

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

**IN RE: ATLAS ROOFING  
CORPORATION CHALET  
SHINGLE PRODUCTS LIABILITY  
LITIGATION**

**MDL DOCKET No.: 2495**

1:13-MD-2495-TWT

This document relates to:

NOBLE BROOKS, JR., individually  
and on behalf of all other similarly  
situated,

Plaintiff,

v.

ATLAS ROOFING CORPORATION,

Defendant.

No.: 1:14-cv-00001-TWT

**PLAINTIFF NOBLE BROOKS, JR.'S REPLY BRIEF  
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

## **I. INTRODUCTION**

Plaintiff incorporates and joins all sections of *Dishman et al. v. Atlas Roofing Corporation*, Docket No. 1:13-CV-02195 (“Dishman Reply Brf.”) as further identified herein. Accordingly, this Reply Brief will be strictly limited to facts and legal issues unique to Brooks and members of the proposed Mississippi class.

If Plaintiff prevails, he will have proven the core element of liability for breach of warranty and fraudulent concealment for every member of the Mississippi class. Because Plaintiff has satisfied the requirements for class certification, the proposed Mississippi class should be certified.

## **II. TRIAL PLAN**

Plaintiff incorporates by reference the facts and arguments set forth in Section II (“Trial Plan”) of the Dishman Reply Brief.

## **III. CAFA JURISDICTION**

The Court has already addressed Atlas’s concerns related to CAFA jurisdiction pursuant to 28 U.S.C. § 1332 (2012), holding that because Plaintiff is entitled to a “plausible inference that there is a non-Mississippi citizen that owns a structure in Mississippi containing Chalet Shingles, the Court may not dismiss the Plaintiff’s claim for lack of subject-matter jurisdiction at this stage in the

litigation.” Order Granting in Part Denying in Part Motion to Dismiss, at 5 (ECF #191). Atlas’s factual challenge to subject-matter jurisdiction at this *current* stage remains premature. A class certification motion is not the correct procedural vehicle in which to debate this issue since “prudence and considerations of judicial efficiency counsel that the Court should refrain from addressing issues not relevant to the issues that may be raised by a motion to certify the class.” *Rivera v. Wash. Mut. Bank*, 637 F. Supp. 2d 256, 263 (D.N.J. 2009). While Atlas is free to raise its own motions (accompanied by proper briefing and a hearing), the Court should not allow it to usurp Plaintiff’s class certification motion to further its own objectives of arguing lack of subject matter jurisdiction. *See* A. C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* 1373, at 552-54 (1990) (“because of its significance, a defense of lack of subject matter jurisdiction usually will receive a hearing, unless its resolution cannot be achieved without a consideration of the merits of the action.”)

**IV. THE PROPOSED CLASS SATISFIES ALL REQUIREMENTS OF RULE 23(B)(3).**

Because Atlas primarily disputes class certification by alleging that individual issues predominate over common issues, Plaintiff begins by establishing predominance and then discusses the requirements of Rule 23(a) and certification pursuant to Rule 23(c)(4). The Eleventh Circuit recently offered a three-step

approach to determine whether predominance is satisfied. *See Brown v. Electrolux Home Prods.*, 2016 U.S. App. LEXIS 5112, at \*14 (11th Cir. Mar. 21, 2016). First, the district court must “identify the parties’ claims and defenses and their elements.” *Id.* Second, the district court should “classify these issues as common questions or individual questions by predicting how the parties will prove them at trial.” *Id.* Third, the district court should determine whether common issues predominate over the individual issues. *Id.* Application of this three-part approach to Plaintiff’s claims for breach of warranty and fraudulent concealment further establishes that common questions predominate over individual ones.

**A. The Warranty Claims Satisfy the Predominance Requirement Because Plaintiff Can Prove Defect and Prior Knowledge on a Classwide Basis.**

**1. The Elements of the Warranty Claims and Atlas’s Defenses**

Plaintiff argues that Atlas breached its express and implied warranties when it provided defective shingles to class members. To prevail on his breach of express warranty claim, Plaintiff must show that Atlas created an express warranty and failed to conform to it. *See Miss. Code Ann. § 75-2-313.* “The plaintiff need only show that the product did not live up to its warranty.” *Austin v. Will-Burt Co.*, 232 F. Supp. 2d 682, 687 (N.D. Miss. 2002).

In Mississippi, a warranty that the goods are merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Miss. Code Ann. § 75-2-314(1). To be merchantable, goods must “pass without objection in the trade under the contract description” and be “fit for the ordinary purposes for which such goods are used.” *Id.* § 75-2-314(2)(a)(c). “Privity of contract is not required.” *Watson Quality Ford, Inc. v. Casanova*, 999 So. 2d 830, 834 (Miss. 2008) (*citing* Miss. Code Ann. § 11-7-20). A product that fails to conform to the quality of other similar products in the market will normally not be merchantable. *Beck Enters. v. Hester*, 512 So. 2d 672, 676 (Miss. 1987).

Atlas has identified a number of defenses to Plaintiff’s breach of warranty claims: (1) class members did not provide Atlas with notice of the defect; (2) variations in the warranties preclude the warranty from applying to certain class members; (3) a manufacturing defect did not cause Plaintiff’s shingles to fail; (4) certain class members are not in privity with Atlas, so they cannot assert a breach of implied warranty claim; (5) the statute of limitations bars certain class members’ claims; and (6) class members have individualized damages determinations. As discussed below, all of these defenses implicate evidence common to the class or present individualized issues that do not predominate over the core common issues – the existence of a manufacturing defect and Atlas’s knowledge of the defect.

## 2. Classification of Common and Individual Issues.

“Common questions are ones where the same evidence will suffice for each member, and individual questions are ones where the evidence will vary from member to member.” *Brown*, 2016 U.S. App. LEXIS 5112, at \*14. Here, Plaintiffs’ prima facie case for breach on their warranty claims presents common issues that can be proven with common evidence. As detailed in Plaintiffs’ Opening Brief in Support of Class Certification (ECF #296-1) (“Dishman Opening Brief), at 12-14, Plaintiffs’ expert, Dean Rutila, will testify that the shingles suffer from a common manufacturing defect manifested by a combination of blistering, cracking and granule loss that was visible on all 351 roofs he inspected and confirmed in the laboratory; and, as a result of the common defect, roofs with Atlas overlay shingles have effectively failed and need to be replaced because they cannot reliably withstand reasonably foreseeable weather events that will inevitably cause the roof to blow off or leak. Anthony Mattina, who has replaced Chalet shingles on more than 1,000 roofs in the Atlanta area due to this premature failure, will confirm Rutila’s opinion and testify that the shingles are not fit for their intended purpose.<sup>1</sup> Moreover, the common evidence will show that Atlas

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<sup>1</sup> Plaintiff also contends that the shingles are defective and violate applicable warranties because they are unsightly. While denying liability, Atlas agrees that blistering affects aesthetics and a shingle fails if it is not serving its aesthetic

warranted that its shingles were free from defect and excessive granule loss, *id.*, at 5-8, and that it uniformly denied warranty claims for cracks, blisters and granule loss in the absence of a leak.<sup>2</sup>

With respect to notice, the class will rely on common evidence of consumer complaints to establish that the notice requirement of Atlas's warranties has been satisfied for all class members. At least 90 warranty claims have been filed in Mississippi (Plaintiffs' Motion for Class Certification (ECF #306-1), at 3-4. Numerous courts have found that a defendant has constructive notice of a defect sufficient to meet the notice requirements of a warranty for all class members when such a large number of consumers bring the defect to its attention. *See, e.g., Muehlbauer v. GMC*, 431 F. Supp. 2d 847, 859 (N.D. Ill. 2006) (consumer complaints provide constructive notice to manufacturers, which satisfies the notice requirement because requiring every single member of a class to provide notice "is

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function. *See* Dep. of Meldrin Collins (ECF #296-10), at 58 (228:23-229:6) & **Tab 1**, at 91:6-8.

<sup>2</sup> While Atlas paid some warranty claims for customer relations purposes, Atlas maintains that the problems at issue are not caused by manufacturing problems or covered by its warranties. *See* Dep. of Glynese R. Thomas (ECF #296-16), at 32 (125:1-17) (cracked shingle without leak is not a manufacturing defect); & 33 (126:16-19) (blistering without a leak is not a defect) & (126:23-1274) (granule loss without a leak is not a defect) & 55 (215:14) (Atlas's position is that blistering is not a manufacturing defect).

not a reasonable proposition.”); *Martin v. Ford Motor Co.*, 765 F. Supp. 2d 673, 683 (E.D. Pa. 2011) (widespread complaints are sufficient to satisfy notice requirement); *Samuel-Bassett v. Kia Motors Am., Inc.*, 613 Pa. 371, 414 (2011) (finding that the class could prove notice and opportunity to cure through common evidence at trial where consumers notified the manufacturer of the defect and the manufacturer failed to repair the defect during production years).

Regardless of whether the notice requirement can be satisfied in this way, Plaintiff will prove, through common evidence, that Atlas has waived the requirement. In handling thousands of warranty claims involving the shingles, Atlas did not ask claimants to prove they filed the claim within 30 days of discovering a problem and, in fact, never denied a claim based on the notice requirement. Declaration of Amanda K. Mkamanga (Apr. 11, 2016) (“Mkamanga Dec.”), at ¶ 3. (**Tab 2**). Such evidence is sufficient to establish waiver. *See, e.g., RHL Properties, L.L.C. v. Neese*, 293 Ga. App. 838, 840-41 (2008) (internal citation omitted) (“wherever a contract provides for the forfeiture of rights on account of the failure of one of the parties to comply with certain express conditions as to notice . . . courts will readily seize upon any fact or circumstance . . . tending to show a waiver of strict compliance, and will seek to avoid the forfeiture and to leave the actual merits of the case open to investigation.”).

Routinely failing to comply with the notice requirement in its ordinary business dealings with class members, Atlas should not be permitted to use the requirement to avoid certification.<sup>3</sup> Regardless, whether Atlas has waived the requirement is a common issue, not an individualized one.

Even if the Court declines to find that Atlas waived its right to notice, denying Plaintiff a remedy for Atlas's wrongful breach of warranty because Plaintiff allegedly did not provide notice runs counter to the UCC. Commentary to the UCC specifically provides that pre-suit notice "is designed to defeat commercial bad faith, not to deprive a good-faith consumer of his remedy." UCC § 2-607(3)(a) cmt. 4. Courts have cited this comment regarding the liberal application of UCC remedies and the general purpose of the notice requirement and concluded that a defendant *must establish prejudice* from any alleged failure of notice in order to bar a plaintiff's claim. *Wal-Mart v. Wheeler*, 262 Ga. App. 607, 609-11 (2003); *Terrill v. Electrolux Home Prods.*, 753 F. Supp. 2d 1272, 1287 (S.D. Ga. 2010) (citing *Wheeler* and holding defendant's notice argument failed where no evidence of prejudice). Because Atlas has failed to demonstrate any

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<sup>3</sup> Regardless, notice is not a barrier to the 90 Mississippians who filed warranty claims. The claims themselves, which Atlas considered without complaint regarding timing, satisfy the notice requirement.

prejudice resulting from the alleged absence of select notice, the issue of pre-suit notice does not defeat Plaintiffs' warranty claims.

Common evidence will also be used to prove that Atlas had prior knowledge of the defect, strengthening an element of Plaintiff's claim that certain limitations of the warranty are unconscionable. Dishman Opening Brf., at 29-31. Atlas argues that the warranties changed over time (for example, those issued after 2002 only cover leaks) and require individualized determinations of whether class members can avail themselves of the warranty. However, Plaintiff contends that the warranties all cover inherent manufacturing defects, without regard to whether a roof has leaked, and all granule loss after six months. *Id.* at 6-7. The meaning of the warranties is a common issue that must be resolved the same way for each class member. If the warranty is construed in Plaintiff's favor, no individualized determinations will be needed. Even if the warranties are construed to only apply to leaks, if the jury finds that Atlas concealed the defect, leading the Court to find the alleged limitation unconscionable, the warranties will uniformly cover all class members.

### **3. Common Issues Predominate Over Individual Issues.**

Atlas's remaining arguments concerning causation, statute of limitations, privity and damages do not defeat predominance. Rule 23(b)(3) "does not require a

plaintiff . . . to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof.” *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1196 (2013) (citation omitted). Instead, “[t]he predominance requirement is satisfied ‘if resolution of some of the legal or factual questions that qualify each class member’s case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.’” *Catholic Health Care W. v. US Foodserv. (In re US FoodServ. Pricing Litig.)*, 729 F.3d 108, 118 (2d Cir. 2013) (internal citation omitted) (emphasis added). Stated differently, “[a] single common issue may be the overriding one in litigation, despite the fact that the suit also entails numerous remaining individual questions.” *Buford v. H & R Block*, 168 F.R.D. 340, 356 (S.D. Ga. 1996) (citing 1 Newberg on Class Actions § 4.25). The common issues of product defect and Atlas’s knowledge of the defect are obviously more substantial and complicated than any individual ones.

That conclusion is particularly true here because the individual issues Atlas enthusiastically point to arise only as a result of affirmative defenses. The Eleventh Circuit has recently reaffirmed the well-established rule that individual affirmative defenses do not defeat predominance. *Brown*, 2016 U.S. App. LEXIS 5112, at \* 28-29. (“The general rule, regularly repeated by courts in many circuits, is that

‘[c]ourts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members.’”) Atlas itself recognizes that the issues of causation and statute of limitations and privity are affirmative defenses, and privity is not required for a breach of implied warranty claim. *Watson*, 99 So.2d at 835.<sup>4</sup> Any affirmative defenses remaining after resolution of the common issues relating to Plaintiff’s liability case, as discussed above, can be resolved in the second phase of the litigation.

**a) Causation**

Atlas contends that individual issues of causation will predominate, namely, what may have caused the roofs to blister, crack and loose granules other than a

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<sup>4</sup> See Atlas Roofing Corp.’s Answer to Plaintiff’s (Dishman) Amended Complaint, at 15-18, July 23, 2013, ECF #8 (“Answer”) (Affirmative Defenses No. 2E (Limitations) *Id.*, Nos. 7, 9, 11, 13, 19 (Causation)).

manufacturing defect.<sup>5</sup> But Atlas simply restates its defense on the merits, which is not relevant to class certification.<sup>6</sup>

A jury could find, based on the testimony of Plaintiff's experts and Atlas's own documents, that excessive moisture in the manufacturing process caused a defect in every shingle that existed at the time it was sold<sup>7</sup> and it could reject Atlas's arguments about alternative causes, without the need for a roof by roof analysis. *See, e.g., Sanchez-Knutsen v. Ford Motor Co.*, 310 F.R.D. 529, 538 (S.D. Fla. 2015). Plaintiff thus can establish a prima facie case of causation based upon common evidence. Atlas can argue an intervening cause, such as a storm was legally responsible for the damage suffered by a particular class member, but Atlas

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<sup>5</sup> Atlas suggests that some or all of these problems could also be the result of installation errors, design errors or storm damage. Nonetheless, Atlas admits that moisture in the manufacturing process contributed to blistering. **Tab 3**, 32:20-24. (agreeing that moisture in the manufacturing process contributed to the blistering of the Chalet overlay shingles) and it was unable to solve the blistering problem. **Tab 4**, at 92:9-12; 215:22-216:1.

<sup>6</sup> *See Gunnells v. Healthplan Servs.*, 348 F.3d 417, 428 (4th Cir. 2003) ("The sufficiency of the evidence as to proximate cause presented by Plaintiffs goes to the merits of Plaintiffs' case - an issue the Supreme Court has held courts may not consider in ruling on a motion for class certification") (*citing Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)).

<sup>7</sup> *See Rutila Dep.* (ECF #296-22), at 51 (198:14-17); 62 (242:15-21) (moisture in manufacturing process likely cause of blistering); 51 (198:2-7) (moisture in manufacturing process contributes to cracking) & (198:8-11) (likely connection between moisture in manufacturing process and loss of granule).

bears the burden of proof on this defense, *see, e.g., Morensi v. Evans*, 257 Ga. App. 670, 677 (2002), and its proof can be assessed in the second phase without creating predominance problems. *See, e.g., Brooks v. GAF Materials Corp.*, 2012 U.S. Dist. LEXIS 150717 at \*18 (D.S.C. Oct. 19, 2012) (certifying class of owners of allegedly defective decking despite GAF's argument that "other things could have caused the shingles to fail such as improper installation or handling").

**b) Statute of Limitations, Wind Damage, and Damages.**

Individualized issues of statute of limitations and damages as a matter of law, rarely predominate and, thus, typically do not defeat class certification. *See, e.g., Brooks*, 2012 U.S. Dist. LEXIS 150717, at \*24-25, *clarified on denial of reconsideration*, 2013 U.S. Dist. LEXIS 15842 (D.S.C. Feb. 6, 2013) (inquiries into the statute of limitations "do not prevent class certification and the statute of limitations is not a complete bar to class certification in the Fourth Circuit."); *Brown*, 2016 U.S. App. LEXIS 5112, at \*26 (the need for individualized proof of damages alone will *not* defeat class certification); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (same). That is particularly true in a case such as this one, where the common issues of defect and Atlas's knowledge drive the litigation and any individual issues can be readily resolved in a second phase of the proceedings.

Atlas's argument that proving damages will require complicated individualized determinations is based on a damages theory that Plaintiff has not asserted. Rutila found that, at each property he inspected, "at least ten percent of the shingles have blisters, granule loss and/or cracking" (SGH Report, at 50) and concluded that each roof needed to be replaced. According to Atlas, Rutila's conclusions required Plaintiffs to inspect each class members roof to show that at least ten percent of the shingles on a roof are damaged to recover replacement costs. However, that is not Rutila's opinion. His opinion – shared by Mattina – is that *all* the shingles must be replaced because none can withstand foreseeable weather events. *Id.*, at 53. Rutila has calculated replacement costs on a per square foot basis (subject to regional adjustments and complexity), *id.*, allowing class members to easily prove damages by showing the size of his or her roof. Even if that were not the case, class members can prove actual damages using estimates they obtain from roofers. *See, e.g., Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1256-58, 1261 (11th Cir. 2003).

Similarly, statute of limitations issues regarding the warranty claims can be handled in a second phase without creating predominance problems. Under its own analysis, Atlas has no statute of limitations defense with regard to a large percentage of the proposed class who purchased their shingles within four years of

the filing of this action. Atlas will have an opportunity in the second phase to discover the facts and obtain an individualized determination for each class member who participates.

**B. The Fraudulent Concealment Claim Satisfies the Predominance Requirement Because Plaintiff Can Prove Defect and Prior Knowledge on a Classwide Basis.**

**1. The Elements of the Fraudulent Concealment Claim and Atlas's Defenses.**

Plaintiff also argues that Atlas fraudulently concealed the defect in the shingles from class members. To prevail on his claim of fraudulent concealment, Plaintiff must prove: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury. *Levens v. Campbell*, 733 So. 2d 753, 761-62 (Miss. 1999).

In its defense, Atlas asserts that Plaintiff cannot uniformly show reliance on Atlas's representations about the shingles.

**2. Classification of Common and Individual Issues.**

Atlas engaged in a conscious common course of conduct to conceal the defect from its customers. Atlas does not assert it disclosed the defect to some class

members, but not others. As a result, whether Atlas concealed the defect is a question that will be answered the same for each class member. Similarly, Atlas's concealment of facts will be a common issue determined by the answer to a common question – whether the defect could have been discovered through the exercise of ordinary care. The element of intent can be satisfied by showing that Atlas had actual knowledge of the defect before selling the product and concealed the truth to induce the sale. *Lacy v. Morrison*, 906 So. 2d 126, 130 (Miss. Ct. App. 2004); *Cf. Lisk v. Lumber One Wood Preserving, L.L.C.*, 792 F.3d 1331, 1339 (11th Cir. 2015) (finding that intent can be inferred when manufacturer “knew its wood was bound for end users and that they would suffer substantial harm if the wood did not conform to the warranty”).

While reliance must be proven for each class member, individualized proof is not required. Damage also is an individual issue.

### **3. Common Issues Predominate Over Individual Issues.**

The need to prove individual damages rarely causes predominance problems and does not do so here, as discussed above. Further, Plaintiff demonstrated, on pages 33 and 34 of their opening brief how class members can prove reliance based on common circumstantial evidence, an approach approved by the Eleventh Circuit in *Klay v. Humana, Inc.*, 382 F.3d 1241, 1258 (11th Cir. 2004). Simply put, each class member purchased the shingles; there is no evidence that any customer knew or could

have known the shingles were defective before buying them; and no customer would have knowingly paid for shingles that prematurely fail and have to be replaced within ten years.<sup>8</sup> Atlas ignores how Plaintiff proposes to prove reliance and simply points out that reliance cannot be presumed, a point of law with which Plaintiff does not disagree. Atlas's silence is telling.

The predominance requirement is satisfied with respect to the claim for fraudulent concealment.

**V. THE PROPOSED CLASS IS ASCERTAINABLE AND SATISFIES ALL REQUIREMENTS OF RULE 23(A).**

Plaintiffs have shown that the class is ascertainable, the requirements of Rule 23(a) have been met, and certification under Rule 23(b)(3) is appropriate, as many courts have found in similar class actions involving defective construction materials and other products.<sup>9</sup> *See, e.g., Thomas v. La.-Pac. Corp.*, 246 F.R.D. 505 (D.S.C. 2007). Nonetheless, Atlas asserts that the class is not ascertainable and –

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<sup>8</sup> Proving reliance circumstantially is easier here because, unlike in the typical case where reliance creates predominance problems, Plaintiffs have not been exposed to different representations. *Compare Jones v. ConAgra Foods, Inc.*, 2014 U.S. Dist. LEXIS 81292, at \*23 (N.D. Cal. June 13, 2014) (reliance on labels that changed over time) and *Aronson v. Greenmountain.com*, 2002 Pa. Super 316, ¶ 7 (2002) (reliance on different TV advertisements) with *Klay*, 382 F.3d at 1258 (reliance on uniform misrepresentations in bills could be proved circumstantially).

<sup>9</sup> Because all members of the proposed Rule 23(b)(3) class are seeking damages, Plaintiffs no longer request certification under Rule 23(b)(2).

without any real analysis, using less than a page of its brief – challenges the existence of commonality, typicality and adequacy. Atlas is wrong for the reasons set forth in Section V of the Dishman Reply Brief, incorporated here by reference.

**VI. ALTERNATIVELY, THE COMMON ISSUES MAY BE CERTIFIED PURSUANT TO RULE 23(C)(4).**

Plaintiff incorporates by reference the facts and arguments set forth in Section V of the Dishman Reply Brief.

**VII. CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that the Court grant his Motion for Class Certification.

Dated: April 11, 2016.

Respectfully submitted,  
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**LOCAL RULE 7.1 COMPLIANCE CERTIFICATE**

Pursuant to L.R. 7.1D, this is to certify that the foregoing pleading complies with the font and point selections approved by the Court in L.R. 5.1B. The foregoing pleading was prepared on a computer using the Times New Roman font (14 point).

This the 11<sup>th</sup> day of April, 2016.

*/s/ Daniel K. Bryson*

\_\_\_\_\_

Daniel K. Bryson

**CERTIFICATE OF SERVICE**

I, Daniel K. Bryson, do hereby certify that the foregoing was electronically filed through the CM/ECF system for the Northern District of Georgia, which will send a notice of electronic filing to the following attorneys of record:

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This the 11<sup>th</sup> day of April, 2016.

*/s/ Daniel K. Bryson*

\_\_\_\_\_  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

<b>IN RE: ATLAS ROOFING CORPORATION CHALET SHINGLE PRODUCTS LIABILITY LITIGATION</b>	<b>MDL DOCKET No.: 2495</b>  1:13-MD-2495-TWT
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This document relates to:

<p>NOBLE BROOKS, JR., individually and on behalf of all other similarly situated,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>ATLAS ROOFING CORPORATION,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">No.: 1:14-cv-00001-TWT</p>
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**PLAINTIFF NOBLE BROOKS, JR.'S APPENDIX OF EXHIBITS RELIED  
UPON IN SUPPORT OF THEIR REPLY BRIEF  
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

**Tab: Description:**

1. Excerpts from the deposition of Kenneth M. Lies taken on November 12, 2015.
2. Declaration of Amanda K. Mkamanga dated April 11, 2016.

3. Excerpts from the deposition of Hazem Shanab taken on December 17, 2014.
2. Excerpts from the deposition n of Dale Rushing taken on January 20, 2015.

Dated: April 11, 2016

By: /s/Daniel K. Bryson

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**CERTIFICATE OF SERVICE**

I, Daniel K. Bryson, do hereby certify that the foregoing was electronically filed through the CM/ECF system for the Northern District of Georgia, which will send a notice of electronic filing to the following attorneys of record:

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This the 11<sup>th</sup> day of April, 2016.

*/s/ Daniel K. Bryson*

\_\_\_\_\_  
Daniel K. Bryson

Kenneth M. Lies, AIA

Page 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

IN RE: ATLAS ROOFING )  
CORPORATION CHALET SHINGLE )  
PRODUCTS LIABILITY ) MDL Docket No. 2495  
LITIGATION ) ALL CASES  
)  
)

VIDEOTAPED DEPOSITION OF KENNETH M. LIES, AIA  
(Taken by Plaintiffs)  
November 12, 2015

9:37 a.m.

Suite 2400  
171 17th Street N.W.  
Atlanta, Georgia

Reported by:

F. Renee Finkley, RPR, RMR, CRR, CLR, CCR-B-2289

Kenneth M. Lies, AIA

Page 91

1           A.     It needs to be -- it has to be water  
2     shedding.  That's a primary function.  It has to be  
3     resistant to wind.  It has to serve its aesthetic  
4     function.  Those are the three main things, I  
5     believe.

6           Q.     So you could have a shingle failure if the  
7     shingle is not serving its aesthetic function?

8           A.     Yes, I believe you can.

9           Q.     In your opinion, on the aesthetic function  
10    is that it's fine?

11          A.     Yes.

12          Q.     And I believe we've already established  
13    though that you don't have any peer-reviewed  
14    literature to -- that discusses aesthetic function  
15    for a shingle, correct?

16          A.     I don't understand what you just asked.

17          Q.     You don't have any peer-reviewed  
18    literature that discusses aesthetic function for a  
19    shingle?

20          A.     What, that that's a proper --

21          Q.     That that --

22          A.     That's something that it provides?

23          Q.     No.

24          A.     I'm not understanding.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

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<b>IN RE: ATLAS ROOFING CORPORATION CHALET SHINGLE PRODUCTS LIABILITY LITIGATION</b>	<b>MDL Docket No.: 2495</b>  Hon. Thomas W. Thrash, Jr.
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This Document Relates to All Actions

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**DECLARATION OF AMANDA K. MKAMANGA**

I, Amanda K. Mkamanga, declare as follows pursuant to 28 U.S.C. § 1746:

1. I am a paralegal in the law firm of Whitfield Bryson & Mason LLP, one of the law firms of record for Plaintiffs.
2. I have reviewed all of the Atlas claims files produced in this litigation. These documents appear to have been submitted pursuant to the terms of Atlas's Limited Warranty. On the basis of this review, I offer the following observations:
  - a. Since **January 1, 2002**, Class Members have submitted thousands of warranty claims related to blistering, cracking, or granule loss of their shingles.

b. Atlas does not appear to require claimants to prove that they have filed their claim in accordance with the warranty's 30-day notice requirement. Atlas's claim intake form does not have a field relevant to this requirement.

3. I was unable to identify any claims where Atlas denied the claim on the basis of the claimant's failure to comply with the 30-day notice requirement.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on this 11<sup>th</sup> day of April, 2016.

s/ Amanda Mkamanga  
Amanda Mkamanga  
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Hazem Shanab

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

MDL Docket No. 2495

ALL CASES

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IN RE: ATLAS ROOFING CORPORATION  
CHALET SHINGLE PRODUCTS  
LIABILITY LITIGATION

-----X

VIDEOTAPED DEPOSITION OF HAZEM SHANAB

Atlanta, Georgia

December 17, 2014

Reported by:

JoRita B. Meyer, RPR, RMR, CRR, CCR

<p style="text-align: right;">Page 30</p> <p>1 But I'm sure there was a lot of efforts.  2 Q. Well, just to be clear, sir, you're  3 here today to answer the questions that are  4 posed to you in the clearest way you can. And  5 if there's anything I ask you that you simply  6 don't know the answer to, you are welcome to  7 say: I don't know.  8 So let's go back to my question, sir.  9 And with regards to the efforts by Atlas to  10 eliminate moisture from the manufacture of the  11 Chalet shingle, do you recall any other efforts  12 besides the three you've told me, which is  13 renting a chiller, purchasing a vacuum oven,  14 and killing the overspray?  15 A. I'm trying to answer your questions.  16 But if you don't give me the opportunity to  17 tell you the background around the answer, then  18 I think you're just handcuffing the answer.  19 I'm trying to give you a very  20 precise, accurate answer because I think that's  21 what you deserve and that's what you need.  22 But, unfortunately, you're not giving me the  23 opportunity. You try to -- all the effort you  24 keep sticking to, so I don't know what all the</p>	<p style="text-align: right;">Page 32</p> <p>1 backyard, if you would -- that may potentially  2 contribute to this blistering.  3 So we were trying to make sure that  4 we're covering, turning every stone, looking at  5 every -- under every rock. That's what we were  6 after, just to see: Can we do anything?  7 Q. Is there any other reason, sir,  8 besides the answer you just gave as to why  9 Atlas was making a concerted effort to  10 eliminate the moisture from the manufacture of  11 the Chalet shingle?  12 A. We are -- we were trying to eliminate  13 moisture in all our product lines. Does that  14 put it in perspective?  15 Q. I'm only asking you about the  16 manufacture of the Chalet shingle, sir.  17 A. I understand. No, we were just  18 looking at -- you know, moisture is not good  19 for our process.  20 Q. Have you ever had a reason to believe  21 that moisture in the manufacturing process  22 could have been contributing to the blistering  23 of the Chalet overlay shingle?  24 A. Yes.</p>
<p style="text-align: right;">Page 31</p> <p>1 effort. And I keep telling you the answer.  2 Q. Are you aware of any besides the  3 three you've told me so far, sir? Easy  4 question.  5 A. As I sit here today, in this room,  6 you know, I need to think was there -- there  7 was a lot of efforts by a lot of folks, and it  8 was not just we were just looking at moisture.  9 Q. Well, let's stay with moisture for  10 just a second and then we'll come back to what  11 else you all looked at. All right?  12 With regards to the efforts to  13 eliminate moisture from the manufacture of the  14 Chalet shingle, tell us, if you would, please,  15 why Atlas was making an effort to eliminate  16 moisture from the manufacture of the Chalet  17 shingle.  18 A. That question I can understand. And  19 thank you.  20 Really, as a researcher -- and maybe  21 you can appreciate this -- we were trying to  22 see, among all the factors that may contribute  23 to asphalt blistering or shingle blistering,  24 what can we do in our own processes -- our own</p>	<p style="text-align: right;">Page 33</p> <p>1 Q. And what was the theory behind that,  2 please?  3 A. I had a lot of theories. I thought  4 maybe it gets in there and eventually it gets  5 out. So that's kind of what one of the  6 theories were.  7 Q. What other theories do you have? And  8 then I'll come back and ask you in more detail  9 about those theories.  10 A. Basically, that it got into the  11 membrane. And that's kind of, you know, the  12 theory.  13 Q. That moisture would get into the  14 membrane during the manufacturing process?  15 A. Yeah, I speculated that perhaps there  16 is a chance, and I wanted to look at the  17 speculation.  18 Q. Okay. And then you referenced it  19 getting out. What does that have to do with  20 blistering?  21 A. At the time, one of the speculations  22 I made is: Could it be moisture? And could it  23 be something in our process? So that's -- that  24 was the speculation back then.</p>

Dale Rushing

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

MDL Docket No. 2495

ALL CASES

-----X

IN RE: ATLAS ROOFING CORPORATION  
CHALET SHINGLE PRODUCTS  
LIABILITY LITIGATION

-----X

VIDEOTAPED DEPOSITION OF DALE RUSHING

Atlanta, Georgia

January 20, 2015

Reported by:

JoRita B. Meyer, RPR, RMR, CRR, CCR

<p style="text-align: right;">Page 90</p> <p>1 shingles that we've had blistering claims on. I'm 2 not aware of any particular study, investigation, 3 that sort of thing. But claims, yes. 4 Q What other type of shingles are you aware 5 of claims on, blistering claims? 6 A I'd say over the course of my career, all 7 of them. 8 Q All Atlas' shingles have had blistering 9 claims? 10 A I -- most of them. Let's just say it that 11 way, I -- only because I'm not -- I don't know every 12 single product that we've made. But I'd say a good 13 many of them, we've had a claim or claims over the 14 years filed for blistering. 15 Q Have any of the product lines, any of the 16 Atlas shingle product lines, had more blistering 17 claims than the other product lines? 18 A I don't have the data. I don't know. 19 Q Okay. And you are -- you are currently, 20 and have been for some eight years now, the vice 21 president of manufacturing in charge of all five 22 roofing plants, correct? 23 A That is correct. 24 Q And the vice president of manufacturing</p>	<p style="text-align: right;">Page 92</p> <p>1 A What we solved was -- what we attempted to 2 solve was removing variability, improving our 3 process, and our people. 4 Q Was the blistering solved? 5 A What blistering? 6 Q In the Chalet shingle. 7 A I mean, we know there's a whole lot of 8 different reasons why a shingle, Chalet or any 9 other, will blister. <b>So to answer your question,</b> 10 <b>then, we solved -- we didn't solve any of those, or</b> 11 <b>any of those other opportunities, or other</b> 12 <b>possibilities.</b> We knew that. We knew that there 13 were other ways that -- and we weren't -- we weren't 14 attempting to solve those. We were trying to 15 improve our process and take out anything that we 16 might be doing that would be part of the cause. 17 Q So blistering continued? 18 A The number of the claims continued, yes. 19 Q And y'all would check those claims to see 20 whether or not they had, in fact, blistered, 21 correct? 22 A When you say "y'all" -- 23 Q Atlas. 24 A Atlas, through our process of the claims</p>
<p style="text-align: right;">Page 91</p> <p>1 for Atlas is unaware as to whether or not any of the 2 Atlas shingle product lines have had more blistering 3 claims than any other product line? 4 A I am unaware, yes. 5 Q Let's go forward in time on the Chalet. 6 As I understand it, the overlay 7 modifications we've been looking at from late 2003 8 and early 2004 were implemented by the end of 2004? 9 A Or the first of 2005, yeah. 10 Q And did these modifications solve the 11 blistering issue? 12 MR. WEATHERHOLTZ: Objection. 13 THE WITNESS: Which blistering issue are 14 you referring to? 15 BY MR. LUCEY: 16 Q The ones you were attempting to solve by 17 making modifications. 18 A We didn't recognize this as an issue that 19 was specific to these modifications. Or at least I 20 didn't. 21 Q Okay. Sir, was the Chalet quality issue 22 that you referred to as "the biggest quality issue 23 at Hampton" on March 23, 2004 solved by the 24 modifications that were implemented by early 2005?</p>	<p style="text-align: right;">Page 93</p> <p>1 filed, yes, we -- we go through the process of 2 investigating. 3 Q And Atlas continued to see blisters on 4 these claims being made by consumers, correct? 5 A We continued to see claims. 6 Q And you checked for blisters on these 7 roofs, correct? 8 A We checked for whatever they were 9 complaining about, whatever the claim was for. 10 Q And you confirmed the existence of 11 blisters on many of these claims' roofs, correct? 12 MR. WEATHERHOLTZ: Objection. 13 THE WITNESS: Many? I don't -- that's too 14 vague of a term, I guess. 15 BY MR. LUCEY: 16 Q How about "some"? 17 A We would, yes, see some blistering on some 18 shingles on roofs. Yes. 19 Q Tell me, if you would, please, what 20 efforts, if any, you're aware of that Atlas made to 21 investigate the cause of blistering on the Chalet 22 overlay shingle after early 2005. 23 A Repeat the question, please. 24 MR. LUCEY: Read the question back,</p>

<p style="text-align: right;">Page 214</p> <p>1 was some general history on Chalet, some general 2 discussion about how shingles are made in general. 3 I think we talked about some of the raw materials 4 that go into making the shingle. But I don't 5 remember specifically talking about theories behind 6 it. 7 You know, I think our goal by going into 8 the meeting was, they could help us figure out those 9 things. 10 Q Sir, do you deny that the purpose of the 11 Georgia Tech consultation was with regards to 12 learning the cause of the blistering of the overlay 13 shingle? 14 MR. WEATHERHOLTZ: Objection. 15 THE WITNESS: You asked me if we discussed 16 these theories. To my knowledge, we didn't 17 discuss any theories. 18 When Mel reached out to Georgia Tech, I 19 can't say for sure what his goal was as far as 20 identifying things that were happening in our 21 process that were showing up in the -- the 22 vacuum oven or, you know, things that were 23 happening out in the field. I don't know that 24 we knew what we would get out of Georgia Tech.</p>	<p style="text-align: right;">Page 216</p> <p>1 <b>there beyond our control.</b> So no, I don't think 2 that was the purpose of the meeting. 3 I think the purpose of the meeting was to 4 see if they could help us understand how raw 5 materials and changes in our process might be 6 affecting what we're doing. 7 BY MR. LUCEY: 8 Q Sir, can you tell us what the title of the 9 background paper is that Atlas provided to Georgia 10 Tech for the consultation? 11 A I'm sorry. I don't -- background paper? 12 Q Yes. Plaintiffs' Exhibit 123. This was 13 provided to Georgia Tech, correct? 14 A Yes. 15 Q And it provides background, correct? 16 A It provides a problem statement, product 17 history, manufacturing -- I mean, I'm missing your 18 question. 19 Q What is the title of the document? 20 A "Overlay Shingle Blistering Overview for 21 Georgia Tech Research Institute." 22 Q Now, do you still deny you consulted with 23 Georgia Tech on the blistering issue? 24 MR. WEATHERHOLTZ: Objection.</p>
<p style="text-align: right;">Page 215</p> <p>1 BY MR. LUCEY: 2 Q Let's try a simple approach. Did y'all 3 discuss blistering with Georgia Tech? 4 A I'm sure that blistering was discussed, 5 yes. 6 Q Was the purpose of the consult to solve 7 the blistering issue? 8 MR. WEATHERHOLTZ: Objection. 9 THE WITNESS: The purpose of the consult 10 or the meeting was to give them an overview of 11 what we had experienced up until then. 12 BY MR. LUCEY: 13 Q Regarding blistering? 14 MR. WEATHERHOLTZ: Objection. 15 THE WITNESS: Regarding Chalet, the 16 process, the raw materials, that sort of thing. 17 BY MR. LUCEY: 18 Q You deny you consulted with Georgia Tech 19 purely for the purpose of solving the Chalet 20 blistering? 21 MR. WEATHERHOLTZ: Objection. 22 THE WITNESS: <b>I don't think we ever</b> 23 <b>thought we would solve blistering. There's</b> 24 <b>just too many other variables that are out</b></p>	<p style="text-align: right;">Page 217</p> <p>1 THE WITNESS: We consulted with Georgia 2 Tech on various things that were done in our 3 process. We discussed Chalet. We discussed 4 raw materials. But there never was a -- a 5 feeling that by doing this, this was going to 6 eliminate blistering. 7 Again, there's just too many -- too many 8 reasons, too many causation -- too much 9 causation. 10 BY MR. LUCEY: 11 Q You were simply trying to reduce 12 blistering? 13 A We were simply trying to see where they 14 might be able to help us in our efforts. 15 Q To reduce blistering? 16 MR. WEATHERHOLTZ: Objection. 17 THE WITNESS: To improve our process, to 18 take out unknowns, raw material, that sort of 19 thing. 20 BY MR. LUCEY: 21 Q And, sir, have you ever heard at Atlas the 22 theory that the blistering might have something to 23 do with the use of SBS rubber in the modified 24 asphalt?</p>