius, NC 28031
phone 800-400-8679, ext 154
cell 704-796-8398
fax 704-896-3426
claire@moisturewarranty.com
www.moisturewarranty.com

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45
MOISTURE FREE114

APP_0943



Letter of Approval

11/11/04

To: Victoria Maoli
From: Tom Russell/Claire Hammett
Re: Moisture Free Warranty for the stucco exterior of the home located at
133 Beaver Dam, Columbia, SC 29223

Based on the findings of the report by C. Strickland on 08/12/04, this home qualifies for a
MoistureFree Warranty with the following exclusions:

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.

- Page 11: Kickout location and area below [0.0 readings]

Level of Warranty Chosen

3 year \$60,000 total limit and \$20,000 annual limit warranty \$4,095
(Includes an interim inspection)

Sign and return this form to activate coverage. Once MWC receives this in writing (and payment is
processed) the warranty will be issued. Subsequent owners must provide their contact information.

I have read and understand this Letter of Approval dated 11/11/04 and the MoistureFree Warranty Terms and
Conditions. I accept the warranty and any exclusions listed for the home at 133 Beaver Dam, Columbia,
SC 29223.

New Owner's Name (Printed) _____ Phone _____

Signature _____

Approval period is 90 days. Final Authorization Certificates are mailed to the property address unless otherwise specified.

TO ACTIVATE COVERAGE, SIGN AND RETURN WITH PAYMENT BY MAIL or FAX

Note: If paid, it will be distributed a closing, may full payment to the address. If by Mail, check payable to MoistureFree Corporation.

CHH

0932

MOISTURE FREE115

APP_0944

Moisture Warranty Corporation
20306 North Main Street
Cornelius NC 28031
(800) 400-8679

Invoice No 133BESC320

INVOICE

Customer

Name Victoria Maoli
Address 133 Beaver Dam
City Columbia State SC ZIP 29223
Phone contact realtor Buddy Lewis 803 779-6000

Misc

Date 11/11/2004
Order No
Rep CHH
FOB

Qty	Description
1	3 year \$60 000 total limit and \$20 000 annual limit warranty one inspection included renewable transferrable

Unit Price	TOTAL
\$4 095	\$ 4 095 00

Payment

Other

Final certificates will be sent to the
Comments Property address within two weeks of
Name processing Return payment with
CC # new owner information
Expires

Tax Rate(s)

SubTotal \$ 4 095 00
Shipping

TOTAL \$ 4,095 00

Office Use Only MWC3/20 7 9

Please include the property address on all correspondence
Make check payable to Moisture Warranty Corporation
Mail check to address at header attention Claire Hammett
We accept Checks Visa MasterCard Discover and American Express Thank you!

Thank you for your prompt payment

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MOISTURE FREE116

APP_0945

claire@moisturewarranty.com

From daniel@moisturewarranty.com
Sent Tuesday August 16 2005 4 29 PM
To claire@moisturewarranty.com
Subject Bababe Fred 133 Beaver Dam Columbia SC

Moisture Test probe readings at back porch page 11 & 12 of inspection report
Readings under kick out Grid H5 & 6 pg 11 14% firm and 16% firm respectively
Best regards
Thank you
For choosing Southeastern Stucco Inspections
Daniel Klaver

8/17/2005

0934

APP_0946



Moisture Free171



November 3 2004

Mr Fred Babae
200 A Business Park Blvd
Columbia SC 29203

Inspection Date November 3 2004
Inspector Frank Clark
Re 133 Beaver Dam, Columbia, SC 29223

On Wednesday November 3 2004 we performed an inspection at the above mentioned address

General Comments We can only inspect what is visible and cannot be responsible for areas concealed by carpet vinyl sheetrock insulation etc. We do not address cosmetic items. The structure was inspected and the above mentioned list was made to the best of our knowledge and ability. We have based this report on the condition of the house observed at the time of our inspection. The conditions of the house are subject to change over time. We recommend that all of our recommendations in this report be addressed.

Front Entrance French doors function normally

Foyer Accessible electrical outlets are wired properly except outlets right of stairwell leading to dining room which have open ground. Door to closet right of entry functions normally. Door on left to half bath functions normally. Water closet refills properly. Exhaust fan is operable. Sink drains properly. Accessible electrical outlets are wired properly. FI outlet that controls this is in downstairs utility room.

Dining Room Bottom of pocket doors from foyer meet before top. Adjustment needed. Accessible electrical outlets are wired properly. Window is operable. Top sash had to be pushed up and held for sash locks to engage. French doors to closet function normally. Accessible electrical outlets are wired properly.

Hallway to Both Garage and Laundry Room Swinging doors function normally. Cabinet doors and drawers function normally. Sink drains properly and garbage disposal is operable. Electrical switch panels are located here and are indexed. Accessible

0935

APP_0947

electrical outlets are wired properly and outlets above counter top have GFI feature
There are no visible leaks

Wine cooler Door functions normally Thermometer read 60 degrees Accessible electrical outlets are wired properly Hardwood floors are bucking because of humidity (see crawl space)

Hall Bath Door functions normally Lavatory and shower drain properly Vanity doors and drawer function normally Water closet refills properly Exhaust fan is operable Accessible electrical outlets are wired properly and have GFI feature There are no visible leaks

Laundry Room Door from laundry room to back foyer and stairwell to room over garage functions normally Sink drains properly Accessible electrical outlets are wired properly and outlets left of sink have GFI feature Window is operable Cabinet doors function normally There is a locked door in laundry room that was not open so it could not be checked There are no visible leaks

Kitchen Cabinet doors and drawers function normally Sinks drain properly Accessible electrical outlets are wired properly and outlets left and right of kitchen sink and end of counter top have GFI feature Windows are operable Garbage disposal is operable There are no visible leaks

* **Dining Area** Sliding door to back patio functions normally as does the screen Pocket doors from foyer to dining area meet at bottoms leaving a gap at top French doors to small den function normally Bar sink drains properly Accessible electrical outlets are wired properly and have GFI feature Doors under bar sink function normally and bi fold doors to bar sink function normally There are no visible leaks *

* **Small Den** Sliding door to deck functions normally Screen door also Pocket doors from foyer meet at bottom leaving gap at top Doors to bar sink top and bottom function normally Fireplace has a ventless gas log Accessible electrical outlets are wired properly Ceiling fan is operable *

* **Library/Study** French doors from foyer function normally except door on left binds at top Needs slight adjustment Windows are operable Accessible electrical outlets are wired properly Drawers of built in desk function normally Doors to cabinet function normally Pocket doors to large den function normally *

* **Large Den** Sliding pocket doors from foyer (both) function normally Fireplace has a closed system could not be inspected There is a gas log with a shut off on right side There is some rust present in fire box Windows are operable Accessible electrical outlets are wired properly

Note There are smoke alarms present in all downstairs rooms

Stairs and Upstairs Hall Rails are adequately secured Accessible electrical outlets are wired properly

First Bedroom on Right Top of Stairs Door functions normally Ceiling fan is operable Windows are operable Accessible electrical outlets are wired properly Cover plate for cable TV is broken needs to be replaced Door to bathroom and closet area functions normally

Bathroom for above Bedroom Doors to closet to adjoining bath and bedroom, and to water closet function normally Check with current homeowner about bidet Water closet refills properly Exhaust fan is operable Window is operable Tub and lavatory drain properly Exhaust fan in tub area is operable Vanity doors and drawers function normally There are no visible leaks Accessible electrical outlets are wired properly and have GFI feature

Half Bath Adjoining above Bath and Office end of Hallway Pocket door does not closet so security privacy latch can be activated Accessible electrical outlets are wired properly and outlet left of lavatory has GFI feature Lavatory drains a little slow Exhaust fan is operable Vanity doors and drawer function normally There are no visible leaks

Office end of Hall on Left French doors function normally French doors to closet function normally Accessible electrical outlets are wired properly Windows are operable Ceiling fan is operable

Upstairs Laundry Room Room functions normally Built in cabinet doors function normally Sink drains properly Accessible electrical outlets are wired properly and outlets above counter top have GFI feature French doors to closet function normally

Master Bedroom Door functions normally Ceiling fan is operable Windows are operable Accessible electrical outlets are wired properly

Master Bathroom Pocket doors function normally Vanity doors and drawers function normally Shower tub and lavatories drain properly Check with homeowner about function of bidet Water closet refills properly Windows are operable Mirrored French doors to closet function normally Pocket doors to closet functions normally Built in drawers in closet function normally Check with homeowner about operation of whirlpool tub Door to water closet and bidet functions normally Accessible electrical outlets are wired properly and outlets above vanity tops have GFI feature There are no visible leaks

Bedroom Left End of Hallway Door functions normally Closet door functions normally Built in drawers in closet function normally Ceiling fan is operable Windows are operable Accessible electrical outlets are wired properly

Bathroom in above Bedroom Door functions normally Tub and lavatory drain properly Vanity doors and drawers function normally Check with homeowner about operation of bidet Water closet refills properly Door to bidet and water closet area function normally Exhaust fan is operable Window is operable Exhaust fan in tub area is operable Accessible electrical outlet is wired properly and has GFI feature There are no visible leaks

Room over Garage Door from house down into room over garage functions normally Step rails are secured adequately Door to a closet area functions normally This room has not been finished (no drywall in ceilings or wall No floor covering) Two rooms One at top of stairs from downstairs utility room The other between stairs and steps down from interior Door to closet left of steps up to interior function normally Door to closet left of bathroom functions normally Built in drawer inside closet function normally Windows and skylights are operable Storage areas with locking doors There is insulation blanket in each door Accessible electrical outlets are wired properly

Bathroom in Room over Garage Door functions normally Water closet refills properly Tub and lavatory drain properly Accessible electrical outlets are wired properly and have GFI feature Vanity doors and drawer function normally Exhaust fan is operable There are no visible leaks

Note There are smoke alarms in each room and three in upstairs hallway

Attic Stair is in good condition Has an insulation blanket There is approximately twelve inches of insulation which equates to R 30 There are no visible leaks Light bulbs need replacing in attic Accessible electrical outlets are wired properly Condensate lines are piped to the exterior There are no visible leaks

Stairwell from Downstairs Utility Room to Room over Garage Door and door to exterior function normally Accessible electrical outlets are wired properly Railings to stairs and around top of room over garage are secured adequately

Garage Door from house to garage functions normally Garage doors and electric door openers function normally Safety features are also working Accessible electrical outlets are wired properly Do not have GFI feature Garage door on left (looking out of garage) has been backed into and has damage French doors to storage room function normally Central vacuum system is located here Light switch is behind refrigerator Windows are operable

Exterior Electrical outlet right side of front door is wired properly and has GFI feature Wrought iron rails at front step are adequately secured Quoins at second corner bottom have breaks in the lamina There is a spot right between right garage door and storage room that has been repaired Stucco color does not match Door to storage room functions normally Accessible electrical outlets are wired properly Does not have GFI feature There is a crack in stucco left of rear patio behind HVAC unit There is a crack in lamina under first window right side There are cracks in stucco above copper roof

and under return above first door on back. There is a small hole in reveal around garage door near bottom. Wrought iron rails around deck and down steps are secured adequately. There are spots above last door on back of house that have been repaired. Stucco does not match. Electrical outlets above tiled patio back of house are wired properly and have GFI feature. There is a crack in finish of quoin on back of house right of access door to crawl space. There are cracks in foundation under vents(all) on left end of house (facing house). There are cracks in foundation left and right of front steps. There are some cracks in tile joints at front steps and steps on left end of patio. In my opinion there is a drain system in place in front yard. There are two catch basins. There are drain pipes emptying into lake on back of house. There are areas in back yard where soils is very wet and boggy. Strip drains are needed. In my opinion springs are the main factor in these conditions. In my opinion the roof has thirteen or fourteen years of useful life under normal conditions.

Crawlspace There are areas where insulation has fallen. Needs to be reinstalled. Insulation below wine closet area has been removed. I think to a 1st floor to dry. There are four hot water heaters. All pressure relief valves have been piped to exterior. There is evidence that water enters crawl space through drops in poured footings and through block walls. There is no pooling water. Soil at left front corner has dropped under footing. Footings have not dropped. Soil is extremely wet. I did not see any evidence of insect infestations. Pool and pool equipment was not inspected.

Note There are a couple of things that I did not check. The operation of the elevator and the operation of the generator which is in place under the deck on back of house. The lift in the garage is operable. An electrician was called while I was at the residence to check it. The electrician replaced a breaker in one of the switch panels. There are several areas where quoins are at or below grade. These should be cut off at least eight inches above the grade for visual inspection by pest control operator. One of the stucco post at left end of patio on back has damage to stucco top.

Thank you for offering CK Services Inc. the opportunity to perform this inspection for you. If you have any questions regarding this inspection please call us at (803) 781 4991. We would be happy to discuss them with you.

Respectfully submitted

Frank Clark

Frank Clark
CK Services Inc
Home Inspector License #000159

Coins 27.6 27.6

Windows 29.6 29.8

Above Roof (Front Porch) 24.6

Roof line (Garage) 40.0 25.9

Back of house window on house
Room over the garage window deteriorated -

downstart utility room 29.1
Clarks in utility room

0939

ReportMakerPro™

Protocol Inspection Report By

PREFERRED HOME INSPECTIONS, INC.



Report Prepared For:
VICTORIA MAOLI

**133 BEAVER DAM
COLUMBIA, S.C.**

**MOISTURE
WARRANTY**

THIS IS NOT A WARRANTY, it is a moisture inspection which follows the protocol testing and reporting procedures required to apply for a MoistureFree Warranty. For more information about obtaining a MoistureFree Warranty on your residence contact your home inspector or call 1 800-400 8679 or visit www.moisturewarranty.com. ReportMaker Pro is a registered trademark of Moisture Warranty Corporation www.reportmakerpro.com

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Moisture Free119

APP_0952

PREFERRED HOME INSPECTIONS INC
1414 OLD ROAD
CHAPIN S C 29036

Project Information

OWNER INFORMATION		BUYER INFORMATION	
Owners	VICTORIA MAOLI	Buyers	
Property Address	133 BEAVER DAM	Buyers Address	
City State ZIP	COLUMBIA S C	City, State ZIP	
Phone	699-7197	Phone	
FAX		FAX	
Owners Realtor		Buyers Realtor	
Realty Company		Realty Company	
Phone		Phone	
FAX		FAX	
PROPERTY INFORMATION		INSPECTION INFORMATION	
Type of Exterior Cladding	EIFS	Date of Inspection	8/12/04
System Manufacturer	Undetermined	Inspector	CHARLES STRICKLAND
Mesh Color		Present at Inspection	OWNER
Underlying Substrate		Temperature / Humidity	88
Age of Property		Weather	Partly sunny
Square Footage		Last Rain	Within past few days

Window Data		
Type of Windows	Quantity	Comments
Double or single hung, metal clad window		
Total Number of Window Units		

VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA, S C

PREFERRED HOME INSPECTIONS, INC.
1414 OLD ROAD
CHAPIN S C 29036

Summary Check List

Caulking	Good	Not Adequate	N/A	Comments
Caulking Around Window Frame	X			
Caulking At Window Joints / Miter	X			
Caulking Around Door Frame	X			
Caulking At Door Joints / Miter	X			
Caulking Around Other Breaches	X			
Flat Accents Caulked or Angled	X			
Soffit, Frieze & Facia Boards Caulked	X			
Flashings / Diverters	Good	Not Adequate	N/A	Comments
Kickout Flashings / Roof / Wall	X			
Deck Flashings			X	
Other Attachment Flashings	X			
Porches / Stoop Flashing			X	
Chimney Cap	X			
Chimney Cricket	X			
Window Head Flashing			X	Window head flashing is not installed
Door Head Flashing			X	Door head flashing is not installed
Column Flashing			X	
Terminations	Yes	No	N/A	Comments
EIFS Is Terminated Above Grade	X			
EIFS Is Sealed At Bottom	X			
EIFS Is Terminated At Porches	X			

VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA, S C

PREFERRED HOME INSPECTIONS INC
1414 OLD ROAD
CHAPIN, S C 29036

Summary Check List Cont

Miscellaneous	Yes	No	NA	Comments
Evidence Of Sprinkler Overspray		X		
Gutters Clean & Functioning		X		
Down Spout Fasteners Sealed	X			
Cracks Or Impact Damage		X		
Delaminating At Foam / Substrate		X		
Exterior Evidence Of Pest Infestation		X		
Adequate Slope Of Grade Away	X			
Crawlspace Inspection Made		X		
Property Located Near Body of Water If Yes, Describe	X		POND	

VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA, S C

0943

3 B

Moisture Free122

APP_0955

PREFERRED HOME INSPECTIONS, INC.
1414 OLD ROAD
CHAPIN S C 29036

PREFERRED HOME INSPECTIONS, INC.
STUCCO MOISTURE INSPECTION AGREEMENT

Page 1 of 2

Name VICTORIA MAOLI
Address _____
City State Zip _____

Property Location
133 BEAVER DAM

This is our report of STUCCO MOISTURE AND VISUAL INSPECTION ONLY, of the readily accessible areas of this building in accordance with the terms and conditions contained in the PRE INSPECTION AGREEMENT which is a part of this Report and incorporated herein. Please read the REMARKS and COMMENTS printed on each page and at the end of the report and call us for an explanation of any aspects of this report which you do not fully understand.

THIS IS NOT A TECHNICALLY EXHAUSTIVE, ENGINEER, ENVIRONMENTAL, HAZARDOUS TO HEALTH, SAFETY, OR CODE COMPLIANCE INSPECTION REPORT. THE REPORT IS NOT A COMPLIANCE INSPECTION OR CERTIFICATION FOR PAST OR PRESENT GOVERNMENTAL CODES OR REGULATIONS OF ANY KIND. A MORE COMPREHENSIVE INSPECTION MAY BE AVAILABLE FROM OTHER COMPANIES.

Date of Inspection 8/23/01 Weather Condition CLEAR Approx Outside Temperature 85

**PRE INSPECTION AGREEMENT
(PLEASE READ BOTH PAGES CAREFULLY)**

PREFERRED HOME INSPECTIONS, INC. agrees to conduct an inspection for the purpose of informing the CLIENT(S) of major MOISTURE deficiencies in the condition of the property subject to the UNCONDITIONAL RELEASE AND LIMITATION OF LIABILITY below. The inspection and report are performed and prepared for the sole confidential and exclusive use and possession of the CLIENT(S). The written report will include the following:

MOISTURE AND VISUAL INSPECTION OF STUCCO EXTERIOR WALLS

It is understood and agreed that this inspection will be of readily accessible areas of the building and is limited to a **MOISTURE AND VISUAL INSPECTION** of apparent conditions existing at the time of the inspection only. Latent and concealed defects and deficiencies are excluded from the inspection. Equipment, items and systems will not be dismantled. Destructive testing is not done during a MOISTURE INSPECTION. Maintenance and other preventive measures may be discussed, but they are not a part of our inspection.

The inspection and report do not address and are not intended to address the possible presence of or danger from any potentially harmful substances and environmental hazards including but not limited to air quality, **mold and mildew**, radon gas, lead paint, asbestos, urea formaldehyde, toxic or flammable chemicals and water and airborne hazards. Also **excluded** are inspections of and report on heating and air conditioning systems, swimming pools, wells, septic systems, security systems, central vacuum system, air filter systems, humidifiers, water softeners, sprinkler systems, fire and safety equipment, plumbing overflows, valves, water heater pressure valves, ice makers, self-cleaning ovens, insulated glass seals, intercom systems, wood stoves, gas lines, and the presence or absence of rodent, termites, and other insects.

UNCONDITIONAL RELEASE AND LIMITATION OF LIABILITY

THIS CONTRACT SUBJECT TO ARBITRATION PURSUANT TO SOUTH CAROLINA CODE 15-48-10

Any dispute, controversy, interpretation of claim including claims for but not limited to breach of contract, any form of negligence, fraud or misrepresentation arising out of from or related to this contract or arising out of from or related to the inspection or inspection report shall be submitted to final binding arbitration under the Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration

VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA, S C

PREFERRED HOME INSPECTIONS INC
1414 OLD ROAD
CHAPIN S C 29036

the Award may be entered in any Court of competent jurisdiction

The Client(s) agree and understand that Preferred Home Inspections Inc is not an insurer and does not insure against defects in the property and that the maximum liability incurred by the Inspection Company or the inspector(s) for error and omission in the inspection, including any liability of any inspector sub contractor owner or employee of the inspection company if any to the Client(s) shall be limited to the amount of the fee paid for the applicable inspection as a result of a settlement. Such damages are the sole and exclusive remedy of Client(s). Client(s) agree to pay all legal expenses and reasonable compensation for loss of time that may be incurred by an inspector sub contractor, owner or employee of the inspection company as a result of any legal action by the Client(s) where the Client(s) do not prevail. Client(s) understands that comprehensive inspections may be available from other companies.

The cursory limited visual and moisture inspection intends to reduce the risk but will not eliminate risk. The inspection will not identify all repairs or hazards be they visible in accessible or in accessible areas. When inspection of any system or component is limited or designated as not inspected due to inaccessible or for any other reason CLIENT(S) must understand that a condition affecting the structure system or components may be present. All findings should be considered partial or incomplete until further evaluation by a qualified repairperson is done prior to closing.

Since the inspection is based upon a visual and moisture inspection and observation on one day during a limited time period the inspection company cannot be responsible for any condition affecting any system or component which is intermittent and not detectable during the inspection. No warranties or guarantees are expressed or implied. The inspection company expects all working items to be ready for inspection.

DISCLAIMER OF WARRANTIES AND GUARANTEES THE INSPECTION COMPANY OR INSPECTOR(S) MAKE NO GUARANTEE OR WARRANTY AS TO ANY OF THE FOLLOWING

1. THAT ALL REPAIR NEEDS AND HAZARDS HAVE BEEN DISCOVERED OR DISCLOSED IN ACCESSIBLE OR INACCESSIBLE AREAS
2. THAT INSPECTION COMPANY OR THE INSPECTOR(S) WILL PAY FOR THE REPAIR OF UNDISCLOSED PROBLEMS OR CONDITIONS
3. THAT ANY OF THE ITEMS INSPECTED ARE DESIGNED OR CONSTRUCTED IN A GOOD OR WORKMANLIKE MANNER
4. THAT ANY OF THE ITEMS INSPECTED WILL CONTINUE TO PERFORM IN THE FUTURE AS THEY ARE PERFORMING AT THE TIME OF INSPECTION
5. THAT THE BUILDING WILL NOT EXPERIENCE OR CONTAIN WOOD DESTROYING INSECT ACTIVITY OR DAMAGE
6. THERE IS NO GUARANTEE OR WARRANTY OF MERCHANTABILITY OR FITNESS OF USE OF THE CONDITION OF THE PROPERTY

THAT BUILDING AND PROPERTY WILL NOT SETTLE, MOVE, SHIFT OR CHANGE IN THE FUTURE

DISCOVERY OF PROBLEMS The CLIENT(S) agree to notify Inspection Company in writing of any complaints or items in question within 14 days of discovery and to allow the inspection company and the inspector access to the property to evaluate these items before corrective action is taken. Immediate repair should be made in life threatening situations. In other than life threatening situations, CLIENT(S) failure to permit the inspection company to reinspect the items in issue shall mean the CLIENT(S) has waived any claim against the Inspection Company and inspector(s) with respect to that item. In no event shall any action be brought against the Inspection Company or inspector(s) for a breach of this Agreement at any time beyond one (1) year after the date of the inspection and this Agreement.

Third party Indemnification This inspection and report are not intended for the use or benefit of anyone other than the CLIENT(S). No third party shall have any right arising from the inspection or this report. In consideration for the inspection company furnishing the report CLIENT(S) shall indemnify and hold the Inspection Company and inspector(s) harmless for any claims, demands or costs as a result of any third party demand or claim arising out of the inspection or the report.

By my signing below I acknowledge that I have read both pages of this contract that I will read the report and all attachments before purchasing the property that I understand the terms and conditions and that I agree to be

VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA, S C

4 B

0945

Moisture Free124

APP_0957

PREFERRED HOME INSPECTIONS INC
1414 OLD ROAD
CHAPIN S C 29036

Acceptance and understanding of this 2 page Agreement are hereby acknowledged

Company Representative Witness _____ Date _____

CLIENT(S) Signature (for both pages) _____ Date _____
If this is a joint purchase, Client(s) signature represents
Authority to sign for all parties

Make Payment To

Charles Strickland
Preferred Home Inspections Inc
1414 Old Road
Chapin S C 29036

Payment Record

Total Fee _____
Paid By _____ Check _____ Cash _____

**STUCCO ✓ CHECK
MOISTURE INSPECTION**

A DIVISION OF PREFERRED HOME INSPECTIONS INC
Call Charles Strickland Phone # 407 3233

STUCCO MOISTURE INSPECTION ANALYSIS REPORT
VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA, S C

4 C

Moisture Free125

0946

APP_0958

PREFERRED HOME INSPECTIONS INC
1414 OLD ROAD
CHAPIN S C 29036

STUCCO INSPECTION SUMMARY

INSPECTION PERFORMED FOR VICTORIA MAOLI DATE 08/12/2004
ADDRESS OF PROPERTY INSPECTED 133 BEAVER DAM, COLUMBIA, S C

STUCCO INSPECTION

WHAT THIS INSPECTION DOES AND DOES NOT COVER

WE DO

A MOISTURE INTRUSION AND VISUAL INSTALLATION INSPECTION WAS CONDUCTED AT THE ABOVE PROPERTY THE SUMMARIZED INFORMATION AND INTERPRETATION IS PROVIDED BELOW

AN EXPLANATION OF TESTING PROTOCOL FOLLOWS THIS INSPECTION SUMMARY PAGE

THE MOISTURE INTRUSION SURVEY WAS CONDUCTED AT THE SUBJECT PROPERTY IN ORDER TO DETERMINE IF EXCESSIVE MOISTURE CONCENTRATIONS WERE PRESENT BEHIND THE STUCCO EXTERIOR THE MOISTURE TESTING EQUIPMENT USED WAS A DELMHORST MOISTURE METER ALL PENETRATIONS CREATED WERE SEALED PRIOR TO COMPLETION OF THE SURVEY

WE DO NOT

WE DO NOT GUARANTEE THE WORKMANSHIP OF BUILDER REPAIRMAN INSTALLER OR MANUFACTURER OF THE STUCCO

WE DO NOT WARRANT THE STUCCO FROM HAVING PAST OR FUTURE PROBLEMS

WE DO NOT INSPECT OR REPORT ON OTHER POSSIBLE PROBLEMS THAT HAVE OCCURRED OR WILL OCCUR FROM THE STUCCO OR THE CONSTRUCTION OF THE HOME

WE DO NOT GUARANTEE THAT THE STUCCO SIDING AND TRIM WILL KEEP MOISTURE OUT IN THE FUTURE SOME MAINTENANCE PAINTING AND SEALING WILL BE REQUIRED AS WITH ALL SIDING PRODUCTS

INTERPRETATION

THE INSPECTOR WILL CONDUCT A VISUAL INSPECTION OF ALL VULNERABLE AREAS WINDOWS DOORS JOINTS WHERE DISSIMILAR BUILDING MATERIALS ARE IN CONTACT ALL ATTACHMENTS AND PENETRATIONS OF THE STUCCO CLADDING (CHIMNEYS THAT CAN BE REACHED GUTTERS FLASHING ETC) THE INSPECTOR WILL CHECK THE SUB FLOOR AREAS WHERE ACCESSIBLE FROM BASEMENT OR CRAWL SPACE TO OBSERVE FLOOR AND WALL FRAMING FOR MOISTURE DAMAGE IF MOISTURE INDICATED ON OUTSIDE WALL INSPECTION

THE INSPECTOR WILL CONDUCT A GENERAL SURVEY AND TAKE MOISTURE READINGS OF THE EXTERIOR TO DETERMINE IF ANY AREAS HAVE BEEN AFFECTED BY MOISTURE MIGRATION PAST THE EXTERIOR CLADDING MOISTURE READINGS IN EXCESS OF 19% (HIGH MOISTURE CONTENT) ARE UNACCEPTABLE AND WILL BE REPORTED WOOD ROT OCCURS WHEN WOOD MOISTURE REACHES 28% WOOD IS CONSIDERED TO REACH TOTAL SATURATION AT 48% A MOISTURE METER READS UP TO 48% ANY MOISTURE READINGS ABOVE THAT SHOWS UP AS 99 %

THIS INSPECTION CAN ONLY MEASURE MOISTURE READ BY THE EQUIPMENT USED THE INSPECTOR AND THE EQUIPMENT CAN NOT DETERMINE MOLD, MILDEW TERMITE OR OTHER WOOD DESTROYING ACTIVITY THAT IS NOT VISIBLE THE EQUIPMENT CAN ONLY DETERMINE MOISTURE LEVELS AT THE TIME OF THE INSPECTION

VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA, S C

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POSSIBLE MOISTURE ENTRY INTO WALLS AT LEAST ONCE A YEAR

WE FOLLOW THE INSPECTION STANDARDS SET BY MOISTURE SCAN MOISTURE WARRANTY COMPANY. THESE STANDARDS HAVE BEEN APPROVED BY THE COURTS IN THE DRYVIT CLASS ACTION SETTLEMENT FOR EIFS STUCCO. WE MAKE NO OPINION AS IF THE STUCCO SYSTEM ON YOUR HOME IS A FAULTY SYSTEM. WE ONLY OBSERVED AND REPORT ON THE CURRENT MOISTURE CONDITION OF THE STUCCO THE DAY OF THE INSPECTION AND TRY TO IDENTIFY WHERE THE MOISTURE IS ENTERING.

OBSERVATIONS

EVERY MANUFACTURER OF STUCCO HAS SPECIFIC INSTALLATION PROCEDURES. IN THE ORIGINAL INSTALLATION OF SOME MANUFACTURER'S STUCCO WALL CLADDING, MANY OF THE MANUFACTURER'S RECOMMENDATIONS WERE IGNORED, MAKING THE INSTALLATION ONE WHICH COULD BE CONSIDERED A NON-COMPLYING APPLICATION. THIS IS COMMON FOR MOST STUCCO APPLIED BEFORE 1998.

SOME REPAIR COMPANIES MAY SUGGEST REMOVAL OF ALL STUCCO AND A NEW STUCCO OR SIDING BE INSTALLED.

I IDENTIFY AREAS THAT HAVE HIGH MOISTURE THAT NEED REPAIR, AND SEALING AND PROTECTING ALL OTHER AREAS TO PREVENT FUTURE MOISTURE FROM ENTERING. REPAIRS WILL NOT NECESSARILY BRING IT UP TO MANUFACTURER INSTALLATION STANDARDS. THE RECOMMENDED REPAIRS GOAL IS TO PREVENT MOISTURE FROM ENTERING INTO THE WALL SYSTEM.

YOU MUST DECIDE WHICH REPAIR PROCESS IS BEST FOR YOU. MY REPORT IS ONLY TO IDENTIFY MOISTURE AND VISUAL CONDITION OF THE STUCCO THE DAY OF THE INSPECTION.

GENERAL MAINTENANCE, REPAIRS, AND INSPECTIONS SPECIFIC FOR STUCCO WILL BE REQUIRED AND ARE RECOMMENDED DURING THE LIFE OF THE HOME.

Kickouts present

Existing kickout flashing appears to be functioning properly **WITH ONE EXCEPTION** Chapter 2 and Chapter 4 Section 3

Elevated moisture

You have areas around kickout flashing areas that are showing signs of elevated moisture. These areas should be modified according to the MoistureFree Repair Standards and Options (Chapter 4) to prevent moisture intrusion.

THIS MOISTURE WAS FOUND ON FOLLOW-UP INSPECTION. THIS AREA SHOULD BE CHECKED FOR POSSIBLE MOISTURE DAMAGE.

VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA, S C

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Moisture Free127

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1414 OLD ROAD
CHAPIN S C 29036

Conclusion

Please note that the moisture readings included in this report are the raw data recorded by the Delmhorst probe meter. Moisture levels are affected by the ambient weather conditions and other factors and this can result in variations between the readings taken on one day and readings taken in the same area on another day. The readings provided in this report are accurate indicators of the presence of retained moisture at the surface of the substrate or framing wood in the area tested at that given moment in time. These readings are not represented to be the absolute moisture content of the full thickness of the substrate or framing wood.

This report only reports on the condition of the structure at the specific locations indicated. Locations were determined by the inspector according to probable areas of possible moisture intrusion and in accordance with accepted industry standards. No judgment is intended or given for any areas not reported on.

THIS INSPECTION IS NOT A WARRANTY OR GUARANTEE. AN STUCCO MOISTURE WARRANTY MAY BE AVAILABLE. WE RECOMMEND THAT YOU CALL MOISTURE WARRANTY COMPANY (# 1 800 400 8679) FOR INFORMATION.

OVERALL CONDITION

☐ Satisfactory
Comments

☐ Not Satisfactory

☐ See Comments Above

THE ABOVE SUGGESTIONS ARE TO MAKE THE HOME AS MOISTURE PROOF AS POSSIBLE WITHIN THE ORIGINAL INSTALLATION. MOISTURE FINDINGS ARE BASED ON READINGS TAKEN DAY OF INSPECTION. THESE FINDINGS CAN CHANGE FROM DAY TO DAY.

Inspection done by _____ Date _____

S C Home Inspector License # 96191

S C Residential Home Builders License # 12642

VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA S C

4 F

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Moisture Free128

APP_0961

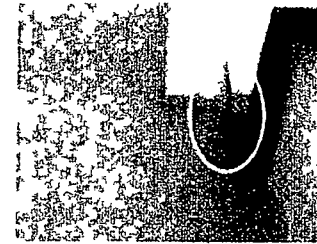
[illegible][illegible]

5

Moisture Free¹²⁹

APP_0962

PREFERRED HOME INSPECTIONS INC
1414 OLD ROAD
CHAPIN S C 29036



END DAM FLASHING IN
PLACE



END DAM FLASHING IN
PLACE



LIGHT FIXTURE IS
CAULKED



STUCCO SEALED AT
EDGES

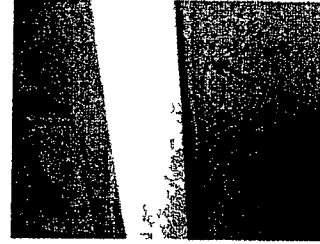
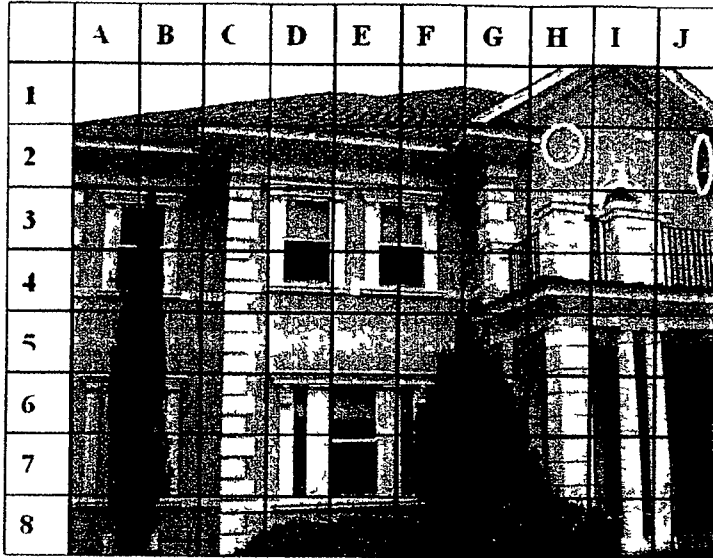


COLUMNS ARE
PROTECTED AT TOP

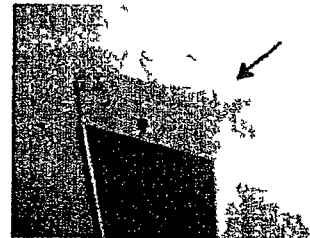
G-4	Kickout	17%	Firm	Kickout is mstalled and appears to be functioning properly	2, 4 3
G-5	Kickout	16%	Firm	Area where moisture reading was obtained	2, 4 3
G-8	Kickout	16%	Firm	Area where moisture reading was obtained	2, 4 3

VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA S C

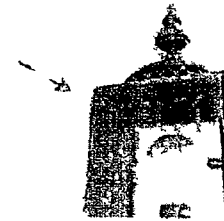
PREFERRED HOME INSPECTIONS INC
1414 OLD ROAD
CHAPIN S C 29036



DOOR CAULKED



SPEAKER IS CAULKED

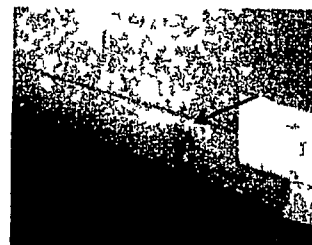


LIGHT FIXTURE IS
CAULKED

H-2	Kickout	Firm	Kickout is installed and appears to be functioning properly	2, 4, 3
J-2	Kickout	Firm	Kickout is installed and appears to be functioning properly	2, 4, 3

133 BEAVER DAM
COLUMBIA, S C

PREFERRED HOME INSPECTIONS INC
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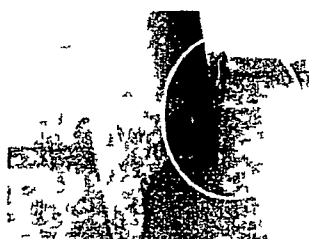
HOSE BIBB SEALED



WINDOW IS CAULKED



KICKOUT FLASHING IN PLACE



KICKOUT END DAM
FLASHING IN PLACE

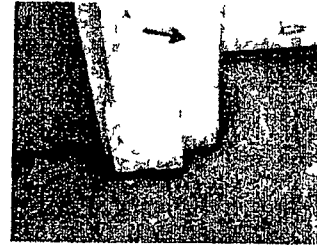
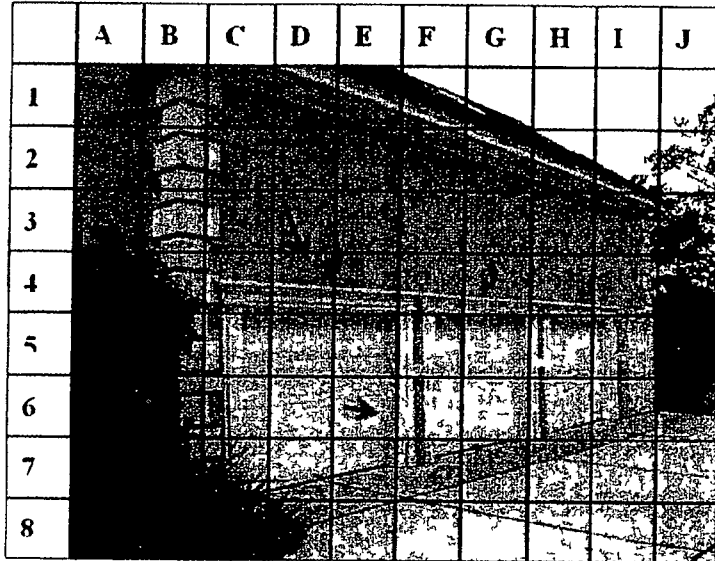


KICKOUT FLASHING IN PLACE

E-3	Kickout	15%	Firm	Kickout is installed and appears to be functioning properly	2, 4 3
H-4	Kickout	15%	Firm	Kickout is installed and appears to be functioning properly	2, 4 3
G-5	Windows	14%	Firm	Area where moisture reading was obtained	2, 4 2, 4 4
F 7	Windows	14%	Firm	Area where moisture reading was obtained	2, 4 2, 4 4
G-7	Windows	15%	Firm	Area where moisture reading was obtained	2, 4 2, 4 4

VICTORIA WAGER
133 BEAVER DAM
COLUMBIA S C

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GARAGE DOOR SEALED



ACCENT TRIM IS SLOPED

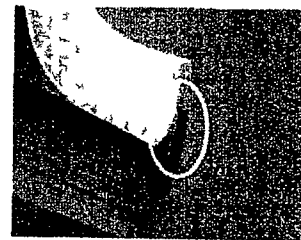
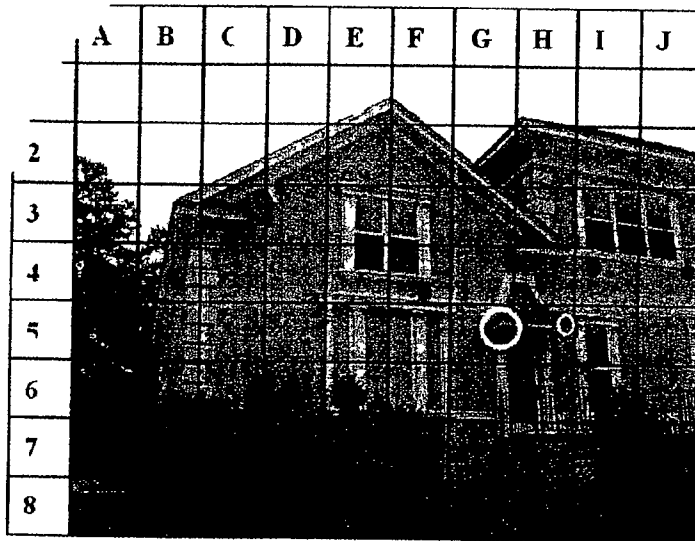


DOOR CAULKED

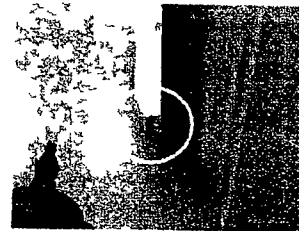
D-4	Light fixture	Firm	Light fixture breach location are caulked
F	Doors	Firm	Brick mold is caulked where it meets the stucco

VICTORIA MODEL
133 BEAVER DAM
COLUMBIA, S C

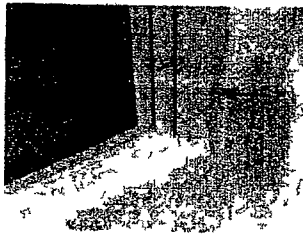
PREFERRED HOME INSPECTIONS INC
1414 OLD ROAD
CHAPIN S C 29036



KICKOUT FLASHING IN PLACE



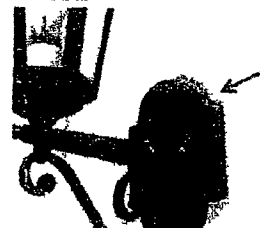
KICKOUT FLASHING IN PLACE



WINDOW IS CAULKED



EDGE CAULKED AT TILE FLOOR

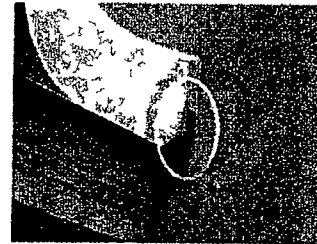


LIGHT FIXTURE IS CAULKED

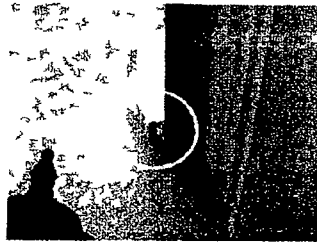
f-4	Windows	14% Firm	Area where moisture reading was obtained	2, 4 2, 4 4
G-4	Kickout	15% Firm	Kickout is installed and appears to be functioning properly	2, 4 3
H-4	Kickout	14% Firm	Kickout is installed and appears to be functioning properly	2, 4 3
I-3	Windows	13% Firm	Area where moisture reading was obtained	2 4 2, 4 4
J-3	Windows	15% Firm	Area where moisture reading was obtained	2, 4 2, 4 4
H-6	Kickout	30% Firm	Elevated moisture reading below kickout	2, 4 3

VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA, S C

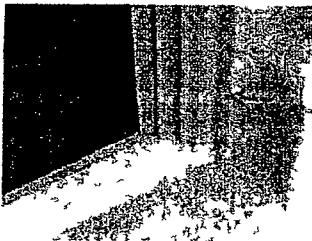
PREFERRED HOME INSPECTIONS INC
1414 OLD ROAD
CHAPIN S C 29036



KICKOUT FLASHING IN PLACE



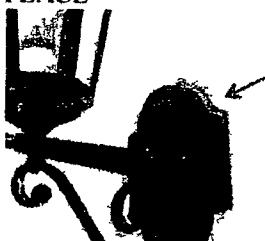
KICKOUT FLASHING IN PLACE



WINDOW IS CAULKED



EDGE CAULKED AT TILE FLOOR

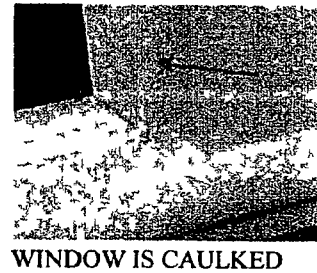


LIGHT FIXTURE IS CAULKED

f-4	Windows	14%	Firm	Area where moisture reading was obtained	2, 4.2, 4.4
G-4	Kickout	15%	Firm	Kickout is installed and appears to be functioning properly	2, 4.3
H-4	Kickout	14%	Firm	Kickout is installed and appears to be functioning properly	2, 4.3
I-3	Windows	13%	Firm	Area where moisture reading was obtained	2, 4.2, 4.4
J-3	Windows	15%	Firm	Area where moisture reading was obtained	2, 4.2, 4.4
H-6	Kickout	30%	Firm	Elevated moisture reading below kickout.	2, 4.3

133 BEAVER DAM
COLUMBIA, S C

PREFERRED HOME INSPECTIONS INC
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G-4	Windows	15%	Firm	Area where moisture reading was obtained	2, 4 2,
H-4	Windows	16%	Firm	Area where moisture reading was obtained	2, 4 2,
I-4	Windows	14%	Firm	Area where moisture reading was obtained	2, 4 2,
E-6	Windows	15%	Firm	Area where moisture reading was obtained	2, 4 2,
G-6	Windows	13%	Firm	Area where moisture reading was obtained	2, 4 2,
H-7	Windows	16%	Firm	Area where moisture reading was obtained	2, 4 2,
C-6	Kickout	30%	Firm	Elevated moisture reading below kickout.	2, 4 3

VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA S C

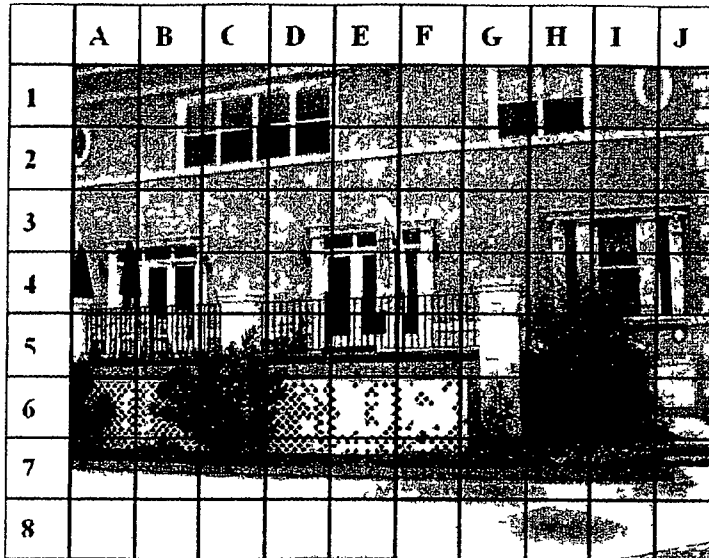
12

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Moisture Free137

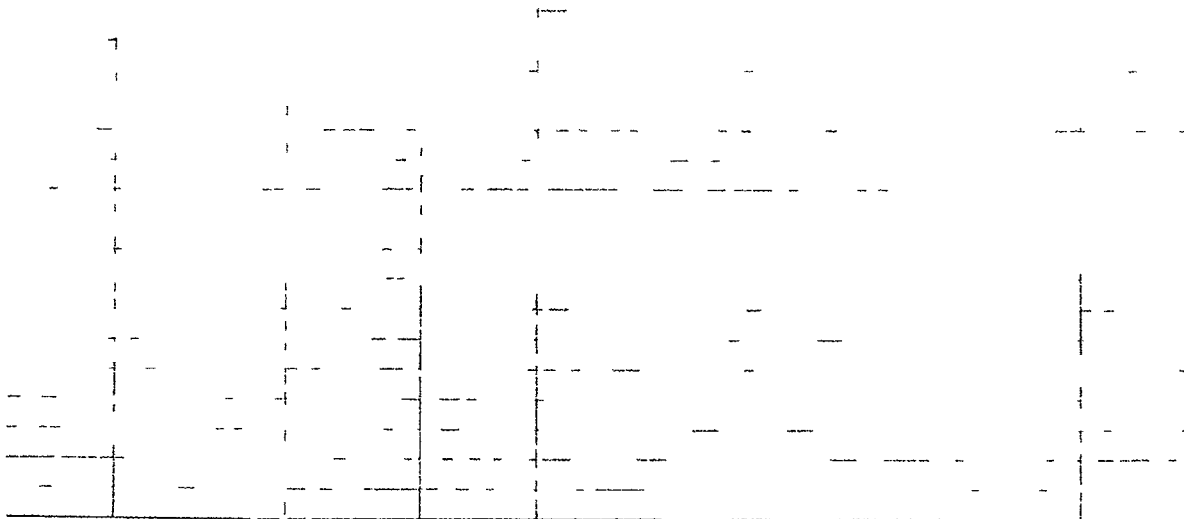
APP_0970

PREFERRED HOME INSPECTIONS, INC.
1414 OLD ROAD
CHAPIN S C 29036



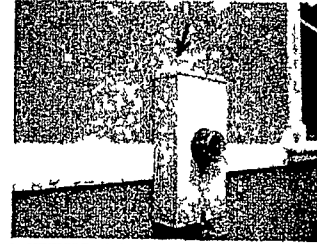
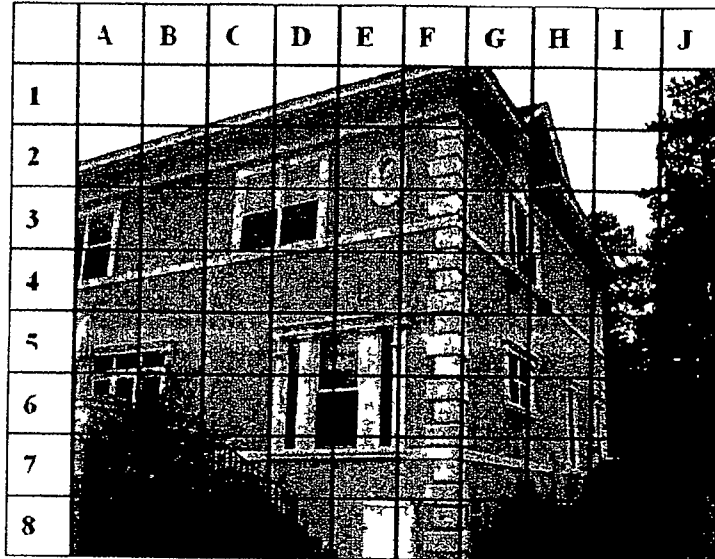
CONCRETE PORCH
RAILS

J-5 Windows 16% Firm Area where moisture reading was obtained 2, 4 2,
4 4



VICTORIA MAOLI
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COLUMBIA, S C

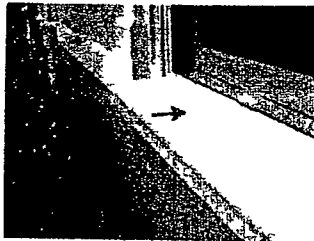
PREFERRED HOME INSPECTIONS INC
1414 OLD ROAD
CHAPIN S C 29036



METER IS CAULKED



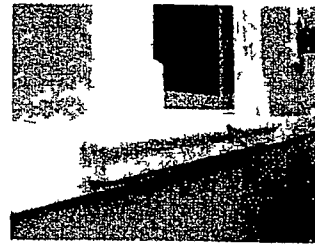
BIBB IS CAULKED



WINDOW IS CAULKED



VENT COVER IS
CAULKED



WINDOW IS CAULKED

G-4	Windows	15% Firm	Area where moisture reading was obtained	2, 4 2, 4 4
H-5	Windows	14% Firm	Area where moisture reading was obtained	2, 4 2, 4 4
G-6	Windows	16% Firm	Area where moisture reading was obtained	2, 4 2, 4 4
H-7	Windows	15% Firm	Area where moisture reading was obtained	2, 4 2, 4 4

VICTORIA MAOLI
133 BEAVER DAM
COLUMBIA, S C



To be reviewed by seller's attorney on 9/27



CONTRACT OF SALE

Revised 8/03

(Standard Form of The Greater Columbia Association of REALTORS®) This form is available for use by the entire real estate industry. The use of the form is not intended to identify the user as a REALTOR®. REALTOR® is the registered collective membership mark which may be used only by real estate licensees who are members of the NATIONAL ASSOCIATION OF REALTORS® and who subscribe to its Code of Ethics and Standards of Practice.

Agency Confirmation Purchaser and Seller acknowledge that a S.C. Real Estate Commission Agency Disclosure has been executed by the Purchaser prior to making this offer and by the Seller prior to its presentation and serves as written confirmation to the agreed upon agency status.

- 1 **DATE** A contract to purchase is offered this 29 day of AUGUST year 2004
by FRED + MALIKE BABAE Purchaser(s)
to OWNER OF RECORD Seller(s)
- 2 **PROPERTY DESCRIPTION** Purchaser agrees to buy and Seller agrees to sell all that lot or parcel of land with the buildings and improvements thereon if any located in RICHLAND County South Carolina and being described as follows:
Street 133 BEAVER DAM City COLLINGIA Zip 29223
TMS# 22707-01-09 Subdivision WILDEWOOD 10 865,000
- 3 **PRICE** The sales price is \$ 650,000 - 875,000 - 700,000 to be paid as follows
A \$ 25,000 Earnest money paid by ☒ cash ☒ check ☐ other held in trust by RUSSELL & JEFFCOAT
B \$ 25,000 Additional earnest money to be deposited with SAMA AC prior to 9-29-04
C \$ 345,000 Balance of down payment at closing is to be in the form of a cashier's check or certified funds
D \$ 300,000 Loan amount (type marked below) to be obtained by Purchaser
- 4 **FINANCING** A Financing shall be ☐ FHA ☐ VA (see addendum for FHA/VA) ☐ CONVENTIONAL ☒ SELLER ☐ CASH (No Financing Required) ☐ LOAN ASSUMPTION (see addendum for loan assumption) OTHER TERMS LOAN TO BE APPROVED BY 9/20/04 WITH CONTINGENCIES
B If Seller financing is included in the financing of this property Selling Broker and/or Listing Broker and their Agents in this transaction make no representation as to the credit worthiness of Purchaser and suggest that Seller determine for himself that Purchaser's credit is satisfactory
C In a cash transaction Purchaser agrees to provide Seller or Seller's Agent within ten (10) business days of acceptance of the contract written verification of sufficient and available funds for the specified date of closing. Purchaser's failure to comply shall constitute a default under this contract.
D This contract is contingent on the property appraising according to the Lender's appraisal or other appraisal as agreed for the selling price or more.
- 5 **CLOSING COSTS DISCOUNT POINTS** If a new loan is obtained Purchaser's closing costs to be paid by the PURCHASER and the Purchaser's prepaid items to be paid by the _____
PMI FHA MIP VA or Rural Housing Funding/Guarantee Fee to be paid by the _____
☐ To be financed Discount Points (if any) to be paid by N/A
If Seller pays closing costs prepaid items (PMI FHA MIP VA or Rural Housing Funding/Guarantee Fee) and/or discount points on behalf of Purchaser Seller will pay allowable and nonallowable costs of Purchaser not to exceed \$ 2500
- 6 **LOAN PROCESSING APPLICATION FINANCING CONTINGENCIES** Purchaser agrees to apply for financing as stated above from the Lender of his choice and to provide Seller within five (5) business days from the date of contract acceptance confirm on from Lender that application has been made and any required funds advanced for credit report and appraisal. Purchaser to furnish Lender any documentation required for the processing of this loan in a timely manner. Purchaser's failure to apply as required above shall constitute a default under this contract. Purchaser further hereby gives permission to Lender to disclose pertinent information concerning the Purchaser's loan to the Listing or Selling Brokers or Agents. If loan is rejected by initial lender Purchaser or Purchaser's Agent must notify the Listing Agent immediately and Seller shall then have the option to void contract. Contract is contingent upon above financing. If loan cannot be obtained earnest money will be refunded to Purchaser after earnest money check has cleared the bank.

7 ADDITIONAL CONTINGENCIES

[] Complete the sale and closing of Purchaser's property located at _____
It is further agreed that Seller will continue to market the property as long as the contingency relating to the sale and closing of Purchaser's property in accordance with this contract remains in effect. Should Seller be presented another contract and if accepted this contract will be voided without notification to the Purchaser or Purchaser's Agent and all earnest money refunded after earnest money check has cleared the bank. Purchaser or Purchaser's Agent will be notified of this contract being voided as soon as possible. For Purchaser to remove this contingency, Purchaser must provide documentation to Seller or Seller's Agent that any financing required under this agreement will be granted without the sale or lease of the aforementioned property and the financing contingency is removed. Upon the Purchaser's acceptance of a bona fide contract clear of contingencies other than financing, the Seller agrees to remove his property from the market and this sale will be contingent upon the close of the Purchaser's property. Any documentation regarding the sale of Purchaser's property to be furnished upon request.
[] Complete the closing of the sale of Purchaser's property currently under contract on or before _____
Property is located at _____ All documentation pertaining to this sale will be provided by Purchaser upon request.
[] Other _____

8 INSPECTIONS

A Home Inspection

The Listing and Selling Broker(s) recommend that Purchaser obtain a home inspection. Purchaser has the right within ten (10) business days after acceptance of contract to have home inspected by qualified professional inspectors of his choice including a professional qualified to inspect for hazardous substances. Expenses of home inspections to be paid by Purchaser. If Seller does not receive Purchaser's written response to the inspection(s) and a copy of the inspection(s) report within the same ten (10) business day period, Section 8A is nullified in its entirety.

- (1) Purchaser has the option of accepting the property in current condition as referenced by the inspection report(s); otherwise, Purchaser must notify the Seller or Seller's Agent in writing by signed addendum specifying the defects or conditions. Purchaser expects the Seller to remedy. Addendum must be accompanied by a copy of the home inspection report.
- (2) Seller has three (3) business days to accept or reject Purchaser's home inspection repair addendum.
 - (a) If Seller accepts addendum, Purchaser agrees to complete this sale according to the terms and conditions of this contract.
 - (b) If Seller modifies addendum, Purchaser has two (2) business days from receipt of Seller's written counterproposal to notify Seller or Seller's Agent of his acceptance of Seller's counterproposal and agrees to complete this sale according to the terms and conditions of this contract or this contract becomes null and void.
 - (c) If Seller rejects addendum, Purchaser has two (2) business days from receipt of Seller's rejection to notify Seller or Seller's Agent in writing that Purchaser agrees to complete this sale according to the terms and conditions of this contract or this contract becomes null and void.
- (3) Purchaser's failure to notify Seller or Seller's Agent in writing of any defect found by the home inspection within the time limits herein provided, or Purchaser's acceptance of the deed at closing, shall constitute Purchaser's full acceptance of the condition of the property and a waiver of Purchaser's right to object to any defects found by the home inspection(s).

B Termite Inspection

Notwithstanding the provisions of Section 8A, [] Purchaser [] Seller shall at his expense furnish a current certification from a licensed and bonded exterminator stating that the herein described property, excluding detached garages, detached buildings, or detached structure(s) of every kind, is free and clear of termites, water and fungus damage, or other wood destroying organisms. If any such damage or infestation is found and Inspector recommends treatment and/or repairs, the Seller agrees to have it corrected at his expense prior to closing.

C Heating & Air Inspection

Notwithstanding the provisions of Section 8A, [] Purchaser [] Seller shall furnish at his expense a letter from a heating and air company stating that heating and air conditioning (if applicable) systems are in satisfactory working order. Seller agrees to have any required repairs corrected at his expense prior to closing. Aforementioned not guaranteed for any period of time after closing.

D Lead Based Paint Inspection

If this home was built prior to 1978, it may contain lead based paint. This contract is contingent upon a risk assessment or inspection of the property for the presence of lead based paint and/or lead based paint hazards at the Purchaser's expense until midnight on the tenth (10th) business day after acceptance of this contract. This contingency will terminate at the above predetermined deadline unless the Purchaser (or Purchaser's Agent) delivers to the Seller (or Seller's Agent) a written contract addendum listing the specific existing deficiencies, corrections needed, and the inspection and/or risk assessment report within the above time limits. The Seller may, at the Seller's option, elect in writing whether to correct the condition(s) prior to settlement. If the Seller does not elect to make the repairs, the Purchaser may remove this contingency and take the property in inspection report(s) condition within the above time limits or this contract will become void. The Purchaser may remove this contingency at any time without cause.

If this home was built prior to 1978, a Disclosure of Information and Acknowledgment Lead Based Paint and/or Lead Based Paint Hazards is hereby made an addendum to this contract and must be signed by both Purchaser and Seller.

TERMITE
DAMAGE BOND
TO BE SIGNED
PURCHASER
BY SELLER



8/03
2 of 5

Purchaser's Initials MJB DATE 8-22-04 HAVE READ THIS PAGE Seller's Initials DATE HAVE READ THIS PAGE

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Russell & Jeffcoat 078

APP_0974

9 CONDITION OF PROPERTY

(A) Except as a new home being sold by the builder the Purchaser acknowledges that Seller except as provided in below paragraphs of this section gives no guaranty or warranty of any kind express or implied and has made no representation as to the physical condition of the property or the existence of improvements services appliances or systems thereof or as to merchantability or fitness for a particular purpose as to the property or improvements thereof and any implied warranty is hereby disclaimed by the Seller

(B) The Seller warrants the heating air conditioning plumbing and electrical systems well and/or septic systems and all appliances to be in operative condition on the day of closing or the day possession is given whichever occurs first

(C) After any inspection by Purchaser and after repairs if any made as a result of any such inspection the Seller agrees to maintain the property including yard maintenance heating and air conditioning plumbing and electrical systems and all appliances to be conveyed in proper operative condition normal wear and tear excepted until the day of closing or the day possession is given whichever occurs first Seller warrants that to the best of his knowledge information and belief there are no conditions in the residence which would adversely affect the value when conditions are hidden by furniture fixtures or window treatments currently in place in the property

(D) Seller represents that the property is connected to ☒ public/community sewer system or to ☐ a septic tank and to ☒ public/community water system or to ☐ well system and ☐ is located in flood zone or ☒ is not located in flood zone

(E) Seller represents that the property ☒ is or ☐ is not subject to a mandatory association fee (i.e. home owner's association/regime or otherwise) If property is subject to a mandatory fee the fee is \$ 300 per year and the fee ☒ is or ☐ is not current Purchaser ☐ has ☒ has not received copy of restrictions/covenants if applicable Coella to give purchaser with 5 business days

(F) Seller warrants that the property ☐ is or ☐ is not subject to a special assessment of any governing body including but not limited to a homeowners association or regime or otherwise If the property is subject of a special assessment the assessment ☐ has or ☒ has not been paid

(G) ☐ Purchaser and Seller agree that a Seller's Property Condition Disclosure statement as required by South Carolina Code of Laws has been provided to Purchaser by Seller prior to the ratification of this agreement ☒ Property is exempt from disclosure requirement in accordance with South Carolina Code of Laws

10 CONVEYANCE DATE OF CLOSING

Conveyance shall be made subject to all easements and covenants of record (provided they do not make the title unmarketable) and to all governmental statutes ordinances rules and regulations Seller agrees to convey by marketable title and to have prepared a proper statutory warranty deed free of encumbrances except as herein stated All statutory deed transfer fees shall be the responsibility of Seller Purchaser shall pay for recording of deed The deed shall be prepared in the name of MALHE D BAEAE and delivered to stipulated place of closing This transaction shall be closed on or before 9-30-08

11 POSSESSION
one week to vacate after closing

The Seller will not be obligated to give possession or vacate the herein described property to the Purchaser until twenty four (24) hours after the title to this property has passed to the Purchaser Seller agrees to deliver the property free of debris in a clean condition with landscaping maintained Seller shall give Purchaser access to the herein described property for the purposes of a walk through inspection within twenty four (24) hours prior to closing

12 FIXTURES AND PERSONAL PROPERTY

This sale includes all fixtures equipment and improvements of any kind which now exist and are attached to or planted on the premises such as shrubbery trees fences shutters blinds lamp posts mail boxes TV antennas satellite dishes Seller owned security systems clothes line poles curtain/drapery rods ceiling fans attached mirrors light bulbs switch plates duct covers and built ins such as equipment appliances cabinets furniture and shelves unless otherwise agreed herein (Other items may be sold separately by bill of sale)

13 REMARKS

Other conditions

SELLER TO PAY \$1000 AT CLOSING FOR MOISTURE BOND WARRANTY

ALL WINDOW TREATMENTS

SELLER TO LEAVE SAFE IN STUDY

POOL TABLE IN ROOM WITH REMAINS

ALL LIGHT FIXTURES TO REMAIN EXCEPT DINING ROOM

14 ADJUSTMENTS

Taxes water sewer charges fuel oil propane electricity natural gas rents when applicable and all other assessments including homeowners association fees regime fees or the like shall be adjusted as of the date of closing Tax proration pursuant to this contract are to be based on the tax information available or projected on the date of closing and are to be prorated on that basis unless otherwise stipulated in this contract



B/C3
3 of 5

Purchaser's Initials MJB DATE 8-29-08 HAVE READ THIS PAGE. Seller's Initials DATE HAVE READ THIS PAGE

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Russell & Jeffcoat 079

APP_0975

- 15 FIRE OR CASUALTY** In case this property is damaged wholly or partially by fire or other casualty prior to delivery of deed Purchaser or Seller shall have the right for ten (10) business days after notice of such damage to terminate this contract. Upon such termination the earnest money deposit of Purchaser shall be returned to Purchaser and neither party shall have any further rights hereunder. If neither Purchaser nor Seller elects to terminate the contract the parties shall proceed according to the terms of the contract.
- 16 DEFAULT** If the Purchaser shall default under this contract the Seller shall have the option of suing for damages or rescinding this contract. In the event the contract is rescinded one half of the earnest money shall then be paid to the Broker(s) not to exceed the commission due such Broker and the remaining balance of earnest money shall be paid to the Seller. Upon default by the Seller the Purchaser shall have the option of suing for damages or specific performance or rescinding this contract. Upon default by the Seller if the Purchaser elects to rescind this contract he will be refunded all sums paid hereunder and in addition shall be reimbursed by the Seller for actual costs incurred including but not limited to credit report appraisal fee survey and cost of title examination. In any action to enforce the provisions of this contract the prevailing party and Broker(s) shall be entitled to the award of their costs including reasonable attorney's fees.
- 17 MEDIATION** Any dispute or claim arising out of or relating to this contract the breach of this contract or the services provided in relation to this contract shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System of the NATIONAL ASSOCIATION OF REALTORS®. Disputes shall include representations made by the Purchaser(s) Seller(s) or any real estate broker or other person or entity in connection with the sale purchase financing condition or other aspect of the property to which this contract pertains including without limitation allegations of concealment misrepresentation negligence and/or fraud. Any contract signed by the parties pursuant to the mediation conference shall be binding. South Carolina Code Ann. Section 15-48-10 et seq. shall not apply to this contract.
- 18 ENTIRE CONTRACT BINDING CONTRACT** The parties agree that this written contract expresses the entire agreement between the parties and that there is no other agreement oral or otherwise modifying the terms hereunder and that the contract shall be binding on both parties their principals heirs personal representatives successors and assigns as state law permits.
- 19 EARNEST MONEY** Broker does not guarantee payment of check or checks accepted as earnest money. Earnest money is to be promptly deposited in Broker's escrow account upon acceptance by both parties of contract. In the event of any action wherein Broker is made a party by virtue of acting as escrow agent or in any action wherein the funds held in escrow by Broker are subject to an action in the nature of interpleader and Broker is made a party Broker shall be entitled to recover reasonable Attorney's fees and court cost the same to be charged and assessed against the Purchaser(s) or Seller(s) or both as the court may decide.
- The South Carolina Real Estate Practices Act allows the Broker holding the earnest money to deposit it into an interest bearing account. Purchaser agrees to and understands that he has been informed of his right to ownership of the interest but relinquishes to the broker by this written agreement said right of ownership. The earnest money so noted [✓] will [] will not be deposited into an interest bearing account with the interest accruing to the benefit of the Broker.
- 20 SURVEY TITLE EXAMINATION INSURANCE** The Listing and Selling Broker(s) and their Agent(s) recommend that Purchaser have a survey of the subject property made that Purchaser select an attorney to examine the title to the property and that Purchaser obtain all appropriate insurance coverage including that required by the lender effective with the time of closing.
- 21 EXTENSION AGREEMENT** Time is of the essence. If Purchaser or Purchaser's Agent has provided written loan commitment but not closed within the stipulated time limit of this contract both parties agree to extend this contract for a period not to exceed five (5) business days from the original closing date. In a cash transaction if terms and conditions of section 4C have been met both parties agree to extend this contract for a period not to exceed five (5) business days from the original closing date.
- 22 BROKERAGE FEE** All real estate brokerage fees as specified in the Listing Agreement and in the Buyer's Brokerage Representation Agreement if applicable are earned upon the acceptance of this offer and are due and payable at the time of closing subject to any contingencies specified herein.
- 23 NON RESIDENT TAX** Seller covenants and agrees to comply with the provisions of South Carolina Code Section 12-8-580 (as amended) regarding withholding requirements of sellers who are not residents of South Carolina as defined in the said statute.
- 24 HOME WARRANTY COVERAGE** Both parties understand that a home warranty [✓] will [] will not be provided at closing. If applicable the warranty premium will be paid at closing by the Seller in the amount of \$ 550 and provided by Home Guard Home Warranty Company and written through the Seller Broker.
- 25 EXPIRATION OF OFFER** This offer from Purchaser shall be withdrawn at _____ o'clock _____ m (ET) on _____ unless accepted or countered by Seller in written form prior to such time.
- 26 FAX** Both Purchaser and Seller agree that receipt of a signed contract by facsimile (FAX) will be the same as receipt of an original signed contract.
- 27 SURVIVAL** If any provision herein contained which by its nature and effect is required to be observed kept or performed after the closing it shall survive the closing and remain binding upon and for the parties hereto until fully observed kept or performed.



B/03
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Purchaser's Initials (M, B) DATE 8-29-04 HAVE READ THIS PAGE Seller's Initials _____ DATE _____ HAVE READ THIS PAGE

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Russell & Jeffcoat 080

APP_0976

- 28 DEFINITIONS** In this contract a single business day is defined as a twenty four (24) hour period beginning at the time of acceptance of this contract excluding Satu days Sundays and South Carolina legal holidays
- 29 HUD/CLOSING STATEMENT RELEASE** Seller and Purchaser authorize the closing attorney to furnish to Listing Broker and Selling Broker copies of the HUD settlement statement for the transaction
- 30 MEGAN S LAW** The Purchaser and Seller agree that the Listing and Selling Broker and all affiliated agents are not responsible for obtaining or disclosing any information contained in the South Carolina Sex Offender Registry The Purchaser and Seller agree that no course of action may be brought against the Listing and Selling Broker and all affiliated agents for failure to obtain or disclose any information contained in the South Carolina Sex Offender Registry The Purchaser agrees that the Purchaser has the sole responsibility to obtain any such information The Purchaser understands that Sex Offender Registry information may be obtained from the appropriate law enforcement officials
- 31 DISCLAIMER** The parties acknowledge that the Listing and Selling Broker(s) and their Agent(s) (A) Give no warranty of any kind, express or implied as to the physical condition of the property or as to condition of or existence of improvements services or systems, thereto including but not limited to termite damage, roof, basement, appliances, heating and air conditioning systems, plumbing, sewage/septic, electrical systems or to the structure (B) Give no warranty, express or implied, concerning the condition of the property, any matters which would be reflected by a current survey of the property, or the accuracy of the square footage heated or unheated (C) Give no warranty, express or implied, as to title (D) Give no warranty, express or implied, as to the fitness for a particular purpose of the property or improvements thereto (E) Give no warranty, express or implied, that the property being purchased is in compliance with all necessary zoning ordinances and restrictions (F) Give no warranty, express or implied, as to projected income, value or other possible benefits to the Purchaser

This is a legally binding contract. Purchaser and Seller should seek legal advice if the contents are not understood. Both Purchaser and Seller acknowledge the receipt of a copy of this contract.

IN WITNESS THEREOF, this contract has been duly executed by the parties hereto

Witness as to Purchaser	<u>UBBROO</u>	<u>8-29-04</u>	SSN
Purchaser		Date	
Witness as to Purchaser	Purchaser	Date	SSN
Witness as to Seller	Seller	Date	SSN
Witness as to Seller	Seller	Date	SSN
Listing Agent	Office	Telephone Number	
Selling Agent	Office	Telephone Number	

FINAL CONTRACT ACCEPTED BY BOTH PARTIES AT _____ O'CLOCK ____ M (ET) ON _____ (DATE)



CONTRACT OF SALE

THIS CONTRACT made and entered into this the 3 day of OCTOBER 2004 between FRED & MALINE BABAEZ (Purchaser) and VICTORIA VMAOLI (Seller) CUSEPPE &

Purchaser agrees to buy and Seller agrees to sell all that lot or parcel of land with the buildings and improvements thereon if any situate in Richmo County State of South Carolina and being described as 133 BEAVER DAM COLUMBIA SC 29223 Conveyance shall be made subject to all matters of record (provided they do not make title unmarketable) and to all governmental statutes ordinances rules and regulations

1 PURCHASE PRICE \$810,000.00 JS

The Purchase Price is \$810,000 to be paid as follows

JS \$5,000.00

(A) \$25,000 earnest money paid by check and held in trust by Russell

JS \$805,000.00 Broker/Realtors' Unacceptable of contract

(B) \$835,000 balance paid in immediately available funds at closing

2 CLOSING COSTS

Purchaser and Seller shall be responsible for their own closing costs

3 CONVEYANCE AND DATE OF CLOSING

Seller agrees to convey by marketable title and deliver a proper statutory general warranty deed free of encumbrances except as herein stated with all stamps affixed thereto. The deed shall be prepared in the name of MALINE P BABAEZ and delivered to Purchaser's Attorney and transaction closed on or before Oct 30, 2004 Time is of the essence

4 POSSESSION

two JS App
Possession of said premises will be given Purchaser one week after closing

Seller agrees to deliver property free of debris and in clean condition

JS If the care Mal holes from pictures on the wall the wall must be repair and painted (every hours)

5 FINANCING CONTINGENCY

Purchaser agrees to apply for financing from the Institution of their choice Purchaser shall provide Seller within 30 calendar days from the date of this contract evidence of said loan having been approved by the Institution of their choice without contingencies If initial lender rejects loan Seller at its option may terminate the contract Contract is contingent upon above financing If loan cannot be obtained within the above stated time either Purchaser or Seller may terminate the Contract and earnest money will be refunded to the Purchaser

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Russell & Jeffcoat 065

APP_0978

6 HOME INSPECTION

Purchaser has the right to inspect or have the home inspected by qualified professionals within fifteen (15) days after acceptance of the Contract by inspectors of their choice as to the condition of the home Expenses of the home inspection to be paid by the Purchaser *Purchaser*
w/ it inspect the stucco by an individual contractor *JIS*

- (A) If Purchaser finds results of home inspections report unacceptable Purchaser may elect to terminate the Contract by notifying Seller ~~in writing within three business days after Purchaser has received the home inspection report~~ of Purchaser's intent to terminate If Purchaser elects to terminate Seller agrees to permit the immediate return of Purchaser's earnest money
- (B) Purchaser shall provide a copy of the home inspection report to Seller ~~within three business days after Purchaser has received the home inspection report~~ and identify those items listed in the report to be repaired by Seller If Seller does not agree to pay the repair costs Purchaser may terminate the Contract and all earnest money shall be returned to Purchaser and neither party shall have further obligations under the contract

7 ADDITIONAL CONTINGENCIES

The Property is being sold with the following additional contingencies

- (A) If the appraised value is less than the Purchase Price Purchaser has the option of terminating the Contract by notifying Seller ~~in writing within three business days after receipt of the appraisal~~ and Seller agrees to return the earnest money
- ~~(B) This Contract is contingent on Purchaser securing a contract on their current home located at _____ If Purchaser is unable to secure a contract on their current home by _____ Purchaser may elect to terminate the Contract and Seller agrees to return the earnest money If Seller receives another contract on the property which does not include this type of contingency Seller shall notify Purchaser and Purchaser shall have 24 hours to waive this contingency If such contingency is not waived then Seller may terminate the contract and all earnest money shall be returned to Purchaser~~

8 OTHER PROPERTY

This sale does not include personal property attached to the premises except for the following items which shall remain with the property

- (A) Interior and exterior window treatments including Plantation Shutters

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APP_0979

OPTIONAL - Any FERT
FOR LVA 11/14/14
TRU m

will remain

(B) Any and all Ceiling Fans and Light Fixtures ~~except any and all chandeliers~~

(C) Major Kitchen Appliances including Stove/Oven Refrigerator Microwave and Dishwasher and all appliances including Washer & Dryer

(D) ~~Safe in study and pool table in room above the garage~~

REPAIRS TO BE MADE IN UPSTAIR LANE
ATTACHED
WASHER & DRYER
WALL LIGHT IN FOYER

9 ADJUSTMENTS

Taxes interest water rents sewer charges fuel oil lights and other assessments shall be adjusted as of the date of delivery of the deed For purposes of adjustments a 365-day period will be used in making calculations

10 FIRE OR CASUALTY

In case the property is destroyed wholly or partially by fire or other casualty prior to delivery of the deed Purchaser shall have the option for ten (10) days thereafter of proceeding hereunder with an agreed adjustment in purchase price or terminating this agreement and being repaid the earnest money

11 DEFAULT

If the Purchaser shall default under this Contract the Seller shall be entitled to the earnest money paid hereunder as liquidated damages and not as a penalty This shall be Seller's sole and exclusive remedy as her damages would be difficult or impossible to ascertain

Upon default by the Seller Purchaser shall have the option of suing for damages or specific performance or rescinding the Contract If the Purchaser elects to rescind the Contract Purchaser shall be refunded all sums paid hereunder and shall be reimbursed by the Seller for the actual costs incurred including but not limited to credit report appraisal fee survey cost of title examination et cetera not to exceed \$2 000

12 MARKETABILITY OF TITLE

In the event the Seller should be unable to convey marketable title in accordance with the terms of this Contract the Seller will not be required to bring any action or proceeding or otherwise to incur any expense to render the title marketable The sole obligation of the Seller shall be to reimburse the Purchaser for the actual costs incurred as indicated above

13 EFFECT OF CONTRACT

The Parties hereto further agree that this Contract expresses the entire agreement between the Parties and that there is no other agreement

Rus

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APP_0980

8/ va
seller
seller
18 AS NOTED ON LISTING⁸⁸ DOCUMENTS, COMMISSION TO BE PAID BY SELLER IS ~~6 1/2~~ ^{5 1/2} % OF PURCHASE PRICE IF HOUSE & LOT IS SOLD BY RUDOLPH LEWIS OF RUSSELL & JEFFCOAT REALTOR, 6 1/2 % IS COMMISSION IF SLD BY

17 HOME WARRANTY COVERAGE ANY OTHER LICENSED PARTY. NO ONE ELSE SHALL BE ENTITLED TO A COMMISSION

Both Parties understand that a home warranty will not be issued at closing

18 COMMISSION (ABOVE)

~~Both Parties represent and warrant to each other that no real estate broker or other individual is entitled to a sales commission as a consequence of the transaction contemplated by this contract.~~

19 LEAD BASED PAINT DISCLOSURE

To the extent any improvements on the property were constructed prior to 1978 Seller and Purchaser make the following certifications

- 1 Seller is not aware of and has no knowledge of the presence of lead-based paint materials on or in the property
- 2 Purchaser acknowledges the receipt of a lead information pamphlet _____ (Purchaser's Initials)
- 3 Purchaser hereby waived the right to conduct a risk assessment or inspection of the property for lead-based paint and
- 4 Both Parties certify that the information and statements as required by this paragraph are to the best of each party's knowledge true and accurate

20. EXPIRATION OF CONTRACT OF SALE

~~This Contract of Sale shall become null and void and all deposits returned to Purchaser if Purchaser does not accept in writing and a copy of the executed contract is delivered to Seller within three days from the date of this contract.~~

SELLER Arthur Paoli

PURCHASER M. Barber

WITNESS our hands and seals as to the year and date first above written The signatures below signify acceptance of all terms and conditions stated herein

SIGNED SEALED AND DELIVERED
IN THE PRESENCE OF

[Signature]

PURCHASER

M. Barber LS

Fred R. [Signature] LS

0970

Russell & Jeffcoat 069

#8

121 Clark Ridge Rd
Columbia SC 29223
November 4, 2004

Mr and Mrs Giuseppe Maoli
133 Beaver Dam Rd
Columbia, SC 29223

Dear Mr and Mrs Maoli

Thank you for agreeing to sell your home to my wife, Malihe, and me In accordance with the Contract of Sale, we have instructed home inspectors to make evaluations

At this time the stucco inspection reveals areas that must be corrected prior to the Moisture Bond Warranty being authorized They are the front porch garage corner, left side of the front porch and the window to the right of the back door I will obtain the complete report next Tuesday Hopefully other areas will not need correction

Also in order for the termite company to agree to install a termite repair bond, quoins on some corners must be removed and the area under them must be sealed

Hopefully we all can agree on necessary repairs and close as agreed

Thank you

Fred Babae

17816089



Chipco Computer Distributors, Inc.

• 888 32CHIPCO • (803)786-8646 • Fax (803)691-0192 •

206 A Business Park Blvd • Columbia, SC 29203

<http://www.chipcocomputer.com>

Fred Z. Babace
President

To Buddy Lewis

Monday, November 08, 2004

Here is the list of things that needs to be corrected before closing on November 15th 2004

- 1 Exterior paint pressure wash
- 2 Outlet right of stairwell leading to dining room has an open ground
- 3 Dining room door adjustment
- 4 Hardwood floor in the wine room
- 5 Pocket doors from foyer to dining area meet at bottoms leaving a gap
- 6 Library door on left binds at top
- 7 Cover plate for cable TV is broken in bedroom upstairs
- 8 Light bulbs needed in attic
- 9 Garage door needs to be fixed
- 10 Quions at second corner bottom have breaks in the lamina. There is a spot right between garage door and storage room that has been repaired but stucco color does not match
- 11 There is a crack in stucco left of rear patio behind HVAC unit crack in lamina under first window right side. There are cracks in stucco above copper roof and under return above first door on back
- 12 There is small hole in reveal around garage door near bottom
- 13 There are spots above last door on back of house that have been repaired stucco does not match
- 14 There is a crack in foundation under vents(all) on left end of house (facing house) there are cracks in foundation left and right of front steps. There are some cracks in the tile joins at front steps and steps on left on left of patio
- 15 Back yard needs strip drain in multiple areas where the soil is wet and boggy
- 16 Moisture bond warranty and termite bond must be received and reviewed before closing
- 17 All Stucco repair must be approved by the Fred Babace and warranty
- 18 Need to figure out why soil is extremely wet in the crawl space

Please note all above fixes must be done or at least on schedule before the closing on November 15th

Sincerely

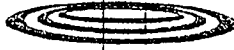

Fred Z. Babace

0972

APP_0984

MoistureFree Warranty

Moisture Warranty Corporation



Letter of Approval

11/11/04

To Victoria Maoli
From Tom Russell/Claire Hammett
Re Moisture Free Warranty for the stucco exterior of the home located at
133 Beaver Dam, Columbia, SC 29223

Based on the findings of the report by C Strickland on 08/12/04 this home **qualifies** for a
MoistureFree Warranty with the following exclusions

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

- Page 11 kickout location and area below [30% readings]

Level of Warranty Chosen

Agreed to be paid at closing. Final Certificates will be sent within two weeks of processing

3 year \$60,000 total limit and \$20,000 annual limit warranty \$4 095

(Includes an interim inspection)

Sign and return this form to activate coverage. Once MWC receives this in writing (and payment is
processed), the warranty will be issued. Subsequent owners must provide their contact information.

*I have read and understand this Letter of Approval dated 11/11/04 and the Moisture Warranty Terms and
Conditions. I accept the warranty and any exclusions listed for the home at 133 Beaver Dam, Columbia,
SC 29223.*

New Owner's Name (Printed)

FRED BABAE

Phone

cell 608 2743
home 788 9589

Signature

MP Babae

and MALI HA
Fred Z. Babae

Approval period is 90 days. Final Authorization Certificates are mailed to the property address unless otherwise specified.

TO ACTIVATE COVERAGE, SIGN AND RETURN WITH PAYMENT BY MAIL or FAX

Note: If funds are to be distributed at closing, mail full payment to the address below. Make checks payable to Moisture Warranty Corporation.

CHH

1

0973

RTT402

20306 North Main Street
Cornelius, North Carolina 28031
800 400 8679 • Fax 704 896 3426
www.moisturewarranty.com

APP_0985

A U S DEPARTMENT OF HOUSING & URBAN DEVELOPMENT SETTLEMENT STATEMENT		B TYPE OF LOAN 1 ☐ FHA 2 ☐ FmHA 3 ☒ CONV UNINS 4 ☐ VA 5 ☐ CONV INS 6 FILE NUMBER 11884 1 7 LOAN NUMBER 6612568950 8 MORTGAGE INS CA#E NUMBER	
C NOTE This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked [POC] were paid outside the closing they are shown here for informational purposes and are not included in the totals. 10 3/98 (11884 1 PFD) 11884 1/14			
D NAME AND ADDRESS OF BORROWER Fariborz Z. Babaee and Malihe Babaee 133 Beaver Dam Road Columbia SC 29223 <i>608-2743</i>		E NAME AND ADDRESS OF SELLER Giuseppe Maoli and Vittoria Maoli Branch Banking and Trust Compa 301 College Street Greenville SC 29601	
G PROPERTY LOCATION 133 Beaver Dam Road Columbia SC 29223 Richland County South Carolina Silver Lake at Wildewood		H SETTLEMENT AGENT J7 0913654 Rogers Townsend & Thomas PC PLACE OF SETTLEMENT P O Box 100200 Columbia SC 29202	
I SETTLEMENT DATE November 18 2004			
J SUMMARY OF BORROWER'S TRANSACTION		K SUMMARY OF SELLER'S TRANSACTION	
100 GROSS AMOUNT DUE FROM BORROWER		400 GROSS AMOUNT DUE TO SELLER	
101 Contract Sales Price	700 000 00	401 Contract Sales Price	700 000 00
102 Personal Property		402 Personal Property	
103 Settlement Charges to Borrower (Line 1400)	7 329 21	403	
104		404	
105		405	
Adjustments For Items Paid By Seller in advance		Adjustments For Items Paid By Seller in advance	
106 City/Town Taxes to		406 City/Town Taxes to	
107 County Taxes to		407 County Taxes to	
108 Assessments to		408 Assessments to	
109		409	
110		410	
111 2004 HOA Assessment	23 01	411 2004 HOA Assessment	23 01
112		412	
120 GROSS AMOUNT DUE FROM BORROWER	707 352 22	420 GROSS AMOUNT DUE TO SELLER	700 023 01
200 AMOUNTS PAID BY OR IN BEHALF OF BORROWER		500 REDUCTIONS IN AMOUNT DUE TO SELLER	
201 Deposit or earnest money	5 000 00	501 Excess Deposit (See Instructions)	
202 Principal Amount of New Loan(s)	525 000 00	502 Settlement Charges to Seller (Line 1400)	41 661 89
203 Existing loan(s) taken subject to		503 Existing loan(s) taken subject to	
204		504 Payoff of first Mortgage to Carolina First	261 269 52
205		505 Payoff of second Mortgage to Aurora Loan Services	389 685 48
206		506 Deposit retained by broker	5 000 00
207		507	
208		508	
209		509	
Adjustments For Items Unpaid By Seller		Adjustments For Items Unpaid By Seller	
210 City/Town Taxes to		510 City/Town Taxes to	
211 County Taxes to		511 County Taxes to	
212 Assessments to		512 Assessments to	
213		513	
214		514	
215		515	
216		516	
217		517	
218		518	
219		519	
220 TOTAL PAID BY/FOR BORROWER	530 000 00	520 TOTAL REDUCTION AMOUNT DUE SELLER	697 616 89
300 CASH AT SETTLEMENT FROM/TO BORROWER		600 CASH AT SETTLEMENT TO/FROM SELLER	
301 Gross Amount Due From Borrower (Line 120)	707 352 22	601 Gross Amount Due To Seller (Line 420)	700 023 01
302 Less Amount Paid By/For Borrower (Line 220)	(530 000 00)	602 Less Reductions Due Seller (Line 520)	(697 616 89)
303 CASH (X FROM) (TO) BORROWER	177 352 22	603 CASH (X TO) (FROM) SELLER	2 406 12

The undersigned hereby acknowledge receipt of a completed copy of pages 1&2 of this statement & any attachments referred to herein

Borrower

Frederick

0974

John

Pg 2

L SETTLEMENT CHARGES						PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
700 TOTAL COMMISSION Based on Price \$ @ % 28 324 00							
Division of Commission (line 700) as Follows							
701	\$ 28 324 00	to	Russell & Jeffcoat	Less Deposit Retained	5 000 00		
702	\$	to					
703	Commission Paid at Settlement						
704		to					23 324 00
800 ITEMS PAYABLE IN CONNECTION WITH LOAN							
801	Loan Origination Fee	0 8750 /	to	Branch Banking and Trust Company	POC \$4 593 75 Lender		
802	Loan Discount	/	to				
803	Appraisal Fee		to	Jon D. Andrews		325 00	
804	Credit Report		to	Credit Financial Services		17 00	
805	Underwriting Fee		to	Branch Banking and Trust Company		325 00	
806	Flood Certification		to	Branch Banking and Trust Company		8 00	
807	Tax Service Fee		to	BB&T Collateral Service Corporation		80 00	
808	Courier/Email/Wire Fee		to	Branch Banking and Trust Company		12 50	
809							
810							
811							
900 ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE							
901	Interest From	11/18/04	to	12/01/04	@ \$ 73 514344/day (13 days 5 1250 /)	955 69	
902	Mortgage Insurance Premium for		months to				
903	Hazard Insurance Premium for	10	years to	Travelers		2 056 00	
904							
905							
1000 RESERVES DEPOSITED WITH LENDER							
1001	Hazard Insurance	months @ \$		per month			
1002	Mortgage Insurance	months @ \$		per month			
1003	City/Town Taxes	months @ \$		per month			
1004	County Taxes	months @ \$		per month			
1005	Assessments	months @ \$		per month			
1006		months @ \$		per month			
1007		months @ \$		per month			
1008		months @ \$		per month			
1100 TITLE CHARGES							
1101	Settlement or Closing Fee		to				
1102	Abstract or Title Search		to	Rogers Townsend & Thomas PC		150 00	
1103	Title Examination		to				
1104	Title Insurance Binder		to	Rogers Townsend & Thomas PC		100 00	
1105	Document Preparation		to	Rogers Townsend & Thomas PC			150 00
1106	Overnight/Copies/Fax/Telephone		to	Rogers Townsend & Thomas PC		30 00	
1107	Attorney's Fees		to	Rogers Townsend & Thomas PC		500 00	
(includes above item numbers)							
1108	Title Insurance		to	First American Title Insurance Company		1 350 00	
\$540 00 to First American Title Insurance Company, \$810 00 to Rogers Townsend &							
(includes above item numbers)							
1109	Lender's Coverage	\$	525 000 00		1 012 50		
1110	Owner's Coverage	\$	700 000 00		337 50		
1111							
1112							
1113							
1200 GOVERNMENT RECORDING AND TRANSFER CHARGES							
1201	Recording Fees Deed \$	10 10	Mortgage \$	25 10	Releases \$	10 20	40 30 5 10
1202	City/County Tax/Stamp	Deed		Mortgage			
1203	State Tax/Stamp	Transfer fees	2,590 00	Mortgage			2 590 00
1204							
1205							
1300 ADDITIONAL SETTLEMENT CHARGES							
1301	Survey		to				
1302	Pest Inspection		to	Terminix		50 00	
1303	HVAC Inspection		to	Drawdy's Heating & A/C	POC \$85 00b		
1304	2004 Taxes		to	Richland County Treasurer		1 064 72	7 997 79
1305	See add'l disb exhibit		to			265 00	7 595 00
1400 TOTAL SETTLEMENT CHARGES (Enter on Lines 103 Section J and 502 Section K)						7 329 21	41 661 89

By signing page 1 of this settlement, the signatories acknowledge receipt of a complete copy of page 2 of this two-page settlement.


Rogers Townsend & Thomas PC
Settlement Agent

Certified to be a true copy

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APP_0987

ADDITIONAL DISBURSEMENTS EXHIBIT

Borrower Farborz Z Babae and Malihe Babae
Seller Giuseppe Maoli and Vittoria Maoli
Lender Branch Banking and Trust Compa
Settlement Agent Rogers Townsend & Thomas PC
 (803)771 7900
Place of Settlement P O Box 100200
 Columbia SC 29202
Settlement Date November 18 2004
Property Location 133 Beaver Dam Road
 Columbia SC 29223
 Richland County South Carolina
 Silver Lake at Wildewood

PAYEE/DESCRIPTION	NOTE/REF NO	BORROWER	SELLER
Moisture Warranty Corporation Moisture Warranty Bond			4 095 00
Clark s Pest & Weed Control Termite Bond			3 500 00
WildeWood I IV HOA 2004 Working Capital Fee		200 00	
Southern Community Services Estoppel Fee		65 00	
Total Additional Disbursements shown on Line 1305		\$ 265 00	\$ 7 595 00

(11884 1 PFD/11884 1/14)

0976

APP_0988

ACKNOWLEDGMENT OF RECEIPT OF SETTLEMENT STATEMENT

Borrower Fariborz Z. Babaee and Malihe Babaee
Seller Giuseppe Maoli and Vittoria Maoli
Lender Branch Banking and Trust Company
Settlement Agent Rogers Townsend & Thomas PC
(803)771 7900
Place of Settlement P O Box 100200
Columbia SC 29202
Settlement Date November 18 2004
Property Location 133 Beaver Dam Road
Columbia SC 29223
Richland County South Carolina
Silver Lake at Wildewood

I have carefully reviewed the HUD 1 Settlement Statement and to the best of my knowledge and belief it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD 1 Settlement Statement.

Fariborz Z. Babaee
Fariborz Z. Babaee

M. P. Babaee
Malihe Babaee

Giuseppe Maoli
Giuseppe Maoli
Vittoria Maoli
Vittoria Maoli

Fred Z Babae
133 Beaver Dam Rd
Columbia S C 29223
Ph 803-786-8646x1011
Cell 803-608-2743

Tuesday January 03, 2006

Re certification number 411014

Dear Moisture Warranty Corporation

Please note that we have performed a moisture mapping survey from Clark's home inspection corporation and discovered the following problems in the stucco that needs to be addressed, please review the enclosed documentation

Our account certification number is 411014

Sincerely

Fred Z Babae

0978

APP_0990