193.3

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss SUPERIOR COURT CIV. 2182CV01044

MARINA BAY RESIDENCES, LLC, Plaintiff
v.
CUBE 3 STUDIO, LLC and CALLAHAN, INC., Defendants

CALLAHAN, INC., Third-Party Plaintiff
v.
EDI HOLDINGS, LLC f/k/a EXTERIOR DESIGNS, INC.; SHAWNLEE CONSTRUCTION, LLC; WELLESLEY ROOFING, INC. d/b/a BOSTON ROOFING; OPTILINE ENTERPRISES, LLC; and BASF CORPORATION, Third-Party Defendants

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EXTERIOR DESIGNS, INC., Third-Party Plaintiff-in-Counterclaim
v.
CALLAHAN, INC., Third-Party Defendant-in-Counterclaim

EDI HOLDINGS, LLC f/k/a EXTERIOR DESIGNS, INC., Third Plaintiff-in-Crossclaim
v.
SHAWNLEE CONSTRUCTION, LLC; OPTILINE ENTERPRISES, LLC; WELLESLEY ROOFING, INC. d/b/a BOSTON ROOFING And BASF CORPORATION, Third-PartyDefendants-in-Crossclaim

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EXTERIOR DESIGNS, INC., Fourth-Party Plaintiff
v.
COPPOLA CONSTRUCTION & REMODELING CORP., FASADEX DESIGNS, LLC; IMPERIAL HAMMER CONTRACTING, LLC, PROFESSIONAL WATERPROOFING & CAULKING, LLC, TIM CAREY, HARVEY INDUSTRIES, INC., PLYCEM USA LLC, RIVERSIDE CONSTRUCTION, INC.; EMPIRE REMODELING, INC.; WHITE CAP SUPPLY HOLDINGS, LLC, successor-in-interest to and/or formerly known as KENSEAL CONSTRUCTION PRODUCTS CORPORATION; and FRY REGLET CORPORATION, Fourth-Party Defendants

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HARVEY INDUSTRIES, INC., Fifth-Party Plaintiff,
v.
ELEMENTIA USA, INC. AND ALLURA USA, Fifth-Party Defendants

WELLESLEY ROOFING, INC., Fourth-Party Plaintiff
v.
C&K ROOFING, INC., Fourth-Party Defendant

EDI HOLDINGS, LLC's MEMORANDUM OF LAW IN SUPPORT OF ITS OPPOSITION TO HARVEY'S MOTION FOR SUMMARY JUDGMENT

Owner, Marina Bay Residences, LLC (Marina Bay), brought this action against its architect, Cube3 Studio, LLC (Cube3), and construction manager, Callahan, Inc. (Callahan), alleging that their faulty design and construction, respectively, of two oceanside apartment buildings located at Marina Bay in Quincy (Project) caused systemic water infiltration and damage. (JSOMF ¶62) The 352-unit oceanfront Project experiences extreme weather conditions, including high winds, heavy precipitation, and saltwater exposure. (JSOMF ¶63)

Marina Bay seeks over $40,000,000 in damages. Callahan, maintains third-party claims against four subcontractors, including exterior siding subcontractor EDI Holdings, LLC f/k/a Exterior Designs, Inc. (EDI), multiple sub-subcontractors, and manufacturers of components of the exterior assembly, including Plycem USA, LLC (Plycem) the manufacturer of the fiber cement exterior siding (Allura) that moving party, Harvey Industries, Inc. (Harvey), sold to EDI. (JSOMF ¶64) Callahan alleges that the Allura siding sold by Harvey was defective, unfit for its intended purpose, and not of merchantable quality. (JSOMF ¶65,66) In turn, EDI asserts various fourth-party claims, including counts against Harvey[1] as seller and distributor of the Allura siding. (JSOMF ¶67)

Exterior Wall Design. Figures 1 and 2 depict Cube3's design of the exterior wall assemblies. (JSOMF ¶68-70) Figure 1 shows the wall assembly with Allura clapboard fiber siding (Clapboard) while Figure 2 shows the same assembly, but with much larger Allura panels (Panels) (collectively, Siding)[2]. (JSOMF ¶68-73) Depending on location, either Clapboard or Panels were fastened to the Sheathing, by screws or nails which penetrated the Siding, AWB and Sheathing and which were embedded in the Framing. (JSOMF ¶74,78) Plycem offered no recommendation for, or restrictions on how, its Siding should be affixed to the buildings and Cube3's design required the Siding be direct

[1] Indemnification (Count 30); Contribution (Count 31); Breach of Contract (Count 32); Breach of Express and Implied Warranties (Count 33); Negligence (Count 34); and Misrepresentation (Count 35).

[2] Cube3 specified and later approved EDI's submittal of the Allura Siding. (JSOMF ¶74-76) Cube3's design required the 4" Clapboard to be "blind" nailed to the Sheathing, meaning all nails were covered by the next Clapboard row and not exposed to view. In contrast, the 8" Clapboard and the Panels were to be "face" fastened, so that all fasteners (in these applications – screws) were screwed through the face of the Siding and exposed to view. (JSOMF ¶74-76,78)

fastened to the Sheathing (Direct Apply) with no drainage or drying cavity between the Siding and the Sheathing. (JSOMF ¶77,78)

EDI's Contract with Harvey. From August 2015 through the end of June 2016, EDI received numerous quotes for the Allura Siding and related accessories for the Project. (JSOMF ¶79) By a purchase order sent by EDI to Harvey on June 28, 2016, EDI accepted a final quote of $486,016.32, which established quantities and unit prices for all Siding and accessories to be furnished by Harvey. (JSOMF ¶82) Over the course of 33 months of construction, EDI sent Harvey periodic "Material Lists" to obtain delivery of Siding and related accessories, as it was needed. (JSOMF ¶83) Upon receipt of EDI's Material Lists, Harvey invoiced EDI which EDI promptly paid. (JSOMF ¶84) EDI received Allura Siding and related accessories from Harvey beginning in June 2016 and ending in 2019. (JSOMF ¶85)

Plycem's Assurances that the Siding Was Appropriate for the Project's Design and Oceanside Location. Plycem and Harvey were intimately aware of the Project's oceanside location, climate conditions, and the Direct Apply requirements of the design long before it ever made a delivery of Siding. (JSOMF ¶88) Cube3 worked with Plycem to establish certain design and engineering elements necessary before the Siding could be used. (JSOMF ¶89-93) In support of these efforts, Cube 3 sent Plycem and/or its engineers Project data, including exterior wall assembly drawings, a project site map, aerial site photos, and other Project documents, and weather data so Plycem could determine if the Siding was appropriate for the Project. (JSOMF ¶90)

As recounted by Cube3's representative, Plycem assured Cube3:

> about the appropriateness of this product [Allura siding] … they [Plycem] made assurances that it could be used; that they could come up with the fastener pattern…[and] [t]hat it was appropriate for this location, appropriate for this building type, that we could use it. (JSOMF ¶91)

When asked if Plycem's assurances to Cube3 extended to Allura's capability to avoid water penetration, Cube3's Bancroft responded, "Yeah.", and later added that Plycem assured Cube3 that its product would also work with the fluid-applied air/water barrier. (JSOMF ¶92) There is no doubt that, Plycem was fully informed of the unique demands of, and, in their own words "extreme conditions" at, the Project. Mr. Bancroft testified:

> Yes, I believe they [Plycem] were provided the drawings, which would have included that information. I believe we were all on the same page during this time." When asked "when you said 'we were all on the same page', you mean they assured you it would work and be suitable for the project; is that right?", to which Mr. Bancroft responded, "Yes". (JSOMF ¶93)

On top of this, Plycem provided a fifty-year warranty that the Siding will be free from manufacturing defects and will not crack, rot or delaminate. (JSOMF ¶94) Plycem and Harvey were NOT delivering Siding to an unknown Project. (JSOMF ¶95) Rather, the evidence is quite clear that both were (or should have been) familiar with the location (Harvey is based in Waltham) and design requirements of the Project. (JSOMF ¶88-95) EDI relied on the manufacturer's installation instructions, which did not mention any Rainscreen requirement. (JSOMF ¶96)

WJE's Report. WJE's report, provided to EDI in July 2020 and updated since then, identifies Plycem's Siding as the first and most important line of defense of the exterior wall system to water infiltration, writing: "Fiber cement panel cladding, such as that installed on the Meriel Marina Bay project, functions as a drainage assembly with respect to water management within the cladding system. As with most cladding types, the exterior face of the fiber cement panels, including joints and adjacent construction, provide the primary barrier to rainwater." (JSOMF ¶100) Marina Bay alleges in its Complaint that it discovered water intrusion in various areas of the Project including at or near wall cladding. (JSOMF ¶101) As to this issue, WJE writes: "As a result of water intrusion into the building shortly after construction, the general contractor completed <u>repairs to fiber cement wall panels</u> at isolated locations o[f] [sic] the building." (JSOMF ¶102) Most importantly, finding water stains surrounding fasteners in multiple locations, WJE writes: "In addition, <u>water bypassed the AWB through panel siding and reglet fasteners</u>." [emphasis added] (JSOMF ¶103) As to its observations of these fastener conditions WJE writes:

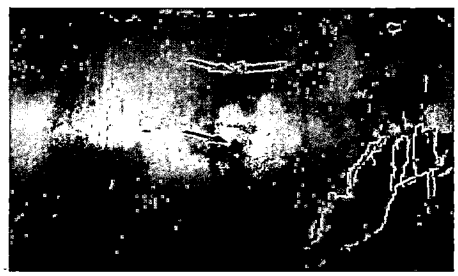
- the fastener ends "protruding through the sheathing were wet to the touch and water was dripping from one fastener. The leak revealed that water continued to bypass the sheathing through panel fastener penetrations."; (JSOMF ¶104)

- "the fiber cement panel fastener screws were wet to the touch and water was observed dripping form one screw"; (JSOMF ¶104)

- "the as-built construction demonstrated that water bypasses the sheathing through AWB deficiencies and fastener penetrations." (JSOMF ¶104)

- "water can bypass the new AWB and plywood sheathing through panel fastener penetrations." (JSOMF ¶104)

WJE includes examples of water stains at panel fastener penetrations:



(JSOMF ¶105) WJE concludes that:

> The pattern of deterioration of the AWB encountered was widespread predominantly at fiber cement cladding panels that were secured using face-fasteners with heads that were exposed to the weather and trimmed out with aluminum reveal trim components, particularly at Cladding Types 1 and 2.
>
> The pattern of the OSB deterioration correlated with that of the AWB. Water was absorbed into OSB at areas of defective AWB and flashings, at fastener penetrations, and at gaps in sheathing panel edges. Once absorbed, the OSB fibers swell and splinter, causing the areas that are coated with AWB to crack, dislodge, delaminate, and debond, exacerbating the failure of the AWB and OSB, and subjecting the stud framing to water. [emphasis added] (JSOMF ¶107)

WJE writes:

> Weather exposed facades oriented toward wind-driven rain exhibited damage from water, particularly at areas clad with fiber cement panel siding. The water protection provided by the fiber cement panel cladding system performed poorly relative to locations with plank siding. (JSOMF ¶124)

As discussed by WJE in its report, during storms, wind-driven rain, snow, precipitation and moisture accumulated behind the directly applied Siding which then degraded the air water barrier and other assemblies and permitted water to migrate on Siding fasteners to the interior of the building. (JSOMF ¶124)

Plycem's and Harvey's Competitive Advantage – No Rainscreen Required. During design, Marina Bay and Cube3 narrowed their choice of fiber cement siding manufacturer to Plycem or James Hardie Industries (Hardie). (JSOMF ¶108) Plycem, however, had an ace up its sleeve – it permitted the Direct Apply of its Siding to the Sheathing without incorporation of an air cavity to create a drainage plane (Rainscreen), whereas Hardie did not. (JSOMF ¶109) Plycem describes a "rainscreen" in its product bulletin as consisting of: "an exterior cladding, a cavity that is typically created through the use of furring strips behind the cladding, and an inner wall that incorporates a weather-resistant barrier." (JSOMF ¶110) A Rainscreen's purpose is threefold – (1) it establishes a drainage plane for water and water vapor management and drainage; (2) it allows air circulation to promptly and fully dry wetted Siding, fasteners, AWB, and sheathing behind the Siding; and (3) it slows deterioration and degradation of the exterior assemblies behind the cladding and assists in prevent organic growth. (JSOMF ¶111)

In high-exposure climates like coastal New England, Rainscreens are a well-known design to prevent moisture buildup and subsequent leaks. (JSOMF ¶112) Without a rainscreen, water, in liquid and vapor form, became trapped between the siding and the exterior sheathing, eventually degrading the wall assemblies, like the air/water barrier and causing water infiltration into the interior wall assembly via the siding fasteners. (JSOMF ¶113) The Allura Siding technical bulletin provides: a rainscreen promotes "airflow and moisture management behind the exterior cladding products", and "Allura Fiber Cement Siding…must be allowed to breathe", yet nowhere these 57 pages does Plycem require, warn, or even suggest, that its Siding be only with a Rainscreen. (JSOMF ¶114) This is especially troubling since Plycem and Harvey, knew of the specific Project design and details, including the Direct Apply design of the Siding and the Project's oceanside location. (JSOMF ¶88-

95) There is not a shred of evidence to even suggest that at any point Plycem or Harvey told EDI, Callahan, Cube3, or Marina Bay that a Rainscreen was required or even recommended. Why did Plycem remain silent? Simple, not requiring a rainscreen allowed Plycem and Harvey to offer lower upfront costs, making its product more attractive to an Owner looking for value, especially in light of Plycem's assurances that the product would be appropriate for the design and location of the Project. (JSOMF ¶115) Moreover, Marina Bay has testified that the backside of the Panels had small striations creating a *de minimis* and inadequate drainage plane. (JSOMF ¶116)

The Siding's Fastening Pattern Designed and Engineered by Plycem. To ensure sale of the Siding to EDI through Harvey, Plycem took it upon itself to design and engineer a custom fastening pattern for the Panels and Clapboard since it admits that it did not have a "prescriptive" fastening pattern that would work in the extreme conditions at the Project. (JSOMF ¶117) To this end, Plycem hired Trinity Engineering to design and engineer a solution. (JSOMF ¶118) After almost three months of testing from May 2016 to August 2016, Plycem finally produced a report detailing the necessary pattern and number of fasteners necessary for the Panels and Clapboard to ensure that the Siding would be appropriate for the Project. (JSOMF ¶119) Plycem's design <u>doubled</u> the number of face-screwed fasteners required to hold the Siding in place. (JSOMF ¶120) These fasteners, which were exposed to the weather, and penetrated the Siding, AWB, and Sheathing, became conduits for water infiltration into the interior wall assemblies at the Project. (JSOMF ¶121) And yet, Plycem's design doubled these conduits, again despite Plycem knowing of the Project's oceanside location and extreme weather conditions.[3] (JSOMF ¶88-95,117-121)

The Crux Supporting EDI's Claims Against Harvey. EDI expects that the factual and expert evidence will demonstrate, <u>at a minimum</u>, that there are disputed issues of fact as to whether

[3] Plycem's fastener design was late causing the unclad AWB to be exposed to the elements for longer than it should. (JSOMF ¶119)

Harvey sold a product that caused or contributed to cause the damages which Marina Bay now complains. As observed by several fact witnesses, WJE, and EDI's experts it is evident that at least some of the water infiltration into the buildings' interior happened via the exposed fasteners on the Panels and Clapboard. (JSOMF ¶98-107,121,124) While there may be other contributing causes, it is clear that the Siding sold by Harvey to EDI, is not without blame. EDI expects its various claims against Harvey to be supported by factual testimony, documentary evidence, and expert testimony, that it expects will demonstrate that Harvey Supplied a Product to EDI that: (1) was manufactured without an adequate drainage space for Direct Applications to sheathing; (2) should have carried a requirement that it be installed with a drainage space, or at a minimum, a warning to purchasers, designers and end users of the deficiencies and problems associated with an inadequate drainage space in connection with direct applications, especially given the location of the Marina Bay Project; (3) allowed water to pass through the fastener locations and access the air water barrier behind Panels and larger Clapboard Siding; (4) were sold with an excessively dense face fastening pattern designed by Plycem which significantly increased the number of pathways for water infiltration, especially though the exposed fasteners given the location of the Marina Bay Project – all of which contributed to cause water infiltration at the Project. (JSOMF ¶123)

Plycem and Harvey were or at least should have been aware that installation of the Siding without a proper rainscreen and with an extensive and dense exposed fastening pattern through critical water barriers, was entirely inappropriate given the location and design of the Project. (JSOMF ¶88-95,98-107,117-121,124) As discussed herein, EDI presents viable claims against Harvey, which, at a minimum, construing the evidence in a light most favorable to EDI, raise triable disputed issues of fact precluding summary judgment.

I. LAW AND ARGUMENT

Summary judgment is appropriate only if there are no genuine issues of material fact, and the record entitles the moving party to judgment as a matter of law. See Mass. R. Civ. P. 56(c); Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983). The opposing party may establish that a genuine issue for trial exists by setting forth specific facts with affidavits, deposition testimony, answers to interrogatories, or admissions. See Mass. R. Civ. P. 56(c). "All reasonable inferences drawn from the material accompanying a motion for summary judgment 'must be viewed in the light most favorable to the party opposing the motion.'" Bailey v. Seacoast Financial Services Corp., 2005 WL 1009637, *3 (Mass. Super.), quoting Curly Customs, Inc. v. Bank of Boston, N.A., 49 Mass. App. Ct. 197, 198 (2000). If the evidence is such that a jury may draw either of two opposing inferences, it is not appropriate for the Court to allow a motion for summary judgment. Flesner v. Technical Communications Corp., 410 Mass. 805, 812 (1991), quoting Anderson v. Lobby, Inc., 477 Mass. 242, 252 (1986). All doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment. Attorney General v. Bailey, 285 Mass. 367, 371 (1982). The Court does not pass upon the weight of the evidence.

A. Summary Judgment Should Be Denied and EDI's Cross Motion Allowed Because Harvey's Motion is Premature as Expert Reports Have Yet to Be Exchanged.

Simply put Harvey's motion is premature as expert report disclosures are not yet required by the calendar set forth by this court. See EDI's accompanying Rule 56(f) motion.

II. THE EVIDENCE SUPPORTS EDI'S PRIMA FACIE CLAIMS AGAINST HARVEY

Harvey's motion ignores credible factual allegations of Plaintiff, and its expert that the Siding caused water infiltration and damage at the Project. These allegations include that the Siding was Directly Applied to the AWB, allowing water to penetrate through fastener locations, where it remained trapped and caused deterioration. See *supra* (JSOMF ¶62-66, 88-95,98-107,117-121,124).

Harvey sidesteps this evidence while failing to inform the Court of the applicable legal standards. As a seller of goods, Harvey is strictly liable under the U.C.C., M.G.L. c. 106. See Commonwealth v. Johnson Insulation, 425 Mass. 650, 653-654 (1997) *discussing,* Back v. Wickes, 375 Mass. 633, 640 (1978) (incorporating the strict liability theory of the Second Restatement, Section 402A to the MA Uniform Commercial Code).

A central issue is the degradation of the AWB and Sheathing due to water infiltration through the Siding fasteners and the absence of an adequate drainage plane between the Siding and AWB. Harvey fails to alert the Court to WJE's report dated July 12, 2024, which states, "water bypassed the AWB through the panel siding" and "WJE noted that the ends of fasteners protruding through the sheathing were wet to the touch and water was dripping from one fastener. The leak revealed that water continued to bypass the sheathing though the panel fastener penetrations." (JSOMF ¶103,104) The report also stated that "As a result of water intrusion into the building shortly after construction, the general contractor completed repairs to fiber cement wall panels at isolated locations o[f] [sic] the building." (JSOMF ¶102) These are core allegations of product defects for which Harvey is strictly liable.

Moreover, EDI contends that permitting direct application without requiring a rain screen or adequate drainage space, unlike competitor Hardie's installation requirement, and failing to warn as to the probable ramifications of such constitutes a product defect. (JSOMF ¶109,123) The lack of a drainage space, or of an adequate integral drainage space (i.e. the *de minimis* small striations at the back of the products), allowed moisture to accumulate against the AWB and related flashing, accelerating their deterioration. (JSOMF ¶116,123) Harvey, as seller, is strictly liable for selling a product to EDI that lacked essential design safeguards for its intended environment.

Harvey repeatedly alleges that it is nothing more than an innocent bystander caught in the crossfire between a subcontractor and a manufacturer. This isn't the case. Harvey knowingly and voluntarily sold Allura Siding and accessories directly to EDI on this Project for almost three years. (JSOMF ¶82-85) Harvey contracted with EDI, billed EDI, and was paid by EDI. (JSOMF ¶82-85) Harvey's downstream arrangement with other suppliers or manufacturers is entirely irrelevant to the claims asserted by EDI. Harvey's liability is not contingent on the conduct of Plycem, since as a seller of goods under the UCC Harvey is independently responsible for the products it sells. See G.L. c. 106; Mitchell, 41 Mass. App. Ct. at 523. Harvey's liability to EDI stands without regard to Plycem.

Contribution. Harvey argues that EDI cannot maintain a contribution claim since it was not sued by Marina Bay. This argument misunderstands the fundamental principles of contribution under Massachusetts law. Massachusetts permits contribution between parties who share liability for a plaintiff's damages, regardless of whether all such parties were named as defendants in the original action. The purpose of contribution is not to mirror the structure of the plaintiff's complaint, but to equitably allocate responsibility among all tortfeasors who contributed to the injury.

G.L. 231B, Section 1(a) provides a right of contribution among joint tortfeasors even though judgment has not been recovered against all or any of them. As the Supreme Judicial Court explained, the statute is intended to eliminate the unfairness of allowing one tortfeasor to bear a disproportionate share of liability and instead ensures an equitable distribution of damages among all those liable for the same harm. McGrath v. Stanley, 397 Mass. 775, 780–81 (1986); see LeBlanc v. Logan Hilton Joint Venture, 463 Mass. 316 (2012). Consistent with this principle, courts have routinely allowed contribution claims against third parties who were not sued by the original plaintiff. Wolfe v. Ford Motor Company, 386 Mass. 95, 98-102 (1982) (manufacturer of defective product may seek contribution against its assembler even though assembler was not a party to the original action and the contribution claim is based upon different tort theories); Economy Engineering Co. v. Commonwealth, (manufacturer may seek contribution against a third-party not sued by Plaintiff); see Dighton v. Federal Pac. Elec. Co., 399 Mass. 687, 692 (1987); O'Mara v. H.P. Hood & Sons, 359

Mass. 235, 238 (1971). Notably, in McGrath, the SJC allowed a contribution claim even where the plaintiff could not have recovered directly against the third-party defendant due to procedural bars under the Tort Claims Act. This reinforces the principle that a contribution claim focuses on shared responsibility for the underlying harm—not on whether the original plaintiff could or did sue each party. McGrath, at 779-781.

Here, Callahan alleges that defects in and associated with the Allura Siding "caused or contributed to cause the Plaintiff's damages". (JSOMF ¶65-66) Marina Bay's WJE further identifies water infiltration and damages tied to the Siding and Plycem's design of the fastening system. (JSOMF ¶99-107) EDI's claims against Harvey arise from the same operative facts and alleged damages as do Callahan's claims against Plycem and EDI, and Marina Bay's claims against Callahan. To claim otherwise, ignores the undisputed facts. To suggest that Harvey's liability "diverge[s] too greatly from those of the Plaintiff and Callahan" is to willfully ignore the undisputed factual overlap among these claims.[4]

Moreover, Rule 14(a) of the Massachusetts Rules of Civil Procedure permits a party to assert a claim against a third party "who is or may be liable to him for all or part of the plaintiff's claim." Here, EDI asserts that Harvey is responsible for at least a portion of the damages Callahan seeks to pass through. EDI's fourth-party complaint is therefore procedurally and substantively appropriate and EDI is entitled to pursue its contribution claim against Harvey. To find otherwise would frustrate the very purpose of G.L. c. 231B ensuring that damages are fairly apportioned among all parties who contributed to the same injury.

[4] The Panagakos case cited by Harvey is inapposite and inapplicable. Panagakos v. Walsh, 434 Mass. 353, 355 (2001). In Panagakos the SJC held that contribution claim could not be had where the joint tortfeasor, as a matter of law, owed no legal duty to the original injured plaintiff. Id. Although Marina Bay and Callahan chose not to sue Harvey directly, there was certainly no substantive legal prohibition preventing them.

Common Law Indemnity. Contrary to Harvey's characterization, EDI does not assert contractual indemnity. Instead, it asserts common law indemnity for harm arising from defective products sold by Harvey. Tort-based indemnification is available to a party who does not join in the negligent act. Decker v. Black and Decker Mfg. Co., 389 Mass. 35, 40 (1983). See Decker v. Black & Decker Mfg. Co., 389 Mass. 35, 40 (1983). Here, at a minimum, it is a question of fact whether EDI was negligent at all. EDI subcontracted all installation work and did not install the Allura Siding. (JSOMF ¶136) If any installation errors occurred, they were made by EDI's subcontractors, not EDI. Id. Viewing the evidence in a light most favorable to EDI, there is clearly sufficient evidence demonstrating that Harvey sold EDI defective products. See *supra.*

Even if EDI bears minor oversight responsibility with respect to its subcontractors' work, this is analogous to Bos. Woven-Hose & Rubber Co. v. Kendall, 178 Mass. 232 (1901), where the Court allowed indemnity despite minor negligence of the indemnitee. There, the employer-indemnitee failed to inspect defective equipment manufactured by the defendant but was nevertheless granted indemnity since the harm stemmed from the manufacturer's warranty and superior expertise. Id.[5] Here, EDI relied on Harvey to sell non-defective Siding suitable for the Project. Even assuming EDI were minimally negligent, Harvey's greater culpability is at the heart of Marina Bay's alleged damages, entitling EDI to indemnity. Summary judgment on this count is therefore inappropriate.

Breach of Contract. Harvey incorrectly asserts that there is no contract between EDI and Harvey. This is just not true. EDI received numerous quotes for the Siding, EDI sent Harvey its acceptance via purchase order the day after it received the final quote, EDI ordered, and Harvey had delivered, Siding over the course of almost 3 years, Harvey sent over 63 invoices to EDI, and EDI paid Harvey hundreds of thousands of dollars. (JSOMF ¶79-87) In fact, the relationship is governed

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[5] In reaching this decision, the SJC wrote, "Whether the false warranty be called a tort or a breach of contract the consequences which ensued must be taken to have been contemplated and was not too remote." Id.

by the U.C.C. for the sale of goods. G.L. c. 106, § 2-201(3)(c) validates a contract where goods have been "received and accepted" or paid for. EDI ordered the Allura products from Harvey, Harvey invoiced, and EDI paid—thereby forming an enforceable contract.[6] See Brewster Wallcovering Co. v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 600 (2007).[7]

Since there is, in fact, a contract and EDI sufficiently pled a breach of said contract in its complaint, namely, that a contract for the goods exists, the goods provided by Harvey were defective as alleged (lack off a Rain Screen, Direct Application and water intrusion through the faster locations, see *supra*) and EDI was damaged, EDI's breach of contract claim must stand.

Implied Warranty of Merchantability. Harvey's claim that the record is devoid of evidence is incorrect. WJE's July 12, 2024 expert report explicitly states that water bypassed the AWB and leaked through fastener penetrations. (JSOMF ¶99-107) The WJE report states in pertinent parts "water bypassed the AWB through the panel siding" and WJE noted that the ends of fasteners "protruding through the sheathing were wet to the touch and water was dripping from one fastener. The leak revealed that water continued to bypass the sheathing though the panel fastener penetrations." (JSOMF ¶103-104). Plycem, and by extension its local distributor Harvey, were intimately aware of the Project's oceanside location, climate conditions, and the Direct Apply requirements of the design long before it ever made a delivery of Siding. (JSOMF ¶88-95,98-107,117-121,124) Cube3 worked hand-in-hand with Plycem to establish certain design and engineering elements necessary before the Siding could be used. (JSOMF ¶89-93) In support of these efforts, Cube 3 sent Plycem and/or its engineers Project data, including exterior wall assembly drawings, a project site map, aerial site photos, building code data, typical floor plans, exterior elevations,

[6] According to M.G.L. c. 106, Sec. 2-201, a contract for the sale of goods includes, "(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable….(c) with respect to goods for which payment has been made and accepted or which have been received and accepted."

[7] In Brewster, there were numerous purchase orders, correspondence, deliveries and payments much like this case.

cladding profiles, wind pressures, negative pressures, and other weather data so Plycem could determine if the Siding was appropriate for the Project. (JSOMF ¶90)

As recounted by Cube3's representative, Plycem assured Cube3:

> about the appropriateness of this product [Allura siding] ... they [Plycem] made assurances that it could be used; that they could come up with the fastener pattern...[and] [t]hat it was appropriate for this location, appropriate for this building type, that we could use it. (JSOMF ¶91)

When asked if Plycem's assurances to Cube3 extended to Allura's capability to avoid water penetration, Cube3's Bancroft responded, "Yeah.", and later added that Plycem assured Cube3 that its product would also work with the fluid-applied air/water barrier. (JSOMF ¶92) There is no doubt that, Plycem was fully informed of the unique demands of, and, in their own words "extreme conditions" at, the Project. Mr. Bancroft testified:

> Yes, I believe they [Plycem] were provided the drawings, which would have included that information. I believe we were all on the same page during this time." When asked "when you said 'we were all on the same page', you mean they assured you it would work and be suitable for the project; is that right?", to which Mr. Bancroft responded, "Yes". (JSOMF ¶93)

On top of this, Plycem provided a fifty-year warranty that the Siding will be free from manufacturing defects and will not crack, rot or delaminate. (JSOMF ¶94) Plycem also guaranteed that the Siding is resistant to "salt spray" and its "proprietary primer/sealer ensures better weather-resistance by sealing out harmful moisture". (JSOMF ¶94) Plycem and Harvey were NOT delivering Siding to an unknown Project. Rather, the evidence is quite clear that both were (or should have been) familiar with the location (Harvey is based in Waltham) and design requirements of the Project. Cube3 and Marina Bay relied on Plycem's assurances that the Siding would work for its intended use, including preventing water infiltration, and EDI relied on the manufacturer's installation instructions, which did not mention any Rainscreen requirement. (JSOMF ¶96)

"The merchant seller warrants that his goods are, among other things, 'fit for the ordinary purposes for which such goods are used.'" Wickes, 375 Mass. at 640, *citing*, G.L. c. 106, s. 2-314(2)(C); see also Scialdone v. Nat'l Crane Corp., 53 Mass. App. Ct. 1108, *4 (2001). "The 'ordinary purposes' contemplated by this section include both those uses that which the manufacturer intended and those which a reasonably foreseeable." Wickes, 375 Mass. at 640. Further, any question regarding the reasonableness or foreseeability of a use is a question for the jury. Id. at 642. Given this, whether Harvey should have reasonably foreseen the intended use of the Siding as siding, and as WJE puts it "[f]iber cement panel cladding, such as that installed on the Meriel Marina Bay project, functions as a drainage assembly with respect to water management within the cladding system. As with most cladding types, the exterior face of the fiber cement panels, including joints and adjacent construction, provide the primary barrier to rainwater" is, at a minimum, a question for the fact finder. (JSOMF ¶100)

However, Harvey certainly should have foreseen that the Siding it sold to EDI should function as siding is expected - by keeping water out of the interior wall assemblies, rather than allowing water in like it did here. Harvey knew or should have known that its Siding was to be Directly Applied in harsh coastal conditions mere feet from the ocean. In fact, a competitor, Hardie as mentioned above, required furring strips behind the Panels to create an adequate drainage plane. (JSOMF ¶108-109,115) Allura's product information highlights the benefits of a rain screen to allow drainage behind the panels, yet did not recommend its use or warn against likely problems with Direction Application of the Siding. (JSOMF ¶114) Given such, "[a] trial is warranted if [EDI] can show 'an available design modification which would reduce the risk without undue cost or interference with the performance of the [product].'" Scialdone, 53 Mass. App. Ct. at *4, *citing*, Uloth v. City Tank Corp., 376 Mass. 874, 881 (1978). Harvey failed to recommend or require this in similar conditions. This failure constitutes a defect in design and warnings, warranting a trial under Uloth 376 Mass. at 881; Scialdone, 53 Mass. App. at *4.

Harvey's claim that it was a mere distributor ("middleman" as it puts it) is unavailing. Even sellers "merely acting as a conduit" are strictly liable under Massachusetts law. Mitchell v. Stop &

Shop Cos., 41 Mass. App. Ct. 521, 523 (1996). Harvey's remedy lies with Plycem, its manufacturer, not EDI. Id. Similarly, Harvey's unsupported allegation that EDI used the Allura products outside its ordinary purposes is without merit, and, in any event, an issue to be decided by the fact finder. Wickes, 375 Mass. at 640 Given the foregoing, summary judgment is inappropriate on EDI's claim for breach of the implied warranty of merchantability.

Implied Warranty of Merchantability - Duty to Warn. Massachusetts recognizes that sellers must warn of reasonably foreseeable risks. Lewis v. Ariens Co., 434 Mass. 643, 647-648 (2001); Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 20-23 (1998). Harvey knew or should have known of the foreseeable risks of Direct Application without a rain screen or without an adequate drainage plane, particularly for a project in a coastal, high-moisture environment. Yet it issued no warnings. (JSOMF ¶114) As a distributor of Allura products and literature, Harvey, not EDI, is in a better position to warn of the risks of directly applying the Allura products without a rainscreen or without an adequate drainage space, especially, on an oceanside project subject to extreme weather and wind conditions located just miles from Harvey's headquarters.

Harvey also had a duty to warn EDI that water could infiltrate exposed fasteners that penetrated the AVB, especially given the oceanside weather conditions such as wind-driven rain at the Project. Yet, Harvey failed to do so. Harvey distributes the Allura line of products, and therefore, is expected to be the most knowledgeable about the Siding. The evidence demonstrates that Harvey, knew or should have known, the weather conditions at the Project, the Direct Apply design of the Siding, and the probability that the exposed fastener penetrations would allow water infiltration. (JSOMF ¶88-95,98-107,117-121,124) Based on this, Harvey should have warned EDI, yet never did. (JSOMF ¶114,123) Accordingly, Harvey's motion for summary judgment should be denied.

Implied Warranty of Fitness for a Particular Purpose. Harvey was aware the Project was located at Marina Bay—a coastal location exposed to severe weather. EDI relied on Harvey's expertise in supplying suitable products. This supports a claim under G.L. c. 106, § 2-315. See Fernandes v. Union Bookbinding Co., Inc., 400 Mass. 27, 33 (1987). Whether the coastal conditions qualify as a "particular purpose" is a factual question for the jury. "An implied warranty of fitness for a particular purpose arises when, at the time of the contract, the seller 'has reason to know any particular purpose for which the goods are required, and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.'" Fernandes v. Union Bookbinding Co., Inc. 400 Mass. 27, 33 (1987), *citing*, G.L. c. 106 Sec. 2-315. "The determination whether this warranty arises ordinarily is a question of fact." Id., *citing*, G.L. c. 106, Sec. 2–315, comment 1.

Harvey was aware from the purchase orders and invoices that this Project was located at Marina Bay, a site directly on the oceanfront. (JSOMF ¶85) Accordingly, EDI relied on Harvey's expertise regarding the suitability of the Siding products for that specific environment, particularly that the siding could be directly applied to the AWB and fastened in the customary manner, meaning directly into the AWB and Sheathing. At a minimum, whether this oceanfront installation constituted a "particular purpose" under the U.C.C. is a question of fact for the jury. Therefore, Harvey is not entitled to summary judgment on this issue.

Express Warranty. Under the Uniform Commercial Code, "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." G.L. c. 106, § 2–313(1)(*a*). Recently, the U.S. District Court for Massachusetts in Herbert v. Vantage Travel Services, 444 F. Supp. 3d. 233, 245-46 (2020) eloquently stated the Massachusetts law for express warranties:

> "'Under Massachusetts law ... an express warranty in a contract is a promise of a particular standard of performance, and it imposes on the warrantor an obligation to fulfill the promise made.' Sparks v. Fid. Nat'l Title Ins. Co., 294 F.3d 259, 272 (1st Cir. 2002). Advertisements can be express warranties under Massachusetts law. Hannon v. Original Gunite Aquatech Pools, 385 Mass. 813, 822, 434 N.E.2d 611 (1982) (stating "[w]e have no doubt that express warranties can be created by an advertising brochure") (citing Hawkins Constr. Co. v. Matthews Co., 190 Neb.

546, 564-565, 209 N.W.2d 643 (1973)). "To establish a breach of express warranty claim ... the plaintiff must demonstrate that the express warranty constituted a basis of the bargain between the seller and the buyer." Sebago, Inc. v. Beazer East, Inc., 18 F. Supp. 2d 70, 102 (D. Mass. 1998). "To demonstrate that the express warranty constituted a basis of the bargain, the plaintiff must demonstrate that the buyer relied on the warranty." Id. To establish a breach of warranty claim, a plaintiff, therefore, must "prove that statements or representations made by the seller induced him to purchase the good and that he relied on those statements or representations." LePage v. E-One, Inc., 4 F. Supp. 3d 298, 312-313 (D. Mass. 2014)."

Here it is abundantly clear that EDI relied upon the representations of Harvey in selling the Allura products as Direct Apply that they would be satisfactory for this Project at this particular location on the waterfront. See *supra*. EDI also relied upon the representations in the Allura product manuals regarding the lack of a need for a rain screen. As a seller of the products, Harvey adopts what is in the product manuals for the products it sells and must held accountable for such. It cannot bury its head in the sand and just say it is a "paper person" in a defective product case. Harvey must be held accountable for express warranties of its defective products.

Negligent Misrepresentation. Under Massachusetts law, "In order to recover for negligent misrepresentation a plaintiff must prove that the defendant (1) in the course of his business, (2) supplies false information for the guidance of others (3) in their business transactions, (4) causing and resulting in pecuniary loss to those others (5) by their justifiable reliance upon the information, and (6) with failure to exercise reasonable care or competence in obtaining or communicating the information." Nota v Keyes, 45 Mass. App. Ct. 15, 19-20 (1998). Harvey represented to EDI that the Allura Siding could be directly applied, which was central to securing the job. (JSOMF ¶78-85) EDI relied on this representation and suffered damages when the Siding failed. Harvey also failed to disclose known risks of water intrusion through Siding's exposed fasteners.

As the Appeals Court has held, these are classic questions for the jury, writing, "[a] claim for negligent misrepresentation is ordinarily one for a jury, unless the undisputed facts are so clear as to permit only one conclusion." Id. at 20, *citing*, Fox v. F & J Gattozzi Corp., 41 Mass. App. Ct. 581, 588 (1996). Here, whether Directly Apply was reasonable or not and whether Harvey had a duty to disclose the probability that water would penetrate through the exposed fasteners are questions for the jury, which cannot be resolved on summary judgment. See Id. ("we cannot say that a jury could not find sufficient facts in those circumstances creating a duty to disclose this information to prospective bidders such as Nota").

III. EDI's Claims Against Harvey Are Timely.

1. EDI's Claims Relate Back to Marina Bay's Original Filing.

EDI's fourth-party claims against Harvey relate back to November 18, 2021, the date Marina Bay filed the original complaint. (JSOMF ¶126) Mass. R. Civ. P. 15(c). Under Massachusetts law, third (or in this case fourth) party complaints arising out of the facts and circumstances of plaintiff's original complaint are deemed to relate back to the original filing. Medical Personnel Pool v. Small, 1996 Mass. App. Div. 45, 46 (1996) (third-party complaint filed after expiration of the statute of limitations nevertheless relates back to date of Plaintiff's filing); Kilmartin v. Wainwright & Co., 637 F. Supp. 938, 940-942 (D. Mass.1986) (third party complaint relates back to the date of the original and timely complaint and is thus permissible even though the statute of limitations would bar an independent action); see also Xarras v. McLaughlin, 66 Mass.App.Ct. 799, 801-803 (2006). As discussed above, Marina Bay's claims against Callahan, and Callahan's claims against EDI arise out of the same facts and damages as EDI alleges against Harvey. See *infra.* Accordingly, the timing of EDI's fourth-party complaint is immaterial for statute of limitations purposes - Marina Bay's November 18, 2021 filing controls.

2. EDI Timely Filed its UCC Claims Against Harvey.

Accrual on Final Delivery. Harvey argues that the statute of limitations under G.L. c. 106, § 2-725 bars the breach of contract claim brought by EDI, asserting that the four-year limitations period began on October 2, 2017 — the date Harvey arbitrarily assumes all siding "must have" been delivered because installation had begun by that time. Based solely on this unsupported and incorrect assumption, Harvey contends that EDI's fourth-party complaint, filed after October 2, 2021, is time-barred irrespective of whether it related back to Marina Bay's complaint filed on November 18, 2021. Harvey's assertion is demonstrably incorrect and couldn't be further from the truth.

The undisputed evidence proves that Harvey continued to deliver Siding and related accessories beyond October 2017. (JSOMF ¶85) Contrary to Harvey's assertion, the undisputed documentary evidence, including Harvey's own invoices, establishes that Harvey continued delivering EDI Siding and related accessories well into 2018 and the spring of 2019. (JSOMF ¶85) Specifically, between mid-September 2017 and mid-March 2019, EDI requested, and Harvey delivered, multiple shipments of Allura Siding and related accessories pursuant to their contract, as follows:

Material Request Date	1/29/2019	4/30/2018	3/19/2018	3/16/2018	3/16/2018	3/15/2018	2/28/2018	2/20/2018	2/2/2018	1/23/2018	10/2/2017	10/2/2017	9/26/2017	9/20/2017	9/19/2017	9/13/2017	9/3/2017	9/3/2017
Harvey Invoice Date	3/18/2019	5/3/2018	3/20/2018	3/16/2018	3/16/2018	3/15/2018	3/1/2018	2/20/2018	2/2/2018	1/24/2018	10/4/2017	10/4/2017	9/26/2017	9/21/2017	9/21/2017	9/14/2017	9/15/2017	10/6/2017
Allura Siding Products	X	X	X							X	X	X	X	X	X	X		
Related Siding Products				X	X	X	X	X	X								X	X

(JSOMF ¶83-85) These deliveries occurred within four years of both the Owner's initial complaint in November 2021 and EDI's fourth-party complaint in July 2022.[8] (JSOMF ¶83-85,126)

Under G.L. c. 106, § 2-725(2), "a breach of warranty occurs when tender of delivery is made," unless a future performance warranty is involved. Where, as here, a contract contemplates multiple deliveries, the statute of limitations does not accrue until the final delivery is made. Courts across jurisdictions have long held that when goods are delivered in installments, the statute runs from the date of the *last* delivery under the contract, not the first. Niagara Mohawk Power Corp. v. Ferranti-Packard Transformers, Inc., 607 N.Y.S.2d 808, 811 (App. Div. 1994); Mem'l Hosp. v. Carrier Corp.,

[8] Harvey testified that it invoiced EDI for materials when they were shipped. (JSOMF ¶83)

844 F. Supp. 712, 716 (D. Kan. 1994); Farmer's Nat. Bank v. Wickham Pipeline Const., 759 P.2d 71 (1988); Baker v. DEC Intern, 580 NW2d 894 (1998); Broadway Resource Supply, Inc. v. West End Land Development Inc 1998 WL 323574. This approach is especially warranted in cases such as this one, where it is not possible to determine which particular delivery may have contributed to cause the alleged damage. Roundhouse v. Owens-Illinois, Inc., 604 F.2d 990 (6th Cir. 1979).

Massachusetts law also supports this view. In Cambridge Plating Co., Inc. v. Napco, Inc., 991 F.2d 21 (1st Cir. 1993), interpreting Massachusetts's version of UCC § 2-725, the First Circuit held that where performance occurs over time, the limitations period should be applied flexibly and does not accrue until the seller's performance is complete and the buyer knows or should know of the breach.

Of the 18 invoices issued by Harvey between October 2017 and March 2019 more than half of them were for Allura Siding. (JSOMF ¶85) Thus, Harvey delivered numerous shipments of goods to EDI well within four years of the Plaintiff commencing its action[9]. Accordingly, EDI's claims are timely under G.L. c. 106, § 2-725. At a minimum, even if Harvey presents contrary evidence regarding the delivery dates, this Court must still deny Harvey's motion since factual disputes must be construed in EDI's favor. Arsenault v. Bhattacharya, 89 Mass. App. Ct. 804, 809 (2016).

Future Performance Exception. The siding sold by Harvey was subject to several explicit warranties of future performance, thereby tolling the four-year limitations period under G.L. c. 106, § 2-725(2) until the time when EDI knew or should have known that its labor and materials were alleged to have contributed to the damages claimed by Marina Bay. Under § 2-725(2), a cause of action for breach of warranty accrues not at the time of delivery, but rather when the breach is or should have been discovered, if the warranty explicitly guarantees future performance. Courts interpreting this provision have consistently held that a warranty stating a product "will be free from

[9] And within four years of EDI commencing its fourth party action against Harvey.

defects in materials and workmanship for a period of years" constitutes a warranty of future performance. Coady v. Marvin Lumber & Cedar Co., 167 F. Supp. 166 (D. Mass. 2001) (promise that product would be free from defects for ten years constituted an explicit warranty of future performance); Grand Island Exp. v. Timpte Indus., Inc., 28 F.3d 73, 75 (8th Cir.1994); Std. Alliance Indus., Inc. v. Black Clawson Co., 587 F.2d 813, 820–21 (6th Cir.1978). In any event, whether an express warranty constitutes one for future performance is a question of material fact that cannot be determined at the summary judgment stage. See Providence & Worcester R.R. Co. v. Sargent & Greenleaf, Inc., 802 F.Supp. 680, 690 (D. RI 1992).

In this case, Plycem, through its distributor, Harvey, provided a product to EDI with clear and unequivocal warranties extending to future performance of the Siding. (JSOMF ¶94) For example, Plycem's product literature explicitly warrants that its fiber cement panels will be free from manufacturing defects for 50 years and will not crack, rot or delaminate. (JSOMF ¶94) Additional representations emphasize that the Siding is resistant to "salt spray" and that its "proprietary primer/sealer ensures better weather-resistance by sealing out harmful moisture". (JSOMF ¶94) Further, after reviewing the project design documents and the Project's coastal location, Harvey's manufacturer, expressly assured the project team that the Siding "was appropriate for this location, appropriate for this building type" and, most importantly, that it would avoid water penetration, presumably for the duration of the 50-year warranty. (JSOMF ¶90-93)

These explicit representations, assurances, and warranties fall within the scope of §2-725(2)'s future performance exception, and thus the statute of limitations did not begin to run until EDI discovered, or should have discovered the alleged breach. As discussed in more detail *infra*, EDI first learned the its work, and the Siding, were implicated in the damages alleged by Marina Bay, at the earliest, in June 2020 when Callahan sent EDI the WJE report and an indemnity demand. (JSOMF ¶133-135) Accordingly, EDI's claims against Harvey under the UCC are timely filed.

3. <u>EDI's Common Law and UCC Claims Were Timely Filed.</u>

Harvey contends that EDI's claims, whether brought under common law or the UCC, are time barred by the three-year tort statute of limitations of G.L. c. 260, §2B, the three-year statute of limitations for implied warranty claims of G.L. c. 106, §2-318, and the four-year statute of limitations for warranty claims as to future performance of G.L. c. 106, §2-725 [see *supra*]. These arguments are without merit. EDI's fourth party claims against Harvey were timely and filed well within the applicable limitation periods.

Under each of these statutes, the limitations clock does not start until the complainant (here, EDI) learns, or reasonably should have learned, that they have been harmed by the Harvey's conduct. Friedman v. Jablonski, 371 Mass. 482, 487-488 (1976) (applying G.L. c. 260, §2B) ; Hendrickson v. Sears, 365 Mass. 83, 89-90 (1974) (applying G.L. c. 260, §2B); Bowen v. Eli Lilly & Co., Inc., 408 Mass. 204, 205-06 (1990) (applying G.L. c. 260, §2B); G.L. c. 106, §2-725 ("...where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered"); Cameo Curtain, Inc. v. Phillip Carey Corp., 11 Mass. App. Ct. 423 (1981) (limitations period under §2-318 begins when the "damage flowing from the injury can be fairly estimated") (applying G.L. c. 106, §2-318); see also Montaup Elec. Co. v. Ohio Brass Corp., 561 F. Supp. 740, 746 (D. RI 1983) (applying Mass. law G.L. c. 106, §2-318). Circumstances must be sufficient to alert a person of ordinary prudence in the plaintiff's position of the likelihood of the injury by another's conduct. See Bowen, 408 Mass. at 207; Hendrickson, 365 Mass. at 83

The discovery rule requires that the plaintiff have actual or constructive knowledge of both of the harm and of its likely causal link to the defendant's conduct. As then Superior Court Judge Gants explained:

> This Court concludes that regardless of whether the substance of the claim is the alleged negligence of a general contractor, an architect, or a physician, a cause of action does not accrue

> until the plaintiff (1) knows or should know that she was harmed, and (2) possess sufficient information or becomes aware of such suspicious circumstances that she recognizes or should recognize that the defendant's conduct may have caused the harm. Harris v. McIntyre, 2000 WL 942559, *2-7 (Mass. Super. June 27, 2000).

Here, the relevant date occurred when EDI first knew, or reasonably should have known, that Callahan alleged that the labor and materials furnished by EDI, and more specifically the Siding supplied by Harvey, caused or contributed to the water infiltration at issue on the Project. Harvey provides no verified evidence that EDI was aware, or reasonably should have been aware, of any such allegations either three or four years prior to November 21, 2021 (the date Marina Bay filed the lawsuit). Harvey's argument instead hinges on the speculative assertion that EDI should have conducted unspecified "testing" on the mock-up wall assembly prior to October 2, 2017, and should have discovered defects in the Siding at that time.

This assertion is flawed. Mock-ups are not intended to replicate real-world environmental conditions. (JSOMF ¶128) Rather, they are typically used to demonstrate aesthetic appearance, installation techniques, and coordination among trades. (JSOMF ¶129) They are installed in atypical, controlled conditions and do not include all critical components (such as roofing or parapets). (JSOMF ¶130) Mock-ups are conducted at the direction of the architect and construction manager, and subcontractors are not permitted to undertake forensic testing on them. (JSOMF ¶131) Moreover, even if water testing had been conducted, it would not have reflected the actual conditions experienced in the completed structure—conditions that include wind pressures, driving rain, and integration with adjacent materials on upper stories. (JSOMF ¶132) Harvey's argument that EDI should have discovered the alleged defect through mock-up testing is not only unsupported but contrary to industry practice and reality.

EDI did not receive any notice that its work might be implicated in causing water infiltration until mid-July 2020, when it received a written notification from Callahan along with the WJE report. (JSOMF ¶133) Prior to that time, while some leaks had been identified and remediated during construction, it was EDI's understanding that these issues were caused by other trades—namely, the roofers, framers, and balcony installers. (JSOMF ¶134) In fact, EDI was paid to assist in repairing those unrelated deficiencies. (JSOMF ¶135) Critically, as Massachusetts courts have recognized, "[n]otice of one type of design or construction defect does not necessarily constitute notice of all design or construction defects." Berish v. Borstein, 2006 WL 2221924, at *10–14 (Mass. Super. May 22, 2006) (citing Campanile v. Suffolk Constr. Co., Inc., 1994 WL 879741, at *3-4 (Mass. Super. Feb. 4, 1994)).

Harvey bears the burden of proving when EDI knew or should have known that its siding caused the damage at issue. Harvey has not met that burden. At a minimum, the accrual of the statute of limitations is a disputed factual issue that precludes summary judgment. [10] Courts consistently hold that whether a plaintiff had sufficient notice to trigger the statute is a question of fact for the jury. See Bowen, 408 Mass. at 208; Fabiano v. Boston Redevelopment Auth., 49 Mass. App. Ct. 66, 72 (2000). This is especially true in construction and design-related disputes. See Black Bear Lodge v. Trillium Corp., 136 N.H. 635, 637-38 (1993) (reasonable diligence in discovering causal connection is a question of fact); 200 Levee Dr. Ass'n Ltd. v. Bor-Son Bldg. Corp., 441 N.W.2d 560, 564-65 (Minn. Ct. App. 1989); Board of Trustees v. Caudill Rowlett Scott, Inc., 461 So. 2d 239, 242-44 (Fla. App. 1984). Accordingly, EDI's fourth-party claims for negligence, misrepresentation, breach of contract and warranties were timely filed. At a minimum, Harvey's limitations defense raises disputed facts that cannot be resolved on summary judgment.

IV. CONCLUSION.

For the reasons discussed herein, Harvey's Motion must be denied.

[10] See e.g. Genereux v. American Beryllia Corp., 577 F.3d 350, 363 (1st Cir. 2009) (applying Massachusetts law); Stark v. Advanced Manetics, Inc., 50 Mass. App. Ct. 226, 234-35 (2000).

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the above Memorandum of Law was served by email to:

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