

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.

HARVEY INDUSTRIES, INC.'S
MEMORANDUM OF LAW IN SUPPORT
OF ITS FOR SUMMARY JUDGMENT AS
TO THE CLAIMS OF
EXTERIOR DESIGNS, INC.

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Now comes Harvey Industries, Inc.'s ("Harvey") Motion for Summary Judgment, by and through its undersigned counsel, to respectfully submit this Memorandum of Law in Support of its Motion for Summary Judgment as to the Claims of and against Exterior Designs, Inc., ("Exterior Designs") pursuant to Rule 56 of the Massachusetts Rules of Civil Procedure, and requests that this Honorable Court issue an order (1) allowing this Motion; (2) granting Harvey judgment as to Counts Thirty to Thirty-Five of Exterior Designs, Inc.'s Amended Complaint; and (3) granting Harvey judgment against any crossclaims for contribution and/or common law indemnification brought by its Co-Defendants, for the reasons stated herein.

I. INTRODUCTION

A. BACKGROUND

The pre-existing relationship between Harvey and Exterior Designs prior to the subject project was as follows. Harvey regularly acted as a materialman, providing products-to-order to Exterior Designs, a contractor, from time-to-time in the same manner as said materialman would provide products to any other persons or entities in the construction industry. No standing contract for service, materials, labor, or other such long-term agreement relevant existed between the parties.

In 2016, Exterior Designs, together with the architect, Cube 3 Studios, LLC ("Cube 3") and general contractor, Callahan, Inc. ("Callahan"), engaged in discussion with Plycem USA, LLC and/or Elementia USA, Inc. (collectively, "Plycem Entities") regarding use of Allura fiber cement panels ("Allura siding") in the subject project. SOMF 4. Pursuant to understandings between Exterior Designs, Plycem Entities, Cube-3, and Callahan, Plycem Entities agreed to sell Allura siding to Exterior Designs at a fixed and discounted price for use in the subject project. SOMF 5. Shipment of the Allura siding was arranged directly from Plycem Entities' manufacturing facilities

in North Carolina directly to Exterior Designs' custody at Marina Bay, Quincy, MA. SOMF 6. Plycem Entities further provided engineering expertise to Callahan, Cube-3, and Exterior Designs through its designated engineering firm, Trinity Engineering. ("Trinity"). SOMF 10. At Plycem's direction, Trinity provided additional testing of the Allura siding because the documentation that Allura had previously made public was insufficient to determine if the Allura siding was suitable for the Project. SOMF 11.

Harvey was not part of, copied on, or otherwise privy to any of the above-referenced communications, negotiations, or services. Rather, Exterior Designs and Plycem Entities each retained intermediaries to handle the "paper logistics". Specifically, Exterior Designs retained Harvey, while Plycem Entities retained the non-party Coastal Forest Products, Inc. ("Coastal"), *see* SOMF 12. Unbeknownst to the prior agreements and understandings negotiated directly between Exterior Designs and Plycem Entities, Harvey placed a drop-ship order¹ with Coastal for the delivery of Allura siding to Exterior Designs. SOMF 13. Coastal, in turn, placed a drop-ship order with Plycem Entities for the delivery of Allura siding to Exterior Designs. SOMF 14. Plycem Entities thereafter fulfilled the purchase order as previously negotiated with Exterior Designs. SOMF 15.

Harvey, a wholly innocent party, was unknowingly roped into this circuitous logistics chain which appears to serve no legitimate purpose other than to obscure the nature of Exterior Designs and Plycem Entities' business relationship. On those grounds alone, Harvey is entitled to summary judgment as to each of Exterior Designs' claims.

¹ "Drop-ship" means "to ship (goods) from a manufacturer or wholesaler directly to a customer instead of to the retailer who took the order." *Merriam Webster*, "drop-ship", accessed November 18, 2024. <https://www.merriam-webster.com/dictionary/drop-ship>.

In addition to the lack of substantive dealings between Exterior Designs and Harvey, despite years of extensive discovery efforts, the record is wholly absent of any substantive evidence that the Allura siding caused or contributed to water infiltration at the subject project. SOMF 47 and 49. Rather, the uncontroverted documentary evidence and testimony is the Project was replete with design flaws and workmanship issues. Such defects included, but were not limited to, a design which failed to account for a substantial amount of water penetrating the structure, *see* SOMF 16; large gaps in OSB substrate, *see* SOMF 17; holes in the roof water resistant membrane, *see* SOMF 18; and literally installing the roof parapets backwards, *see* SOMF 19. In contrast, Exterior Designs admitted that it joined Harvey without any independent basis for its claim that the Allura siding was defective. SOMF 20. Exterior Designs' claims are wholly speculative and based upon the legally conclusory statement that if the building envelop was defective then Harvey must necessarily share some part of the blame. SOMF 32.

B. PROCEDURAL HISTORY

The Plaintiff, Marina Bay Residences, LLC ("MBR"), commenced litigation in this matter on November 18, 2021, naming only the general contractor and architect of record, being Callahan and Cube 3, respectively, as Defendants. *See* Docket No. 1. Callahan, in turn, joined its three (3) subcontractors, including Exterior Designs. *See* Docket No. 6. On July 28, 2022, Exterior Designs substantially expanded the scope of litigation by naming eleven (11) Fourth-Party Defendants, being each second-tier subcontractor, manufacturer, and intermediary entity which it had contact with for this Project regardless of role they served or fault. *See* Docket Nos. 28. Notably, Exterior sought leave to join Harvey as a Fourth-Party Defendant merely because Harvey "sold materials to [Exterior Desings] that were incorporated into the Project." *See* Exterior Designs, Inc.'s Memorandum of Law in Support of Its Motion for Leave to File Fourth-Party Complaint, Docket

No. 27.1, ¶ 12. Exterior Designs further represented that the need to join Harvey in this capacity was based upon the “potential liability as alleged by MBR and Callahan” and articulated in the Plaintiff’s expert witness, Wiss, Janey, Elstner Associates, Inc. (“WJE”). *Id.* at ¶¶ 13 and 14.

Exterior Designs brought six (6) distinct claims against Harvey as Fourth-Party Defendant: (1) indemnification; (2) contribution; (3) breach of contract; (4) breach of express and implied warranties; (5) negligence; and (6) misrepresentation, being Counts 30 through 35, respectively.

Exterior Designs also brought substantially identical claims against Plycem USA, LLC, being counts 26 through 29, except for breach of contract, which was not asserted. On December 16, 2024, this Court entered this dismissal of Exterior Designs breach of warranty and indemnification claims against Plycem USA, LLC, for failure to state a claim.

II. LEGAL STANDARD

“Summary judgment is a device to make possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts or if only a question of law is involved.” *Cassesso v. Comm’r of Correction*, 390 Mass. 419, 422 (1983); *see also Ortiz v. Morris*, 97 Mass. App. Ct. 358, 361-62 (2020). “The purpose of summary judgment is to decide cases where there are no issues of material fact without the needless expense and delay of a trial followed by a directed verdict.” *Correllas v. Viveiros*, 410 Mass. 314, 316 (1991). Subsequently, when a party’s claim is futile, it is contrary to the purpose of summary judgment to allow the litigation to go forward. *See Martin v. Stericycle, Inc.*, 389 F. Supp. 2d 131, 135 (D. Mass. 2005) (the trial court denied a request to extend discovery prior to summary judgment and granted summary judgment because additional discovery would not change the facts of the case). “The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor

to the burden of a trial.” Doral Country Club, Inc. v. O'Connor, 355 Mass. 27, 30, 242 N.E.2d 425, 427 (1968), *citing* Richard v. Credit Suisse, 242 N.Y. 346, 350 (1926)).

It is standard practice in the Commonwealth for courts to dispose of futile claims at any stage of litigation. *See* Hayes v. CRGE Foxborough, LLC, 167 F. Supp. 3d 229, 241 (D. Mass. 2016) (courts will not allow a motion to amend a complaint when the amendment is futile); Marsman v. W. Elec. Co., 719 F. Supp. 1128, 1142 (D. Mass. 1988) (where proposed amendments to a complaint would not survive a motion to dismiss, despite newly discovered evidence, the motion to amend must be denied on futility grounds). This is such a case. As Exterior Designs cannot prove an essential element of each of its claims, nor does the evidentiary record support any of its claims, its claims should be dismissed in accordance to Mass.R.Civ.P. 56.

In deciding a motion for summary judgment, the court looks at the evidence in the light most favorable to the non-moving party to determine whether there is “any combination of circumstances... from which a reasonable inference could be drawn in favor of the Plaintiff.” Mullins v. Pine Manor College, 389 Mass. 47, 56 (1983), *quoting* Poirier v. Plymouth, 374 Mass. 206, 212 (1978). Reasonable inferences are those based on “probabilities, rather than possibilities” and “not the result of ‘mere speculation and conjecture.’” *Id.* A plaintiff fails to maintain the burden of proof if all of the evidence in question of the defendant’s negligence is left to conjecture, surmise, or speculation. Morris v. Weene, 258 Mass. 178, 180 (1927); *see also* Brown v. Bangs, 306 Mass. 551 (1941). A moving party’s burden may be satisfied by demonstrating that proof of an element of a non-moving party’s claim is unlikely to be forthcoming at trial and a complete failure of proof concerning an essential element of the nonmoving party’s case renders all other facts immaterial. Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 10 Mass. 706, 711 (1991).

III. EXTERIOR DESIGNS' DERIVATIVE CLAIMS FAIL BY OPERATION OF LAW

A. The Right to Contribution from Harvey is Not Available to Exterior Designs

Massachusetts General Law, Section 1, Chapter 231B governs the right to contribution and states, in pertinent part, "The right of contribution shall exist only in favor of a joint tortfeasor... who has paid more than his pro rata share of the common liability, and his total recovery shall be limited to the amount paid by him in excess of his pro rata share." G.L. c. § 231B. The Supreme Judicial Court expressly held, "In order to state a claim for contribution from a joint tortfeasor, the party seeking contribution must show that the potential contributor is directly liable to the tort plaintiff. Panagakos v. Walsh, 434 Mass. 353, 355, 749 N.E.2d 670, 671 (2001), *citing* Liberty Mut. Ins. Co. v. Westerlind, 374 Mass. 524, 526, 373 N.E.2d 957 (1978).

Notably, despite alleging Harvey's conduct was deeply intertwined with that of the Plycem Entities, the Plaintiff, Callahan, and Cube 3 have all declined to join Harvey as a Third-Party Defendant. This is particularly relevant as Callahan joined both Exterior Designs and Plycem as Third-Party Defendants.² No party, other than Exterior Designs, has asserted a non-derivative claim against Harvey.

In the alternative, Exterior Designs is not entitled to contribution for its liability to the Plaintiffs and/or Callahan because its theory(s) of Harvey's liability diverges too greatly from those of the Plaintiff and Callahan. For example, Callahan cites to the May 19, 2020 WJE Report in its Third-Party Complaint for the proposition that the Allura siding was defective. This contention, however, is wholly unsupported by source document. Despite Allura siding being referenced several times throughout the May 19, 2020 WJE Report, it was only in the context of

² Various co-fourth-party defendants have served crossclaims for contribution and/or indemnifications against Harvey. However, as these claims are purely derivative of Exterior Designs' claims against Harvey, all such derivative claims would fail upon issuance of summary judgment against Exterior Designs claim.

physical damage (presumably caused by Exterior Designs and/or other subcontractors), *see* SOMF 21, or the need to remove the Allura siding to inspect the building envelop, *see* SOMF 22. There are no allegations that the Allura siding in and of itself was physically defective upon delivery or that such defects were the cause of water intrusion.

As neither the Plaintiff nor Callahan have a claim against Harvey, nor could they assert such a claim, Exterior Designs cannot properly seek contribution from Harvey under the theory that Harvey is a joint tortfeasor. Accordingly, Exterior Designs' claim for contribution fails by operation of law.

IV. ALL OF EXTERIOR DESIGNS INDEPENDENT CLAIMS ARE BARRED BY THEIR RESPECTIVE STATUTES OF LIMITATION

A. Exterior Designs' Claim Breach of Contract Ran on October 2, 2021, Being Four (4) Years After the Delivery of Allegedly Defective Goods

Exterior Designs failed to produce any written contract with Harvey, and therefore cannot establish a *prima facie* case for breach of contract. However, to the extent that this Court may consider material lists Exterior Design produced with Harvey as contracts for sale, Exterior Designs' claims are nonetheless barred. Massachusetts General Law, Chapter 106, Sections 2-275 governs the statute of limitations in contracts for sale and states, in pertinent part:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. *A breach of warranty occurs when tender of delivery is made*, except that 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.

G.L. c. 106 § 2-275(1) and (2). (Emphasis added).

Harvey did not perform the shipment of goods to the Project site, *see* SOMF 70, and Exterior Designs did not comprehensively document their deliver date. However, documentation of the shipment produced by Plycem Entities indicate that shipment departed from their North Carolina manufacturing facility as early as May 2, 2016. SOMF 23. It is uncontested that installation of the Allura siding began on or before October 2, 2017. SOMF 24. Thus, delivery must have occurred in that timeframe, beginning the statute of limitations for breach of contract for sale of goods, which thereafter ran at the very latest on October 2, 2021.

In the alternative, Exterior Designs had ample opportunity to identify any defects in the Allura siding after delivery but before substantial completion of the Project. As evinced by the Certificates of Occupancy issued by the Town of Quincy, Substantial Completion occurred on July 31, 2017, and June 27, 2018, for the buildings located at 552 and 550 Victory Road, respectively. SOMF 25 and 26. Prior to those dates, Exterior Designs participated in a mock-up that utilized the Allura siding, *see* SOMF 31. Further, any physical defects in the Allura siding would have also been immediately obvious to any layperson observer. SOMF 27. Therefore, even if some implied warranty for future performance existed, Exterior Design knew or should have known if the Allura siding was physically defective prior to substantial completion. Thus, the statute of limitations for Exterior Designs' breach of contract claim began at some time on or before June 27, 2018, and ran on June 27, 2022, at the latest.

Exterior Designs failed to pursue its claims for Harvey's alleged breach of contract until July 20, 2022. Accordingly, this Court should enter judgment as to Exterior Designs' Fourth-Party Complaint based on this untimely ruling.

B. Exterior Designs' Claims For Breach Of Express And Implied Warranties Ran On October 2, 2020, Being Three (3) Years After Delivery Of The Allura Siding Into The Custody Of Exterior Designs

Massachusetts General Law, Chapter 106, Sections 2-313, 2-314, and 2-315 govern express warranties, implied warranties of merchantability, and implied warranties for fitness for a particular purpose. The statute of repose for claims arising out of tort actions is three (3) years from the date of injury and damage. *See* G.L. c. 106 § 2-318 (“All actions under this section shall be commenced within three years next after the date the injury and damage occurs.”). However, G.L. c. 106 § 2-725 separately provides a four (4) year statute of limitation of an action for breach of any contract for sale.

Distinguishing between the applicable standard of limitations requires the Court to determine the appropriate “focus” of the case, i.e., whether the case sounds in tort or contract law. *See Jacobs v. Yamaha Motor Corp., U.S.A.*, 420 Mass. 323 (1995) (distinguishing tort-based claims decided under § 2-318 from “[c]ontract-based warranty claims involving commercial transactions may generally call for different treatment than tort-based warranty claims”); *c.f. Bay State-Spray & Providencetown S.S., Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103, 108-109 (1989) (explaining the “tort concepts” of § 2-318 was adopted after the enactment of the Uniform Commercial Code, relaxed privity requirements in warranty actions, and referred to damages for negligence and/or breach of warranty). This Court previously addressed these issues in an order dismissing certain claims of Exterior Designs against Plycem Entities:

As to the claims for breach of implied warranties, Plycem argues the claim is barred by the statute of limitations. “Claims for breach of warranty under Massachusetts law are subject to a four-year statute of limitations under contract based theories, or three years for tort-based theories.

[Exterior Designs] filed the Fourth-Party Complaint on July 28, 2022. Because [Exterior Design] alleges that it had a written contract with Plycem[...] the Court applies the four-year statute of limitations to the claim. The Fourth-Party Complaint does not state the date that Plycem made the tender of delivery, but Plycem contends that the action started to accrue as of April 23, 2018—the

date that Marina Bay alleges there was substantial completion of the Project. That date, however, does not inform the Court when the *tender of delivery was made beginning the statute of limitations*. Moreover, the alleged date of substantial completion is not stated in the Fourth-Party Complaint and although the Fourth-Party Complaint refers to Marina Bay's Complaint, it does not specifically incorporate that date. *Accordingly, resolution of this issue is better determined on summary judgment or at trial rather than a motion to dismiss.*

Memorandum of Decision and Order on Plycem USA LLC's Motion to Dismiss Callahan Inc.'s Second Amended Third-Party Complaint and Motion to Dismiss Exterior Designs, Inc.'s Fourth-Party Complaint, Docket No. 162, pp. 9-10. (Internal citations omitted). (Emphasis added).

On summary judgment, Exterior Designs is no longer entitled to rest upon its allegations. There is no written contract providing express warranty to Exterior Designs for the Allura siding or otherwise. SOMF 40. Exterior Designs' claims for breach of warranty further sound solely in tort law, as evinced by its repeated reference to "*negligent[] design[], manufacture[], formulat[ion], test[ing] and/or market[ing][.]*" See Exterior Designs Fourth-Party Complaint, Docket No. 28, ¶¶ 215, 216, 222, 230, 235, and 246. (Emphasis added). Notably, Exterior Designs bases its claim for contribution, as an alleged joint tort-feasor, solely upon "the negligence of Harvey." *Id.* at ¶ 210. Thus, the statute of limitations for Exterior Designs' tort-theory based warranty claims is three (3) years from tender of delivery.

As explained above, delivery of the Allura siding occurred before October 2, 2017. In the alternative, substantial Completion occurred upon issuance of the second Certificate of Occupancy on June 27, 2018. SOMF 26. Thus, whether this matter sounds in tort or contract law, both the three (3) and four (4) year statute of limitations ran well in advance of Exterior Designs' filing date. Accordingly, this Court should enter judgment as to Exterior Designs' Fourth-Party Complaint, being Exterior Designs' claims for express and implied warranty against Harvey.

C. The Statute of Limitations For Exterior Designs' Claims For Negligence and Misrepresentation Ran on October 2, 2020, As Exterior Designs Knew or Should Have Known of Harvey's Alleged Negligence on or Before October 2, 2017.

Despite being a subcontractor, Exterior Designs was included in discussions alongside Callahan and Cube 3 during the design stage prior to construction. SOMF 28. Specifically, Exterior Designs was an active participant in discussions with Plycem Entities and Trinity for the testing of Allura siding for its fitness for use on the Project. SOMF 29. There is no evidence before this Court that the specific pieces of Allura siding used in the Project were defective. only claims that the Allura siding, generally, was defective and unfit for its intended use on the Marina By project. However, despite this claim, Exterior Designs can neither point to any specific evidence of the defect. SOMF 30. Notable, the architect of record expressly denies that the Allura siding was in any way defective. SOMF 54. As Exterior Design was a participant in the pre-construction testing, it had ample opportunity to engage in or request the performance of additional testing of the Allura siding to ensure that it could adequately perform up to the standards required for the Project.

Exterior Design further a mock-up test that evaluated the Allura siding panels, among other aspects of the building envelop. SOMF 31. However, neither Exterior Design nor any other party performed testing to confirm that the Allura siding adequately performed to the standards required by the Project. SOMF 31. Exterior Designs' failure to perform this testing rendered it willfully ignorant of the alleged negligent design defects in the Allura siding. As Exterior Designs had the opportunity to discover prior to the full-scale installation of the Allura siding but chose not to do so, the statute of limitations for negligence began running well before substantial completion. Accordingly, this Court should enter judgment as to Exterior Designs' Fourth-Party Complaint, being Exterior Designs' claims of negligence.

V. EXTERIOR DESIGNS CANNOT PRESENT A *PRIMA FACIE* CASE FOR ITS INDEPENDENT CLAIMS AGAINST HARVEY

A. There is No Fact Witness Or Documentary Evidence Causally Connecting the Allura Siding Product Which Harvey Allegedly Sold to Any Damage to the Project

Exterior Designs cannot produce any documentary evidence, fact witness testimony, or expert witness report establishing a causal connection between the Allura siding sold by Harvey and damage to the Project. A plaintiff bears the burden for demonstrating a defendant's acts or omissions caused the alleged injury. *See* Restatement (Second) of Torts § 430 (1965). "It is a bedrock principle of negligence law that a defendant cannot and should not be held liable for a harm unless the defendant caused the harm." Doull v. Foster, 487 Mass. 1, 6-7 (2021); *see also* Wainwright v. Jackson, 291 Mass. 100, 102 (1935) ("The general rule is that one cannot be held liable for negligent conduct unless it is causally related to injury of the plaintiff"); Glidden v. Maglio, 430 Mass. 694, 696 (2000) ("Causation is an essential element of" proving negligence); Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 45 (2009) (Liability only attaches when the defendant's actions are the cause in fact of plaintiff's injuries); DaSilva v. Toyota Motor Corp., 474 F. Supp. 3d 448, 458 (D. Mass. 2020) ("One cannot be held liable for negligent conduct unless it is causally related to injury of the plaintiff").

Despite over two (2) years of discovery before its corporate representative was deposed, Exterior Designs was unable to offer more than speculative supposition that the Allura siding sold to Exterior Designs contributed to the water infiltration:

Q. Okay. You'd agree with me, sir, that as you sit here today, you do not have any direct factual knowledge that Harvey did anything to cause or contribute to the water intrusion or the damages in the Marina Bay project, correct?

MR. BROWN: Objection.

A. Other than selling us -- well, you know, the sold us material that has been alleged to be defective or that has been alleged to, you know, be part of a wall design that leaks. So, you know, if it's found out that that wall -- that they sold the material, you know, I think there's some responsibility there.

SOMF 26. When asked whether "any direct factual evidence" of any act or omission by Harvey contributed to any damage to the Project, Exterior Designs corporate representative stated, "I don't think we know that yet. I don't think we know." SOMF 26 and 47.

Months later, and with the benefit of further discovery not previously produced having been made available, Mr. Dion was offer no further clarity on his company's allegations:

Q. So as you sit here today, you don't have any direct factual evidence that anything that Harvey did with respect to its simply shipping the products in a box to the Marina Bay project caused or contributed any damage to the project, correct?

MR. BROWN: Objection.

A. I don't think we know that yet. I don't think we know.

Q. Well, I'm only asking what you know today, sir.

A. Correct.

Q. Because you're under oath today. It's your deposition. This lawsuit was started three years ago. So three years into the lawsuit, this is what you know today as the corporate representative, correct?

A. Correct.

Q. And you'd agree with me that that's really speculation on your part and EDI's part to say that we may, we meaning Harvey, may have contributed to the damage at the Marina Bay project for water infiltration, right?

MR. BROWN: Objection.

A. Yes, I guess it is speculation, but it's very possible.

SOMF 33. To prevail on its claim for negligence, Exterior Designs must provide some evidence supporting a causal link between (a) Harvey's involvement in the sale of Allura siding to Exterior Designs and (b) water infiltration at the Project. To date, Exterior Designs has yet to identify a specific manufacturing or design defect in the Allura siding which contributed to the water intrusion. Accordingly, in the absence of any documentary evidence or witness testimony evincing a connection between the Allura siding and water infiltration in the Project, this Court should enter summary judgment against Exterior Designs for its negligence claim.

B. Exterior Designs Requires, And Cannot Produce, Any Qualified Expert Witness Testimony Supporting Its Claim The Allura Siding Products Were Defective Or Otherwise The Cause Of Its Damages

Exterior Designs has also failed to produce any expert witness or report in support of its allegations. In cases where liability relies on technical expertise to interpret the evidence available, a plaintiff fails to prove a *prima facie* case where there is no disclosed expert. See Nally v. Volkswagen of Am., Inc., 405 Mass. 191, 194, 539 N.E.2d 1017, 1019 (1989) (a plaintiff was precluded from establishing a *prima facie* case after their expert was excluded, leaving them without a technical motor vehicle expert); Zoning Bd. of Appeals of Holliston v. Hous. Appeals Comm., No. 09 393326 KCL, 2010 WL 2543651, at *6 (Mass. Land Ct. June 24, 2010), *aff'd*, 80 Mass. App. Ct. 406, 953 N.E.2d 721 (2011) (a plaintiff established a *prima facie* case through the presentation of expert testimony and documentary evidence); Brotherston v. Putnam Invs., LLC, No. CV 15-13825-WGY, 2017 WL 2634361, at *11 (D. Mass. June 19, 2017), *aff'd* in part, vacated in part, remanded, 907 F.3d 17 (1st Cir. 2018) (production of expert reports is sufficient establish a *prima facie* case); Luceus v. Rhode Island, 923 F.3d 255, 257 (1st Cir. 2019) (technical evidence must be assessed by an expert to establish a *prima facie* case).

Exterior Designs agreed that expert testimony would be necessary to establish Harvey's liability in this matter:

Q. And can you tell me how the owner of siding played any role in these leaks?

MR. BROWN: Objection.

A. I think it's going to have to come down to what the experts -
- what the experts say.

SOMF 36. Exterior Designs further affirmed that its claims are based wholly upon the allegations of the Plaintiff's expert, Wiss, Janney. SOMF 37. Thus, there is no disagreement that expert testimony is both the basis of its claims and will be necessary to present a *prima facie* case for Exterior Designs' claims at trial.

The causal mechanism for water infiltration through a building envelope of the Project matter is precisely the kind of technical issue that must be established by an expert witness. Notably, despite having grounded its pleadings upon the initial analysis performed by the expert report of WJE, a careful reading of the May 19, 2020, WJE Report reveals WJE did not actually identify any manufacture or design defect with the Allura siding. SOMF 38. In an updated report on July 12, 2024 WJE again failed to identify any manufacturer or design defects. SOMF 39. Absent expert testimony identifying the alleged causal mechanism, Exterior Designs cannot prevail based solely upon unsubstantiated allegations and misinterpretations of a report produced by the Plaintiff's expert witness. Accordingly, Harvey is entitled to summary judgment as Exterior Designs cannot produce an expert witness to establish a *prima facie* case for negligence.

VI. EXTERIOR DESIGNS CANNOT PRESENT A *PRIMAE FACIE* CASE FOR BREACH OF CONTRACT FOR SALE, CONTRACTUAL INDEMNIFICATION, OR EXPRESS WARRANTY

As a preliminary matter, no written contract exists between Harvey and Exterior Designs for sale, contractual indemnification, and/or express warranty. To succeed in this claim, Exterior Designs must prove each of the following elements by a preponderance of the evidence:

1. *<only if contested>* There was a valid contract [with the terms that PLF alleges];
2. *<only if contested>* PLF substantially performed his/her/its obligations under the contract [IF APPLICABLE: or DFT failed to perform his/her/its obligations before PLF had to perform];
3. DFT violated the contract or in other words, breached the contract; and
4. PLF suffered damages because of DFT's breach.

MCLE Superior Court Civil Practice Jury Instructions – Contract Claim – General Instructions.

To the extent that Harvey's involvement in Exterior Designs' acquisition of Allura siding to constitutes a contract for sale and/or express indemnification, no document exchanged between Harvey and Exterior Designs regarding that sale contained provision for indemnification or express warranty.

Invoices issued by Harvey to Exterior Designs confirm that Harvey's obligations to Exterior Designs was limited to the replacement of defective goods:

All claims for storage or error must be made on receipt of goods. Any material proving defective will be replaced, but no claims for labor or damage can be allowed. Prices subject to change without notice. Purchaser agrees to pay all reasonable costs, collection fees, attorney fees, and expenses incurred by seller in event of failure of purchaser to pay this amount when due.

SOMF 41. The purchase orders issued by Exterior Design to Harvey included additional language regarding obligations on the supplier, but (a) Plycem Entities, not Harvey, were the supplier, *see* SOMF 42, and (b) these conditions did not impose indemnification or other form of express

warranty. See SOMF 43 (“*Supplier* to furnish industry standard on-site technical and installation support from qualified technical representatives”). (Emphasis added). Plycem Entities were aware of this obligation, as Exterior Designs provided at least one (1) purchase order containing this language directly to a representative of Plycem Entities. SOMF 44.³

Under the terms as articulated in Harvey’s invoices and Exterior Designs purchase orders, there was no breach of contract by Harvey. To the extent that Exterior Designs (or any other party) has been injured by the design of the Allura siding, such harm is beyond the scope of Harvey and Exterior Designs’ contract for sale of goods and/or Harvey’s role as an intermediary between a purchaser (Exterior Designs) and supplier (Plycem Entities). Accordingly, as Exterior Designs failed to produce a written agreement for indemnification or warranty; cannot cite any evidence of an oral agreement for indemnification or warranty; or otherwise assert a violation of terms of any written or oral contract for sale, Harvey is entitled to summary judgment on claims of breach of contract, whether for sale or express indemnification.

VII. EXTERIOR DESIGNS CANNOT PRESENT A *PRIMAE FACIE* CASE THAT HARVEY IMPLIEDLY WARRANTED OR MADE MISREPRESENTATIONS ABOUT THE ALLURA SIDING PRODUCT

A. No Implied Warranty Exists Because Exterior Designs Used The Allura Siding Outside Their Intended Purpose

Massachusetts General Law, Chapter 106, Section 2-314, governs implied warranties of merchantability and states, “[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” G.L. c. 106, § 2-314(1). To be merchantable, goods must at least:

³ It is unknown if all such purchase orders were forwarded to Plycem Entities as Exterior Designs destroyed all emails of Matthew Bouchard, the employee primarily responsible for interfacing with Plycem Entities for the first half of the Project. To the extent that this issue of fact is both material and contested, Harvey requests an adverse inference be taken against Exterior Designs for spoliation of evidence.

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

G.L. c. 106, § 2-314(2). Here, it cannot reasonably be disputed that the Allura siding satisfies elements (a), (b), (c), and (e) of the definition of merchantable. SOMF 59. Exterior Design has not alleged that Allura siding failed to conform to any promises or affirmations made on their container or label. Thus, the sole issue required to enter judgment upon Exterior Designs' claim for Implied Warranty is whether the Allura siding was fit for the purposes for which the product was used.

The evidentiary record is bare of any evidence that the Allura siding was not fit for the ordinary purposes for which it is intended to be used. Further, even if that were not the case, Exterior Designs utilized the Allura siding for purposes *outside* their ordinary use. SOMF 46 (a representative of Plycem Entities wrote in an email: "This is a most unusual method of installing our products in very extreme conditions and it is taking time to thoroughly investigate your proposed designs"); SOMF 47 (Plycem Entities acknowledged, "Allura had never seen a wall assembly similar to the type that was used at Marina Bay"). Plycem Entities further confirmed that the wall assembly in which Exterior Designs used the Allura siding was not "in [Plycem's] list of tests that we have, and also we didn't identify it in any of the public testing reports[...]." SOMF 48.

Exterior Designs' choice to participate in the development and implementation of a novel, custom, and off-market wall assembly system utilizing the Allura siding is a usage outside the product's "ordinary purpose". To the extent Harvey impliedly warranted the merchantability and fitness for a particular use of the Allura siding, such warranties cannot possibly extend to a custom, off-market configuration that is not supported by the manufacturer-provided documentation made available to the public. Accordingly, Harvey is entitled to summary judgment as to Exterior Designs' claim for breach of implied warranty.

B. Plycem, Not Harvey, Made All Representations As To The Quality And Suitability Of The Allura Siding For The Project

Exterior Designs failed to produce any documentary evidence, fact witness testimony, or expert witness reports establishing *any* of the required elements for negligent misrepresentations under Massachusetts law. To prevail on a claim for negligent misrepresentation, Exterior Designs must demonstrate: (1) Harvey made a false statement; (2) the statement was supplied in the course of their business; (3) Harvey made the statement to guide Exterior Designs in its business transactions; (4) Harvey failed to use reasonable care in making the statement; (5) Exterior Designs reasonably relied on Harvey's statement; and (6) Exterior Designs suffered some financial loss by relying on Harvey's statement. See MCLE Superior Court Civil Practice Jury Instructions – Negligent Misrepresentation.

Exterior Designs cannot produce any evidence of the first (1st), second (2nd), and third (3rd) elements of negligent misrepresentation as no document or witness has testified that Harvey made any substantive statement to Exterior Designs regarding the Allura siding's suitability for use on the Project. This is consistent with Exterior Designs' allegation against Harvey for misrepresentation, in which it alleged the Allura siding was "designed, manufactured, formulated, tested and/or marketed *by Plycem*." See EDI Am. Fourth-Party Compl., *supra*, ¶ 246. (Emphasis

added). As Exterior Designs has neither alleged Harvey was involved in the marketing of Allura siding, nor produced any evidence that Harvey made false statements, Harvey is entitled to summary judgment as to Exterior Designs' claim for misrepresentation.

To the extent that product information Plycem Entities supplied to Exterior Designs may be construed as statements made by Harvey, Exterior Designs still cannot meet the **fourth (4th)** element of negligent misrepresentation. As the architect of record, Cube 3 specifically required the use of "ASTM C 1186, Type A, Grade II, fiber-cement board, noncombustible when tested according to ASTM E 136" based on the design of "Allura Fiber Cement Products by Plycem USA, LLC, Houston, TX" be utilized in construction. SOMF 49. The standard information provided directly by Plycem Entities to Exterior Designs (to the extent it can be attributed to Harvey), clearly satisfies the ordinary duty of care of a logistics intermediary in Harvey's position. Thus, Harvey exercised all reasonable care that can be attributable to an intermediary retained solely for on-paper logistics purposes.

Assuming in *arguendo* Exterior Designs nonetheless satisfies each of the proceeding elements, it still cannot satisfy the **fifth (5th)** and **sixth (6th)** elements of negligent misrepresentation. Aaron Bancroft, on behalf of Cube 3, testified that "a big factor" in the use of Allura siding in the project were the representations of Allura's representatives and the testing of an "independent agency or [] the manufacturer" for the choice of materials. SOMF 50 and 51. Mr. Bancroft further affirmed, "[Cube 3] relied on [its] prior successful experience with [Allura siding] in lieu of doing any vapor analysis[.]". SOMF 52. Speaking on whether a defect in the Allura siding caused water intrusion, Cube 3 denied the existence of any flaw. SOMF 53.⁴

⁴ Cube 3 also testified Allura siding had been used on "dozens" of other unrelated projects since substantial completion of the subject Project without issue. SOMF 55.

Thus, the architect of record, in instructing Exterior Designs to obtain Allura siding, relied not on any representation of Harvey, but on those of Plycem Entities. Far from supporting a claim of misrepresentation by Harvey, all parties responsible for designing and building the Project relied on representations of Plycem Entities. Accordingly, Harvey is entitled to summary judgment as to Exterior Designs claim for negligent misrepresentation.

VIII. EXTERIOR DESIGNS CLAIMS ARE BASED UPON A NON-SEPCIFIC BUSINESS RELATIONSHIP BETWEEN HARVEY AND PLYCEM ENTITIES THAT DOES NOT EXIST

Exterior Designs' initial third-party complaint contained several apparent misnomers which Harvey assumed to be accidental. However, as Exterior Designs twice moved to amend their fourth-party complaint without addressing these issues, these drafting choices must now be assumed to be intention. Based its pleadings, it is apparent Exterior Designs' position is that the conduct of Plycem Entities somehow imposed liability upon Harvey.

A. Plycem's Conduct Does Not Establish That Harvey Expressly Or Impliedly Warranted The Allura Siding Product To Exterior Designs

Exterior Designs' allegation of Harvey's breach of express and implied warranties of merchantability and/or fitness for a particular purpose focus on Plycem's conduct, rather than any act or omission by Harvey. To the extent that Exterior Designs' Amended Complaint references Harvey, it does so solely in the context of non-specific joint conduct:

214. *Plycem* designed, manufactured, formulated, tested, and marketed the siding related products installed on the Project.

* * *

216. MBR and/or Callahan have alleged that the siding and related products is inherently defective and/or was negligently designed manufactured, formulated, tested and/or marketed by *Plycem*.

* * *

218. MBR and/or Callahan allege that as a result of the alleged failures described in the Complaint and the Third-Party Complaint as summarized in the preceding paragraphs of this Fourth-Party Complaint that one or both of them have suffered damages as a result of *Plycem's and Harvey's alleged conduct*.

219. *Plycem and Harvey* expressly warranted to EDI that the siding and related products were durable, sustainable, long-lasting, and free of defects.

220. *Plycem and Harvey* impliedly warranted to EDI that the siding and related products were fit for their ordinary, usual, and intended uses.

221. *Plycem and Harvey* impliedly warranted to EDI that the siding and related products were of merchantable quality.

Exterior Designs, Inc.'s Amended Fourth-Party Complaint. (Emphasis added). Notably, Exterior Designs does not allege that Harvey "manufactured, formulated, tested and/or marketed" the Allura siding products, only that "Harvey sold the siding and related products to EDI", *see Id.* at ¶ 215, and that Harvey was part of some joint scheme with Plycem that gave rise to express and implied warranties, *see Id.* at 218-221.

The uncontroverted evidence, however, is that Harvey was little more than a logistics intermediary. SOMF 54. ("[Harvey]" did not have this material out of warehouse. It went from Plycem to the job site."). In all material respects, Exterior Designs was a direct purchaser of the Allura siding products from Plycem Entities, including negotiation of price, *see* SOMF 55; and received direct shipments of the Allura siding, *see* SOMF 56. There is no evidence whatsoever that Harvey was party to this negotiation or otherwise made themselves party of some common scheme to warrant the Allura siding product.

In the alternative, even if the limited involvement of Harvey in the acquisition of the Allura siding product by Exterior Designs would otherwise give rise to express and/or implied warranties of said products for use in their *ordinary* purpose, Harvey lacked knowledge that Exterior Designs

intended to use them for the *particular* purpose. Specifically, the intent that the Allura siding products be used as part of a custom, off-market configurations that Cube 3 approved, *see* SOMF 57; and Exterior Designs executed upon, *see* SOMF 58; was not known to Harvey when it issued invoices confirming Exterior Designs' purchase requests. SOMF 59.

Exterior Designs pleadings to the contrary are wholly unsubstantiated. Indeed, all available email correspondence clearly show that personnel for Cube 3, Callahan, and Exterior Designs, were actively involved in the design of this off-market configuration, *see* SOMF 61 *but not a single piece of fact witness testimony or documentary evidence shows that Harvey was ever made aware of the intended use of the Allura product.* Mr. Patt, speaking both as Harvey's corporate representative and as the individual responsible for managing the paperwork for Harvey in relation to the drop shipping of the Allura siding panels at issue, expressly denied any knowledge as to the intended use of the Allura siding products. Exterior Designs cannot rest upon these unsupported allegations given its failure to produce any evidence to support its claim in discovery. Accordingly, this Court should dismiss Exterior Designs claim for express & implied warranties.

B. Plycem's Conduct Neither Established A Duty Of Care On Behalf Of Harvey Nor Constituted A Violation Of The Same

As a preliminary matter, Exterior Designs' claim for negligence is deficient on its face. The sole allegation related to Harvey therein states, "Harvey had a duty to EDI of reasonable and ordinary care in the sale and marketing of siding and related products[.]" EDI Am. Compl., *supra*, ¶ 228. Exterior Designs subsequently alleged that it is Plycem's conduct, rather than any act or omission by Harvey, that breached that duty and caused Exterior Designs' harms.

229. MBR and/or Callahan have alleged that the siding and related products are inherently defective and/or was negligently designed manufactured, formulated, tested and/or marketed *by Plycem.*

230. MBR and/or Callahan have that *Plycem* marketed and represented that the siding and related products were fit for their intended use, however, that it failed on the Project.

231. MBR and/or Callahan have that *Plycem* knew or reasonably should have known that the siding and related products were defective as designed and manufactured and could fail prematurely causing or contributing to property damage.

* * *

233. MBR and/or Callahan allege that as a result of the alleged failures described in the Complaint and the Third-Party Complaint as summarized in the preceding paragraphs of this Fourth-Party Complaint that one or both of them have suffered damages as a result of *Plycem's alleged conduct*.

Id. at ¶¶ 229, 230, 231, and 233. (Emphasis added). Thus, at best, Exterior Designs has waived any claim that Harvey independently caused any harm and must show that Harvey's liability may be established through a common scheme with Plycem.

The evidentiary record simply does not support the existence of *any* connection between Plycem and Harvey, let alone one where Harvey could be held vicariously liable for Plycem's conduct. In its Answers to Interrogatories, Plycem expressly disclaimed *any* direct business relationship with Harvey. SOMF 61.

Harvey subsequently established that the Allura siding was acquired through a two-step distribution process whereby Plycem dealt directly with Cube 3, Callahan, and Exterior Designs to solicit business, agree upon prices, and provide additional engineering materials. Harvey and the non-party Coastal Forest were thereafter brought in as on-paper only intermediaries due to the particular way Plycem had set up its supply chains. Rather than Harvey being part of some scheme with Plycem whereby it might vicariously hold some liability for Plycem's conduct, the evidence shows it is Exterior Designs (as well as Cube 3 and Callahan) that privately coordinated with

Plycem. Accordingly, this Court should grant Harvey summary judgment as to Exterior Designs' claim for negligence.

C. Harvey Be Cannot Held Liable For The Representations Of Plycem

As with Exterior Designs claims for Express & Implied Warranty and Negligence, it also alleged that Plycem's acts or omissions in some way gave rise to a cause of action against Harvey. Although, here, Exterior Designs at least alleged that Harvey made certain representations "about the superior quality and durability of the siding and related products[.]" EDI. Am. Compl., *supra*, at ¶ 239, Exterior Designs immediately contradicted itself by stating, "the siding and related products is inherently defective and/or negligently designed, manufactured, formulated, tested and/or *marketed by Plycem*." *Id.* at ¶ 240. (Emphasis added). To date, Exterior Designs has produced no evidence that Harvey made any representations to it.

In the absence of any documentary evidence or fact witness testimony, Exterior Designs is left only with, at best, the publicly available marketing materials circulated by Plycem Entities that it independently obtained and reviewed. Further, there is ample evidence that Cube 3, Callahan, and Exterior Designs identified and decided upon the use of Allura siding products prior to having contacted Harvey. Harvey cannot be responsible for "misrepresentations", assuming any exist, in marketing materials that it neither produced nor provided to Exterior Designs.

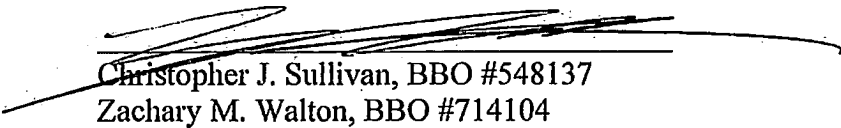
WHEREFORE, the Fourth-Party Defendant, Harvey Industries, Inc., requests this Honorable Court to issue an order (1) allowing its Motion for Summary Judgment as to the Claims of Exterior Design; (2) granting Harvey judgment as to Counts Thirty to Thirty-Five of Exterior Designs, Inc.'s Amended Complaint; (3) entering judgment denying any derivative claims for contribution and common law negligence by Co-Defendants against Harvey; and (4) any other relief that it deems necessary.

Date: April 10, 2025

Respectfully submitted,

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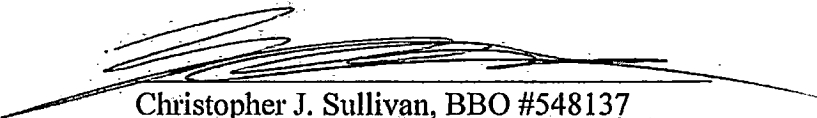
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