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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT DEPT.
CIVIL ACTION NO. 2182CV01044

MARINA BAY RESIDENCES, LLC,
Plaintiff,

v.

CUBE 3 STUDIO, LLC and CALLAHAN,
INC.,
Defendants.

CALLAHAN, INC.
Third-Party Plaintiff,

v.

EXTERIOR DESIGNS, INC.; SHAWLEE
CORPORATION, LLC; WELLESLEY
ROOFING, INC; d/b/a/ BOSTON ROOFING;
OPTILINE ENTERPRISES, LLC; AND BASF
CORPORATION,
Third-Party Defendants

EXTERIOR DESIGNS, INC.
Fourth-Party Plaintiff

v.

COPPOLA CONSTRUCTION &
REMODELING CORP.; FASADEx
DESIGNS, LLC; IMPERIOR HAMMER
CONTRACTING, LLC; PROFESSIONAL
WATERPROOFING & CAULKING, LLC;
TIM CAREY; HARVEY INDUSTRIES, INC.;
PLYCEM USA LLC; RIVERSIDE
CONSTRUCTION, INC.; EMPRIE
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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CLERK OF THE COURT
NORFOLK COUNTY
6/23/25

HARVEY INDUSTRIES, INC.'S
OPPOSITION TO EDI HOLDINGS LLC'S
RULE 56(f) MOTION

Now comes Harvey Industries, Inc. ("Harvey"), to respectfully submit its Opposition to the Motion to Deny Harvey's Motion for Summary Judgment Without Prejudice as Premature filed by EDI Holdings, LLC, f/k/a Exterior Designs, Inc. ("EDI"), and request this Honorable Court deny EDI's Rule 56(f) Motion because EDI has waived its right to seek such relief. In the alternative, EDI's Rule 56(f) is without merit.

In summary, EDI has dragged its feet on discovery and despite nearly four (4) years of litigation, twenty-four (24) days of deposition testimony, and nearly a hundred different sets of interrogatories, Rule 34 requests, and Rule 36 requests exchanged by the parties, EDI claims it needs *more* discovery without articulate what "more" discovery would entail. Following the service of the motion for summary judgment, EDI asked for multiple extensions and Harvey was glad to extend the courtesies. The extensions, however, have forced Harvey to file the motion with the court and the two (2) cross motions literally in the middle of a mediation. These delaying tactics must stop and a hearing on the merit should be scheduled expeditiously to allow Harvey the opportunity to extract itself from this twenty (20) plus party litigation as it was neither an installer, a design professional, or a bona fide distributor to the Marina Bay Project.

I. EDI WAIVED ITS RIGHT TO SEEK DELAY UNDER RULE 56(f)

As a preliminary matter, EDI waived its right to seek a delay on adjudication of Harvey's Motion for Summary Judgment by agreement of counsel. In December 2024, Harvey sent correspondence to EDI and Callahan requesting availability for conference pursuant to Sup.Ct.R. 9C. Callahan declined to respond, presumably on the basis that they have no claims pending against Harvey. Counsel for EDI and Harvey thereafter met and conferred on or about

The substance of the conference was simple: Harvey intended to proceed upon its Motion for Summary Judgment and requested that EDI identify all outstanding discovery issues to be

resolved to avoid a dispute under Rule 56(f). *The sole objection EDI had to the timing of Harvey's Motion for Summary Judgment was that it had not yet taken the deposition of its corporate designee.* Harvey agreed to submit for deposition notwithstanding its position that EDI's claims were wholly without merit. Harvey and EDI further agreed that, due to the nature of EDI's claims, the deposition should be set expeditiously and solely based on their respective calendars. EDI provided a schedule of seventeen (17) topics areas on January 8, 2025, and a formal notice for the taking of Harvey's deposition was issued on January 16, 2025.

As the date of Harvey's deposition approached, counsel for various parties began to propose the delay and/or rescheduling of Harvey's deposition to resolve various scheduling conflicts. In response, Harvey sent correspondence to EDI on re-affirming the terms of their agreement under Sup.Ct.R. 9C and stating that if EDI declined to take Harvey's deposition as previously scheduled, it would be considered a waiver of their right to due so prior to service of Harvey's Motion for Summary Judgment.

In th time since Harvey disclosed its intent to seek summary judgment in this matter, EDI did not once object to the timeliness of such a motion on grounds other than taking Harvey's deposition. The discovery schedule for this Court does not control the representations and agreements made by the parties in this matter. EDI was aware of the expert disclosure deadline when the parties met and conferred regarding Harvey's intention to seek summary judgment. Accordingly, this Court should deny EDI's Rule 56(f) Motion as EDI waived its right to seek any delay in the adjudication of Harvey's Motion for Summary Judgment.

In the alternative, should this Court decline to summarily deny EDI's Rule 56(f) Motion on the grounds that it has waived its right to seek such relief, it should deny said motion on the merits for the following reasons:

II. EDI FAILED TO DEMONSTRATE IT IS ENTITLED TO A DELAY UNDER MASS. R. CIV. P. 56(f)

A. Legal Standard

Massachusetts Rule of Civil Procedure 56(f) permits a party to delay adjudication of a motion for summary judgment only when “affidavits are unavailable”:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A continuance under Rule 56(f) is appropriate if the party opposing the motion for summary judgment cannot fully present its summary judgment defense without further discovery. Com. v. Fall River Motor Sales, Inc., 409 Mass. 302, 307, 565 N.E.2d 1205, 1209–10 (1991). The standard for such a continuance in Commonwealth of Massachusetts mirrors that of a motion for a denial or stay under Rule 56(f) of the Federal Rules of Civil Procedure, which are analyzed under the following five criterion: (1) authoritative, (2) timeliness, (3) good cause, (4) utility, and (5) materiality. Alphas Co. v. Kilduff, 72 Mass. App. Ct. 104, 110, 888 N.E.2d 1003, 1009–10 (2008), *adopting* Resolution Trust Corp. v. North Bridge Assocs. Inc., 22 F. 3d 1198, 1204 (1st Cir. 1994).

To prevail, the party moving for a stay must demonstrate good cause for why the facts were not discovered sooner, set forth a plausible basis for believing that the specified facts exist and can be collected in a timely manner, and how those facts may influence the outcome of the pending summary judgment request. Alphas Co. v. Kilduff, 72 Mass. App. Ct. at 110; Resolution Trust Corp. 22 F.3d at 1203-1208. The Court should “construe motions that invoke the rule generously,

holding parties to the rule's spirit rather than its letter.” Resolution Trust Corp. 22 F.3d a 1203. When these criteria are satisfied, a strong presumption arises in favor of the relief. Id.

In addition to the foregoing, Massachusetts courts should look to the efforts a party made prior to the closing of discovery before granting them additional time to cure defects in the evidentiary record before ruling on a motion for summary judgment. Cape Cod ASC, LLC v. Bentivegna, No. 2008457, 2010 WL 3038824, at *1, f.n. 2 (Mass. Super. July 1, 2010) (Denying a motion and affidavit pursuant to Mass.R.Civ.P. 56(f) where a plaintiff had “nearly two years in which to conduct discovery”). Denying additional time to conduct discovery is proper where the party submitting the Rule 56(f) affidavit had adequate time and opportunity to obtain expert witnesses but failed to do so. Madigan v. Gen. Motors Corp., 73 Mass. App. Ct. 1114, 899 N.E.2d 118 (2009) (Appeals Court held a plaintiff was properly denied a continuance as they had “made no effort to retain an expert witness, even after learning of the defendants’ experts”); Bardige v. Performance Specialists, Inc., 74 Mass. App. Ct. 99, 101, 904 N.E.2d 464, 466 (2009) (Appeals Court unpersuaded by an argument that trial court was required to give additional time to obtain experts under Mass.R.Civ.P. 56(f)).

B. EDI’s Rule 56(f) Motion Is Not Supported by an Affidavit Attesting to Essential Facts Necessary to Oppose Harvey’s Motion

EDI failed to comply with the plain text of Rule 56(f) that it submits affidavits claiming that it cannot obtain “facts essential to justify [EDI’s] opposition” to Harvey’s motion for summary judgment. No affidavit from counsel or a corporate representative identifying what “essential facts” are included with EDI’s Rule 56(f) Motion, and thus, EDI fails to set forth any verified reasons as to why it cannot obtain the same. In lieu of this requirement, EDI relies upon an affidavit from its expert architect, Keith Olsen. Notably, Mr. Olsen *does not* claim that EDI lacks any “facts essential” to complete an expert report, only that his report is still in the preliminary stage of

drafting. J.A. Ex. 36, ¶ 4. Mr. Olsen otherwise has access to all necessary discovery, including “numerous” opportunities to visit the Project Site, review Project Documents and discovery exchanged between the parties, review deposition transcripts and exhibits introduced at those depositions; and form a preliminary report as to causation.

Rather than supporting its Rule 56(f) Motion, Mr. Olsen’s affidavit demonstrates that further delay would not assist EDI in further developing the evidentiary record to support its claim against Harvey. The fact EDI was not prompt in retaining an expert, not diligent in preparing the expert, and withholding the expert opinion is not a basis to deny a hearing on Harvey’s motion.¹ EDI has access to all essential facts necessary for it to oppose Harvey’s Motion for Summary Judgment, including obtaining expert testimony regarding the same. The deposition of Harvey was repeatedly delayed even though EDI knew, before it asked a single question of Harvey, that Harvey was intent on filing a motion for summary judgment. Accordingly, this Court should deny EDI’s Rule 56(f) Motion.

C. EDI Cannot Prove Harvey Played Any Role in the Design, Manufacture and Testing of the Allegedly Defective “Allura” Siding

Once a motion for summary judgment has been filed a plaintiff cannot rely and rest on its pleadings. *See Shapiro Equip. Corp. v. Morris & Son Constr. Corp.*, 369 Mass. 968, 968-969, 341 N.E.2d 668 (1976); *Pupecki v. James Madison Corp.*, 376 Mass. 212, 217 n.5, 382 N.E.2d 1030 (1978); *Stanton Indus. Inc. v. Columbus Mills, Inc.*, 4 Mass.App. 793, 794, 344 N.E.2d 199 (1976). EDI is doing just that. Because it has made an allegation of negligence, breach of warranty, misrepresentation and other claims EDI asserts it needs to do nothing more. This is simply not true. If EDI has an expert it must be produced. Harvey’s provided ample notice to EDI that it

¹ EDI has been intimately aware of this claim as far back as 2017 when leaks began to spring from the Marina Bay Project like rain showers in the tropics.

intended to seek summary judgment. Slow walking an expert report or affidavit to utilize such deflection in the form of a Rule 56(f) motion is not appropriate. EDI filed its Fourth Party Complaint bringing in Harvey in July of 2022-almost three (3) years ago. It is time for EDI to articulate a good faith basis for dragging in a company that did nothing more than process some paperwork; having never even touched the product using during construction, let alone designed, tested, installed, altered, or modified it. It cannot be too heavy a burden for EDI to present one solid piece of evidence to keep Harvey in the case other than Harvey being in possession of an insurance policy to contribute towards a mediated settlement.

D. EDI's Rule 56(f) Motion Does Not Satisfy Any of the Five Criteria Required to Delay Adjudication of Harvey's Motion for Summary Judgment

EDI in its motion fails to address the applicable law which articulates the five (5) factors—of authoritativeness, timeliness, good cause, utility, and materiality—necessary for a court to consider upon submission of an affidavit pursuant to Mass.R.Civ.P. 56(f).

1. The affidavit of John Curran provides no specific basis for what discovery is necessary to delay a hearing on Harvey's Motion for Summary Judgment.

The Affidavit of Attorney Curran, aside from authoritatively referencing 18 unrelated documents used in EDI's opposition, provides no specific basis as to why EDI should be entitled to delay the hearing on Harvey's motion. The only relevant part of the affidavit is as follows: "Fact discovery is presently ongoing and expert reports and disclosures are not presently due and have not been exchanged by and between the parties". This generic reference to "discovery" provides no explanation as to why thirty-eight (38) months of discovery since EDI has been in this case, has

been insufficient for EDI to “find” additional facts nor is there any proffer as to why EDI’s expert has not been able to formulate an opinion at this late stage of the case.²

2. The untimely service of EDI’s Motion to Stay is substantially prejudicial to Harvey.

Harvey notified EDI in the Superior Court Rule 9C conference on December 17, 2024 of its intent to file a motion for summary judgment to expressly avoid a Rule 56(f) motion. Thus, EDI had nearly half a year to retain, prepare, and disclose an expert witness opinion to oppose the motion for summary judgment. There was no secret as to why Harvey was seeking summary judgment as it only had a tangential connection to the Marina Bay Project. Further, when faced with EDI’s dragging its feet on its deposition of Harvey, Harvey sent correspondence to EDI expressing concerns over the apparent delay. This included specific statements related to how EDI appeared to be creating a record it could use in support of a Rule 56(f) Motion:

Pursuant to the Sup.Ct.R. 9C Conference held on December 17, 2024, regarding Harvey’s intent to file a motion for summary judgment, my agreement to cooperate in scheduling of Harvey’s deposition was intended to avoid any unnecessary motion practice and delay that would arise from Exterior Designs seeking further discovery pursuant to Mass.R.Civ.P. 56(f). The purpose of this agreement is defeated should Exterior Designs fail to timely act upon its intent to take Harvey’s deposition.

See Correspondence, dated February 12, 2025, a copy of which is attached hereto as Exhibit “A”.

EDI’s tactic of repeatedly delay after already being provided months of additional notice should not be rewarded by this Court. Any injury to EDI is entirely self-inflicted.

² EDI was officially served on March 28, 2022, with Callahan’s Third-Party Complaint. Thus, EDI has had over three years of time to “find” these facts, retain an expert and provide a basic opinion.

3. **EDI's Motion to Stay is a request to conduct a fishing expedition for which no good cause exists.**

Massachusetts courts generally find “good cause” for an extension pursuant to Mass.R.Civ.P. 56(f) discovery in the sole possession of the party moving for summary judgment Alphas Co. v. Kilduff, 72 Mass. App. Ct. at 109–10, *citing* A. John Cohen Ins. Agency, Inc. v. Middlesex Ins. Co., 8 Mass.App.Ct. 178, 183, 392 N.E.2d 862 (1979). EDI asserts this to be the case, but in truth, its request amounts to little more than a fishing expedition in hopes of finding testimony or documents that it can cherry-pick in support of its claim. In the absence of any explication or description of the discovery it needs, permitting EDI additional time serves no purpose. The fact that EDI has not even issued supplemental discovery requests since Harvey served its motion evinces the frivolous nature of this demand. Accordingly, there is no “good cause” to grant Eversource additional time as its newfound and unpled theory of the case is a mere fishing expedition intended to delay judgment on this matter.

4. **There is no utility in an extension to permit further discovery as EDI has already questioned the corporate representative of Harvey with all relevant documents.**

EDI did not suspend the deposition of Harvey at the conclusion of its examination, it simply declined to ask any further questions content with the deposition of the corporate representative Stephen Patt. EDI has also declined to notice the deposition of any other Harvey employees or witness. Finally, no additional interrogatories, request for production of documents or request for admissions were served.

EDI was joined as a party in this matter some *thirty-eight (38) months* ago. In that time, it has shown a near complete indifference to Harvey. It is only once Harvey’s served its Motion for Summary Judgment that EDI discovered a sudden need to “find” additional facts, conduct additional discovery, and resuscitate its expert witness Mr. Douglas.

5. **It is impossible to determine the “materiality” of the discovery EDI needs to conduct because EDI has not articulated what the discovery, if any, it seeks from Harvey**

Addressing the fifth and last prong of the analysis, materiality, Harvey has no idea what the evidence is that EDI hopes to uncover in discovery because apparently Edie does not know either. The Affidavit of Atty. Curran makes no mention of it nor does the Affidavit of Expert Douglass who lays out his preliminary opinion and makes no mention of Harvey let alone expresses an opinion linking Harvey's conduct to any issue in connection with the failure of the building envelope at the Marina Bay project. In fact, Mr. Douglas's Affidavit is evidence supporting why Harvey is entitled to summary judgment because EDI's own expert makes no allegation against Harvey.

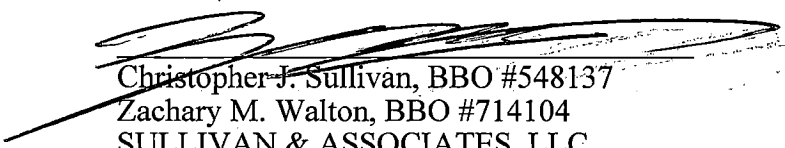
III. CONCLUSION

EDI's request for additional discovery and time to cobble together an expert opinion lacks merit. It has had nearly four years to conduct discovery, including deposing Harvey's corporate representative. Yet, after that deposition, EDI made no further discovery requests from Harvey until it was confronted with Harvey's motion for summary judgment. Its eleventh-hour plea for more time to secure an expert opinion underscores the fundamental weakness of its claim: If EDI did not have a good-faith basis—expert or otherwise—for asserting its allegations against Harvey at the time it filed the Fourth Party Complaint, then it should not have brought the claim in the first place. The fact that EDI now seeks a procedural lifeline only serves to highlight the baselessness of its position. Harvey has been forced to expend considerable time and resources defending against a claim that, by EDI's own admission, was unsupported from the outset. The Court should not allow EDI to continue this fishing expedition. Its request for relief under Rule 56(f) should be denied, and Harvey should be relieved from this meritless litigation.

Dated: May 29, 2025

Respectfully submitted,

HARVEY INDUSTRIES, INC.,
By its Attorneys,



Christopher J. Sullivan, BBO #548137

Zachary M. Walton, BBO #714104

SULLIVAN & ASSOCIATES, LLC

500 West Cummings Park, Suite 4700

Woburn, MA 01801

Tel. (781) 939-5840

Fax (781) 935-3027

csullivan@sullivanlitigation.com

zw Walton@sullivanlitigation.com

Exhibit A



Sullivan & Associates, LLC

Attorneys at Law

500 West Cummings Park, Suite 4700

Woburn, MA 01801

Telephone (781) 939-5840 Facsimile (781) 935-3027

www.sullivanlitigation.com

Christopher J. Sullivan
Zachary M. Walton
Erin E. Lynch

Susan Craig
David Gerson
Michael C. Houlihan

February 12, 2025

VIA EMAIL & U.S. MAIL

John M. Curran, Esq.
Corwin & Corwin, LLP
600 Unicorn Park Drive
Woburn, MA 01801
jcurran@corwinlaw.com

Norman Brown, IV, Esq.
Corwin & Corwin, LLP
600 Unicorn Park Drive
Woburn, MA 01801
nbrown@corwinlaw.com

RE: Marina Bay Residences, Inc. v. Cube 3 Studio, LLC and Callahan, Inc.
The Superior Court, Norfolk County, Massachusetts
Civil Action No.: 2182CV01044

Dear Counsel,

I am writing regarding our prior discussions to arrange for Exterior Designs, Inc.'s deposition of my client, Harvey Industries, Inc. On January 28, 2025, you indicated to me that Exterior Designs was available to move forward with Harvey's deposition on February 21, 2025. We then agreed to continue Harvey's deposition a second time to **March 3, 2025**. Since then, however, you have not served a Re-Notice of Deposition or otherwise indicated that you intend to proceed with Harvey's deposition in email chains discussing upcoming depositions.

Pursuant to the Sup.Ct.R. 9C Conference held on December 17, 2024, regarding Harvey's intent to file a motion for summary judgment, my agreement to cooperate in scheduling of Harvey's deposition was intended to avoid any unnecessary motion practice and delay that would arise from Exterior Designs seeking further discovery pursuant to Mass.R.Civ.P. 56(f). The purpose of this agreement is defeated should Exterior Designs fail to timely act upon its intent to take Harvey's deposition.

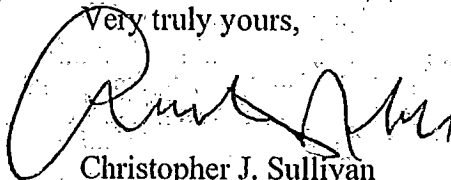
* *Of counsel*

Kindly be advised that if Exterior Designs does not proceed with Harvey's deposition on **March 3, 2025**, and/or no alternative deposition dates have been agreed to at that time, I shall consider it a waiver of Exterior Designs' right to take Harvey's deposition prior to the commencement of the Sup.Ct.R. 9A process for Harvey's motion for summary judgment. I will, of course, produce Harvey's corporate designee at a later date if Exterior Designs' Re-Notice of Deposition is served prior to the close of discovery.

If, after failing to re-notice Harvey's deposition for **March 3, 2025**, or another date as may agree upon, Exterior Designs files an affidavit pursuant to Mass.R.Civ.P. 56(f) upon receipt of Harvey's motion for summary judgment, I reserve the right to seek appropriate relief pursuant to Mass.R.Civ.P. 56(g).

Thank you for your anticipated cooperation and should you have any questions or concerns, please feel free to contact the office.

Very truly yours,

A handwritten signature in black ink, appearing to read "Chris Sullivan", written over a large, loopy "C" that starts the signature.

Christopher J. Sullivan
Zachary M. Walton

Encl.

cc: Counsel of Record (*via* email only)