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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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2025 MAY 30 AM 8:57
CLERK OF THE COURT
NORFOLK COUNTY
6/22/25

HARVEY INDUSTRIES, INC.'S
OPPOSITION TO EDI HOLDINGS LLC'S
MOTION TO STRIKE

Now comes Harvey Industries, Inc.'s ("Harvey") Motion for Summary Judgment, by and through its undersigned counsel, to respectfully submit this Opposition the Motion to Strike Inadmissible Exhibits and Paragraphs from Harvey Industries, Inc.'s Statement of Undisputed Material Fact in Support of Its Motion For Summary Judgment filed by EDI Holdings, LLC, f/k/a Exterior Designs, Inc. ("EDI"), and request this Honorable Court deny EDI's Motion to Strike for the reasons set forth herein.

A. The Exhibits Submitted By Harvey Are Admissible

EDI's objection to proposed Exhibit Nos. 7 and 9-27 is based upon a misapplication of Mass.R.Civ.P. 56(e). Rule 56(e) provides no authority for an opposing party to seek the exclusion of relevant documentary evidence in the record to the prejudice of the moving party. Rather, "Rule 56(e) requires the opponent of any summary judgment motion to do something more than simply deny the proponents allegations." Mass.R.Civ.P. 56, Reporter's notes (1973). It is the adverse party that must "by affidavits or as otherwise provided in this rule[] [] set forth specific facts showing that there is a genuine issue for trial." *Id.* at 56(e).

Nothing in Rule 56(e) provides an independent basis to have documents from the record, the providence and authenticity of which are uncontroverted. Indeed, ***all EDI's own documentary exhibits are similarly unauthenticated.*** EDI attempts to sidestep the evidentiary requirement by purporting to authenticate all its exhibits *en masse* as "Documents kept in the ordinary course of business by the parties to this litigation[.]" J.A. Ex. 37, ¶ 2. Of course, Attorney Curran is not the keeper of records for any entity perhaps own law firm's files. As such, he certainly cannot purport to authenticate any records or documentation on behalf of adverse parties to litigation. EDI's attempt to introduce documentary evidence in this manner demonstrates that its Motion to Strike

is wholly frivolous and intended to gain an advantage in litigation through improper gamesmanship.

All documentary exhibits that Harvey seeks to incorporate into the Joint Appendix of Exhibits are business records produced by and exchanged among the parties in the course of litigation in this matter. Despite dozens of depositions having been taken in this matter and hundreds of thousands of pages of documents circulated, Harvey is unaware of a single substantive objection to the providence and authenticity of said documents having been raised by any party.

Harvey expressly *does not* move to strike any of EDI's documentary exhibits because Counsel for Harvey lacks a good faith basis to contest the providence and authenticity of such documents under the Massachusetts Rules of Civil Procedure and Rules of Professional Conduct. Counsel for EDI similarly lacks any basis to do so, as evinced by their failure to cite any relevant authority or to substantively challenge the authenticity of any documentary exhibits relied upon by Harvey.

B. Exterior Designs' Corporate Designee Did Not Provide Expert Testimony

EDI's Assertion that paragraphs 20, 30, 32-33, 35, 35-37, and 45 in Harvey's proposed Statement of Undisputed Material Fact are "inadmissible testimony provided by a lay fact witness as to matters within the realm of expert opinion" is wholly without merit. Each of the above-referenced paragraphs was a quote and/or paraphrase taken directly from Michael Dion, the president of EDI and named as its corporate designee pursuant to Mass.R.Civ.P. 30(b)(6). On May 31, 2024, Harvey served a Notice of Deposition upon EDI requiring that it appoint a corporate designee to be deposed on, among others, the following topics:

9. Any and all matters related to the claims asserted against EDI in the matter known as Marina Bay Residences, LLC v. Callahan, Inc., et al., The Superior Court, Norfolk County,

Massachusetts, Case Action No.: 2182CV01044. This matter shall include, but not be limited to, those counts against EDI contained in complaints and/or crossclaims filed by Callahan, Inc., Shawnlee Construction, LLC, Optiline Enterprises, LLC, Wellesley Roofing, Inc. d/b/a Boston Roofing, BASF Corporation, and/or Harvey Industries, Inc.

10. Any and all factual information relating to the performance of Allura-branded products utilized in the Project, as referenced by the Purchase Orders referenced in paragraph #3. This shall include, but not be limited to, similar construction projects involving an allegation and/or complaint of water infiltration.

See Notice of Deposition, dated May 31, 2024, Schedule A, a copy of which is attached hereto as Exhibit "A". Mr. Dion, speaking in his capacity as Exterior Designs' corporate representative, confirmed that he had knowledge of each of these topics. 07/16/24 Dion Dep. 34:22-37: 37, attached hereto as Exhibit "B". Counsel for EDI neither provided written objection to these topic areas nor objected to the confirmation of Mr. Dion's knowledge of the same when Counsel for Harvey took his deposition. Accordingly, EDI cannot now attempt to claw back adverse admissions that its corporate designee made on the record on the grounds that he was not "competent" to provide answers to questions that fell squarely within each of these two topic areas.

1. Paragraphs 20 and 32 questions about the information known to EDI at the time of his deposition.

Contrary to EDI's claims, paragraphs 20 and 32 do not contain inadmissible expert evidence. Harvey asked whether Mr. Dion, speaking on behalf of EDI, had "any direct factual knowledge that Harvey did anything to cause or contribute to the water intrusion or damages in the Marina Bay project". Mr. Dion expressly disclaimed any present knowledge, deferring vaguely to some unspecified future discovery of responsibility. Mr. Dion thereafter deferred to the allegations of the Plaintiff, the allegations of Callahan, and information in the WJE Report to support his claim.

Nothing in Harvey's question or Mr. Dion's answer required that he formulate his own expert opinion. Harvey asked only what "direct factual knowledge" EDI relied upon to connect Harvey's acts or omissions to water intrusion or damages at Marina Bay. That EDI's entire claim rested on the aspiration that an expert might, at some future date, provide EDI with a basis for a claim that they have thus far been unable to provide any substantive basis to support does not make Mr. Dion's statement "expert opinion".

2. Paragraph 33 is admissible fact witness testimony for substantially the same reasons as paragraphs 20 and 33.

Paragraph 33 asks substantially the same question of Mr. Dion, instead emphasizing any specific acts or omissions "Harvey did with respect to its simply shipping the products in a box to the Marina Bay Project [that] caused or contributed [to] any damage to the project". Mr. Drion, speaking on behalf of EDI, admitted that three (3) years into litigation in this matter, EDI had no knowledge of how any action by Harvey may have damaged the project. Admissions of lacking specific factual knowledge are not expert opinions; they are the admission that a claim is based on nothing but speculation.

3. Paragraphs 30 and 45 concern the factual issue of whether EDI ever made a claim that the Allura siding was defective.

Paragraphs 30 and 45 are also fact witness testimony, as Mr. Dion was only asked to confirm that there was no "claim by EDI that [the Allura siding and various products]" were defective, as referenced in a series of documents. Whether EDI observed defects in the Allura siding and various other products and made a claim to Plycem, Elementia, Harvey, or any other persons or entities is a question of fact to which EDI's corporate designee claimed to be knowledgeable. Whether EDI can find an expert to testify that the Allura siding was defective years after its delivery and acceptance by EDI has no bearing on whether, as an issue of fact, EDI

ever claimed they were defective prior to the commencement of litigation in this matter (or, as noted in paragraph 20, even to the date of Mr. Dion's deposition).

4. Paragraph 35 is testimony to which no timely objection was made, or in the alternative, is fact testimony as to the absence of specific evidence.

As a preliminary matter, EDI waived any claim to strike paragraph 35 by failing to state an objection on the record in a timely manner. The parties in this matter have agreed to a standard set of stipulations before each deposition in this matter. During Mr. Dion's deposition, those stipulations included, among others, an agreement to "reserve all objections, except as to form, until the time of trial" and "[m]otions to strike will be reserved until the time of trial." 01/21/25 Dion Dep. 2:5-9, a copy of which is attached hereto as Exhibit "C". Counsel for EDI even reminded Counsel for Callahan of one portion of the parties' standard stipulations that he inadvertently failed to put on the record. *Id.* at 2:18-20.

Paragraph 35 concerns Mr. Dion's answer to Plycem's simple question of whether he was "aware of any evidence that the siding or panels were themselves defective?" to which he responded, "No." Immediately thereafter, Counsel for Plycem finished her questioning of Mr. Dion, providing Counsel for EDI ample opportunity to state his objection on the record. No objection was made, to form or otherwise, thereby waiving the admissibility of EDI's admission to lacking any evidence.

In the alternative, for substantially the same reasons that paragraphs 20, 30, and 32 are admissible as admissions by EDI that it lacked any evidence to support its claims and/or allegations, paragraph 35 is also admissible as an admission that EDI is not in possession of any evidence that the Allura siding or panels were defective.

5. Paragraph 36 is an admission by EDI as to the necessity of expert witness testimony but is not itself expert testimony.

Contrary to EDI's claim, no expert testimony was solicited from EDI in paragraph 36. Rather, Harvey inquired about what acts or omissions by the party responsible for siding could have given rise to the leaks EDI was caused by the Allura siding. In lieu of answering, Mr. Dion stated that expert witness testimony was necessary to establish this fact. The admission of an agent appointed to act on behalf of a corporation that expert witness testimony is necessary to prove a particular element of that corporation's claim is a highly relevant factual detail. *See, e.g., Nally v. Volkswagen of Am., Inc.*, 405 Mass. 191, 194, 539 N.E.2d 1017, 1019 (1989).

In Nally, a trial court granted summary judgment for a defendant following the plaintiff's counsel's in-court admission that, without particular expert testimony, the plaintiff would be unable to present a *prima facie* case at trial. Id. at 192. Although the Supreme Judicial Court ultimately remanded the case for further deliberation, it affirmed "the plaintiff does not escape the consequences of his admission". Id. at 195.

We conclude that, in a civil case, where an expert has removed an item of physical evidence and the item has disappeared, or the expert has caused a change in the substance or appearance of such an item in such circumstances that the expert knows or reasonably should know that that item in its original form may be material to litigation, the judge, at the request of a potentially prejudiced litigant, should preclude the expert from testifying as to his or her observations of such items before he or she altered them and as to any opinion based thereon.

Id. at 197. Paragraph 36 is highly relevant to issues of fact, as in making this admission, Mr. Dion affirmed that EDI is in the same position with respect to its claims against Harvey as the plaintiffs in Nally. EDI further served a Motion to Deny Harvey's Motion for Summary Judgment Without Prejudice as Premature, contemporaneously with its Motion to Strike on the grounds that expert witness testimony was required. Thus, just as Mr. Dion admitted during his deposition, EDI

reaffirms the necessity of expert witness testimony for it to prevail on its claims in this matter.

To the extent EDI seeks to strike paragraph 36 as redundant, Harvey has no objection, but EDI should not otherwise be permitted to substantively deny this uncontested fact.

6. Paragraph 37 is testimony to which no timely objection was made, or in the alternative, is an affirmation of EDI's own previously produced Answers to Interrogatories.

Paragraph 37 is admissible for the same reasons as paragraph 35: neither EDI nor any other party raised a timely objection during the taking of Mr. Dion's deposition. In the alternative, Mr. Dion's testimony on behalf of EDI is unambiguously fact witness testimony pertaining to the factual basis of EDI's claims against Harvey. Notably, the bulk of the testimony cited in support of the fact that "Exterior Designs... claims are based wholly upon the allegations of the Plaintiff's expert, Wiss Jenney" is merely requesting that Mr. Dion review and confirm his Answers to Interrogatories that Harvey had propounded upon EDI. *See* Exhibit "#". EDI's effort to strike the substance of its own Answers to Interrogatories from the evidentiary record is improper and without merit.

C. Jeff Brouillard Did Not Provide Expert Testimony

EDI's request that this Court strike paragraph 27 is similarly unpersuasive and contrary to its arguments. As a preliminary matter, this Court should be aware that Attorney Zepeda, counsel for the non-party, Jeff Brouillard, took the position that Mr. Brouillard is entitled to adequate compensation as a joint expert retained by the parties. Mr. Brouillard's firm went as far as to send each party in this matter an invoice for expert witness consulting fees. *See* Exhibit "#".¹ Thus, to the extent that EDI contends that paragraph 27 is expert witness testimony, Mr. Brouillard is eminently qualified to provide such testimony.

¹ Substantially identical copies of this invoice were separately sent to each party.

The specific testimony Mr. Brouillard provides in paragraph 27, however, is not expert witness testimony. Review of the quoted portions of the deposition demonstrates that Harvey posed four simple questions related to (1) whether Mr. Brouillard made any observation while doing building walk through; (2) what was visible during these walkthrough; (3) whether he would have documented breakage or physical deformities to materials, if observed; and (4) whether any physical deformities or imperfections were observed with the fiber cement panels. None of these questions solicited expert opinion or observations. Instead, Harvey asked what actions Mr. Brouillard took while on-site, to describe what was visible with his own eyes, and to report what he observed.

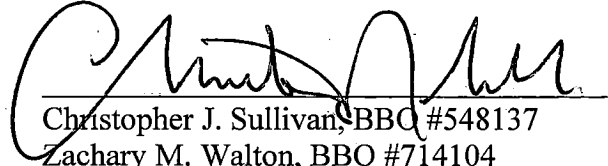
Any person in Mr. Brouillard's position could have posed the same questions and provided the same responses. Counsel for Harvey did, in fact, specifically ask whether "anyone else on site would have been able to see" the same thing as Mr. Brouillard. In response, Mr. Brouillard confirmed that it was simply a matter of access. While Mr. Brouillard may have utilized his expert credentials to interpret and contextualize his observations while walking through the Project buildings, no such credentials are required merely to report whether defective products were observed on the premises.

Date: May 29, 2025

Respectfully submitted,

HARVEY INDUSTRIES, INC.,

By its Attorneys,

A handwritten signature in black ink, appearing to read "Christopher J. Sullivan", is written over a horizontal line.

Christopher J. Sullivan, BBO #548137

Zachary M. Walton, BBO #714104

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