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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ILENE STERN & MELISSA McCAFFREY,
individually and on behalf of all
others similarly situated,
PLAINTIFFS

Vs.

CIVIL NO.
11-3951 (PGS)

MAIBEC, INCORPORATED,
DEFENDANT

MARCH 30, 2017
CLARKSON S. FISHER COURTHOUSE
402 EAST STATE STREET
TRENTON, NEW JERSEY 08608

B E F O R E: THE HONORABLE PETER G. SHERIDAN
U.S. DISTRICT COURT JUDGE
DISTRICT OF NEW JERSEY

**COURT'S OPINION ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION,
MOTIONS TO STRIKE/DEFENDANT'S MOTION TO STRIKE**

Certified as true and correct as required
by Title 28, U.S.C. Section 753
/s/ Francis J. Gable
FRANCIS J. GABLE, C.S.R., R.M.R.
OFFICIAL U.S. REPORTER
(856) 889-4761

1 THE COURT: This matter comes before the Court on a
2 number of motions: A motion for class certification pursuant
3 to Rule 23; three motions to exclude the testimony of expert
4 witnesses, including Dean Rutila, and the expert testimony of
5 Maibec's experts, Dr. Barry Goodell, and Jan Kalas, (Dockets
6 202, 220 and 222); there's also a motion to strike plaintiffs'
7 new arguments and documents submitted in reply on the motion
8 for class certification (Docket 230).

9 With respect to the class certification motion,
10 Eileen Stern and Melissa McCarthy, individually and on behalf
11 of all similarly situated (plaintiffs) move before this Court
12 to certify the class on the following basis: (1) breach of
13 express warranty; (2) breach of express warranty advertising
14 statements, class under Rule 23(b) (2); (3) breach of implied
15 warranty of merchantability under Rule 23(b) (3); (4) breach of
16 contract under 23(b) (3); (5) a claim under the New York
17 General Business Law Section 349 under Rule 23(b) (2); and (6)
18 a limited issues class under 23(c) (4). In opposition, Maibec
19 generally argues that the aforementioned classes cannot be
20 certified under Rule 23 because individualized inspections,
21 examinations and subjective assessments of each and every
22 shingle owned or used by every class member would be needed to
23 determine: (1) whether a defective shingle used by each and
24 every class member was in fact a Maibec product; (2) whether
25 each and every shingle was properly installed (i.e., proper

1 fasteners, nails and staples) as required by Maibec's
2 instructions; (3) whether each and every shingle did in fact
3 decay, absent issues of proper installation and other
4 extraneous environmental factors; and (4) whether there is
5 causation between Maibec's alleged defective product and
6 plaintiffs' injuries, that is, because individualized
7 treatment is needed as to each and every class member the
8 aforementioned classes cannot be certified under Rule 23.

9 In order to determine whether a class may be
10 certified, the parties rely upon expert evidence or testimony.
11 Each party moves in limine to disqualify the experts of their
12 adversary based upon *Daubert* analysis. For example, Mr.
13 Rutila, plaintiffs' expert, argues that the eastern white
14 cedar shingles (shingles) manufactured by Maibec, do not
15 comply with its 50 year limited warranty because their
16 defective design, which does not take into account the grain
17 orientation or moisture content during the manufacturing
18 process, results in an inferior product that is prone to
19 cupping, curling, lifting, buckling and crackling. In
20 contrast, Dr. Goddell, Maibec's expert, asserts that Maibec's
21 manufacturing and production of shingles is not defective, and
22 the term "decay" should be interpreted to mean rot or
23 decomposition, and not wood movement as purported by Mr.
24 Rutila.

25 Background.

1 In September 2011, Stern, a resident of New York,
2 filed the first amended complaint. Thereafter on March 31st
3 plaintiff Stern filed a third amended complaint adding
4 plaintiff McCarthy, also a resident of New York as a class
00:05 5 representative. According to the complaint, the plaintiffs
6 allege the shingles cupped, curved or lifted after
7 installation. As such, the shingles are defective and
8 plaintiffs believe they must be replaced. Maibec is a leading
9 manufacturer of eastern white cedar shingles in North America,
00:05 10 and Canada's leading manufacturer of wood siding. Maibec
11 warrants that its shingle are "very durable and require very
12 little maintenance", and that they are made from the best
13 white cedar.

14 Further, Maibec allegedly makes the following
00:06 15 statements in its brochures and advertising materials: (i) its
16 unique system increases the durability of the product once
17 installed; (ii) its manufacturing "guarantees consistently
18 high grade product", "kiln dried and factory stained shingles"
19 results in "greater stability, higher quality finished
00:06 20 product...", and Maibec factory stained shingles have "greater
21 stability" while competitors' shingles stained after
22 installation or dipped on the job experience or "more
23 cupping"; (iii) Maibec chooses top quality cedar that will
24 resist decay for decades, and "light and even grain cedar
00:07 25 improves with age naturally"; (iv) its shingles are protected

1 against mildew, mold, cracking, peeling and blistering"; and
2 (v) the white cedar is resistant to decay...cedar shingles
3 retain the durable properties of their origin, the white
4 cedar. Aside from the added protection of a penetrating
5 preservative cedar shingles resist hot and cold weather, wind
6 and rain while retaining their rich grain."

7 At varying times Maibec has offered a 30 or 50 year
8 warranty against decay for its shingles. The 50 year limited
9 warranty states in part:

10 "Under the terms of this warranty, Maibec, Inc.
11 warrants the product against decay for a period of 50
12 years from the date of purchase. This warranty is void
13 should the product be immersed in water or come into
14 direct contact with the ground or adjacent horizontal
15 structures (decks). This warranty does not cover any
16 other damages. Maibec, Inc. reserves the right to void
17 all warranties if the installation requirements are not
18 respected. The requirements are found in the product box
19 or on Maibec's website. The purchaser recognizes that
20 the product is subject to naturally occurring variations
21 (contraction, texture, minor dimensional differences).
22 Maibec, Inc. reserves the right to inspect the product
23 prior to any repairs, and to confirm that the product
24 displays the defect covered by this warranty."

25 In order to install Maibec's shingles, Maibec

1 provides installation instructions. The installation
2 instructions require: (i) fasteners that are rust resistant
3 fasteners only with two fasteners per shingle that are located
4 three-quarters of an inch from each edge, and one inch above
50:10 5 the butt line of the overlapping shingle, and they must
6 penetrate the solid nailable substrate by a minimum of one
7 half inch; (ii) exposure on the walls of five inches; and
8 (iii) the spacing between the shingles should be 1-16th of an
9 inch where shingle edges should not butt each other, and the
50:11 10 keyway spacing must be offset a minimum of one and a half
11 inches on the consecutive rows. Additionally, the
12 installation requirements state that failure to follow these
13 installation requirements will void all warranties.

14 The central issue that arises in this case concerns
50:11 15 the testimony of the experts and the definition of the word
16 "decay". Plaintiffs' counsel argued that the most
17 straightforward approach to these motions to determine class
18 certification is by determining the word "decay" as set forth
19 in the warranty. Such an approach pits the testimony of the
50:12 20 three experts, Dr. Rutila, Dr. Goddell, and Dr. Kalas against
21 each other. Rutila relies on the definition of decay as set
22 forth in Merriam-Webster's Dictionary. Decay means "the
23 gradual decline in strength, soundness or prosperity or in the
24 degree of excellence or perfection." Applying this definition
50:12 25 to the facts, Rutila finds that since the shingles have cupped

1 or curled, the shingles have decayed. On the other hand, Dr.
2 Goddell opines that the word decay is defined within the
3 industry as "the deterioration of wood caused by fungi
4 (typically Basidiomycota) resulting in mass and strength loss
5 of the wood." In light of the differences in the definition
6 and its possible outcome on class certification, each party
7 seeks to exclude the testimony of its adversary's expert under
8 the three-part test set forth under Federal Rule of Evidence
9 Rule 702.

10 Expert testimony.

11 Federal Rule 702 governs the use of expert
12 testimony. Rule 702 states in part: "A witness who is
13 qualified as an expert by knowledge, skill and experience,
14 training or education, may testify in the form of an opinion
15 or otherwise if: (a) the expert's scientific or other
16 specialized knowledge will help the trier of fact to
17 understand the evidence or to determine a fact in issue; (b)
18 the testimony is based on sufficient facts and data; (c) the
19 testimony is the product of reliable principles and methods;
20 and (d) the expert has reliably applied the principle methods
21 to the facts of the case."

22 "Rule 702 embodies three distinct substantive
23 restrictions on the admission of expert testimony;
24 qualifications, reliability and fit. *Elcock v. Kmart*, 233
25 F.3d 734, 741 (3d. Cir. 2000). The Third Circuit has "long

1 stressed the importance of in limine hearings under Rule
2 104(a) in making reliability determinations under 702 and
3 *Daubert*." *Padillas v. Stork-Gamco*, 186 F.3d 412, 417 (3d.
4 Cir. 1999). The decision to hold a *Daubert* hearing "rests in
5 the sound discretion of the district court." *Henry v. St.*
6 *Croix*, 572 Fed. App'x 114, 119 (3d. Cir. 2014). To satisfy
7 the first of these requirements, qualification of an expert,
8 the witness must possess specialized expertise. *Pineda v.*
9 *Ford*, 520 F.3d 237, 244 (3d. Cir. 2008.) The Third Circuit has
10 interpreted this requirement liberally. *Thomas & Betts v.*
11 *Richards Manufacturing*, 342 Fed. App'x 754, 761 (3d. Cir.
12 2009). The policy of liberal admissibility of expert
13 testimony extends to the substantive as well as the formal
14 qualifications of the expert. *Pineda*, 520 F.3d at 244.
15 Consequently, a "broad range of knowledge, skills and training
16 qualify an expert." *Id.* And the basis for the proposed
17 expert's expertise can be practical experience, as well as
18 academic training and credentials. *Betterbox Communications*
19 *v. Bb Tech*, 300 F.3d 325, 327 (3d. Cir. 2002). A proposed
20 expert need not be the best qualified or have the
21 specialization courts consider the most appropriate in order
22 to satisfy Rule 702's qualification requirement. That's
23 *Thomas & Betts*, 342 Fed. App'x at 761.
24 With respect to the second requirement, reliability,
25 it means that the expert's testimony must be based on methods

1 and procedures of science, rather than on subjective belief or
2 unsupported speculation, and the proposed testimony must be
3 supported by an appropriate validation. *Daubert v. Merrell*
4 *Dow*, 509 U.S. 579, 590 (1993). In *Daubert*, the court
5 announced a non-exhaustive list of factors that bear on the
6 inquiry of reliability: (1) whether the theory or technique
7 can be and has been tested; (2) whether the theory or
8 technique has been subject to peer review; (3) the known or
9 potential rate of error and the existence of and maintenance
10 of standards controlling the technique's operation; and (4)
11 general acceptance of the practice. *Oddi v. Ford*, 234 F.3d
12 136, 144-45 (3d. Cir. 2000). "Any step that renders the
13 analysis unreliable under *Daubert's* factors renders the expert
14 testimony inadmissible. This is true whether the step
15 completely changes a reliable methodology or merely misapplies
16 the methodology." *Paoli II*, 35 F.3d at 745.

17 However, reliability does not require correctness.
18 *Paoli II*, 235 F.3d at 744. Rather, the party need only
19 demonstrate by preponderance of the evidence that the expert
20 opinion bears adequate indicia of reliability, not that it is
21 objectively true. *Krys v. Aaron*, 112 F.Supp.3d 181, 190
22 (D.N.J. 2015). The trial court has considerable leeway in
23 deciding in a particular case how to go about determining
24 whether particular expert testimony is reliable. *Id.* at 291.
25 The Third Circuit has cautioned that "the standard for

1 determining reliability is not that high, even given the
2 evidentiary gauntlet facing the proponent of expert testimony
3 under Rule 702." *Id.*

4 Lastly, the third and final requirement is that the
5 expert testimony fit, meaning the expert's testimony must be
6 relevant for the purpose of the case, and must assist the
7 trier of fact. *Calhoun v. Yamaha*, 350 F.3d 316, 321 (3d. Cir.
8 2003). A connection must exist between the expert testimony
9 offered, and the particular disputed factual issues of the

10 case. *In re TMI Litigation*, 193 F.3d 670. In order for the
11 expert's testimony to fit, scientific knowledge must be
12 connected to the question at issue. *Paoli II*, 35 F.3d at 745,
13 note 13. Fit is not always obvious and scientific validity
14 for one purpose is not necessarily validity for other
15 unrelated purposes. *In re TMI Litigation*, 193 F.3d at 670.

16 The standard of fit is not that high, but is higher than bare
17 relevance. *Paoli II*, 35 F.3d at 745. Plaintiffs do not have
18 "to prove their case twice -- they do not have to demonstrate
19 to the judge by a preponderance of the evidence that the
20 assessment of their experts are correct, they only have to

21 demonstrate by a preponderance of the evidence that their
22 opinions are reliable." *Oddi v. Ford*, 234 F.3d at 145. A
23 court must examine the expert's conclusions in order to
24 determine whether they could reliably flow from the facts
25 known to the expert and the methodology used. *Id.* The court

1 may conclude that there is simply too great a gap between the
2 data and the opinion proffered. *Id.*

3 Mr. Rutila's opinion focuses on the manufacturing
4 process of the shingles. For example, under the Conclusions
-02:-05 5 section of his report, Mr. Rutila states inter alia "Maibec's
6 eastern white cedar shingles cup...and curl...as the shingles
7 gain and lose moisture depending on the grain...the moisture
8 content at the time of sawing, and the uniformity or
9 non-uniformity of moisture change between the exposed and back
-02:-05 10 services...Maibec's manufacturing does not produce eastern
11 white cedar with apparent superior quality or long-lasting
12 stability." (Rutila's report at 52-53.) When you read
13 Rutila's report as a whole, the opinion appears to indicate
14 that Maibec is employing an inadequate manufacturing process.

-02:-04 15 Maibec argues that Rutila has no expertise in shingle
16 manufacturing, and therefore the testimony should be
17 precluded. In reviewing Mr. Rutila's curriculum vitae, it
18 sets forth that: Rutila has decades of engineering
19 experience; he has a Master's degree in civil engineering; he
-02:-03 20 was required and has obtained knowledge in wood science in
21 addition to that Master's degree; he is a licensed
22 professional engineer; he has significant continuing education
23 to retain his license, some of the courses he had to take in
24 continuing education include material science and engineering
-02:-02 25 related subjects; he has some experience with cladding

1 systems, and some of those cladding systems included eastern
2 white cedar shingles and he has over 30 years experience in
3 designing construction of buildings; his principle occupation
4 involves design construction, investigation and rehabilitation
-02:-02 5 of building envelope systems; and lastly, he has conducted
6 numerous investigations of these cladding systems, including
7 some with wood shingles. Despite this vast array of
8 expertise, there is no prior academic or work experience
9 directly relating to the shingle manufacturing process which
-02:-01 10 is at the hub of Mr. Rutila's opinion; that is, Mr. Rutila's
11 background does not pertain to or relate to manufacturing of
12 shingles, effect of humidity on the shingles during the
13 manufacturing process, the grain orientation of the shingles,
14 and effect of the moisture content on the shingle's durability
-02:-01 15 and longevity. Instead, his background appears to be directed
16 toward design and construction of buildings and how to
17 rehabilitate them. As such, the Court does not find any
18 rational correlation between Rutila's experience in building
19 construction and his opinions on the manufacturing process of
-02:00 20 shingles. As such, the Court notes that Rutila is not
21 qualified to opine on the manufacturing process of shingles,
22 let alone on whether the manufacturing process is defective
23 due to inadequate moisture content in the shingles or lack
24 humidity control.

-02:00

25 Reliability of Rutila's opinion.

1 One argument that Maibec asserts is that Rutila used
2 a faulty testing process in examining the shingles, and this
3 undermines the reliability of his opinion, and more
4 specifically whether Rutila's testing process shows any
-01:-59 5 relationship between the actual shingles used and the ones he
6 tested. More specifically, Maibec argues that 12 installed
7 shingles from plaintiff Stern's home and six shingles from
8 McCarthy's home that were retained by Mr. Rutila for analysis,
9 were intentionally left unrestrained. According to Maibec,
-01:-59 10 shingles that are left unrestrained tend to expand, contract
11 and curve. Maibec asserts Rutila let the shingles remain
12 unrestrained for more than two and a half years prior to
13 measuring the curvature of the shingles. Rutila argues that
14 allowing the shingles to remain unrestrained was his method to
-01:-58 15 measure moisture of the shingles over a period of time.
16 Maibec argues shingles must be packed tightly to prevent wood
17 movement, and then fastened in a precise manner also to
18 prevent any wood movement. Here, Rutila did not follow such a
19 process. During his deposition, Rutila stated: "We knew that
-01:-57 20 it was an inevitable part of taking samples, and we
21 intentionally did it by this method to work with shingles to
22 minimize the difference in moisture content of shingles when
23 we're making measurements. An important part of our
24 understanding was to do exactly that." (Page 119, line 4,
-01:-57 25 through 120, line 18.)

1 On the other hand, plaintiffs argue that Rutila's
2 expert testimony as to when the cladding material ceased to be
3 sound is authoritative because he brings the perspective of an
4 engineer with over 30 years of experience who designed,
-01:-56 5 installed and investigated hundreds of business envelope
6 systems; that is, Rutila's opinions are "firmly grounded in a
7 well-established investigative methodology that Rutila has
8 employed for over 30 years." To the Court, Rutila's opinion
9 is unreliable because it is premised on an examination of
-01:-56 10 shingles that were unrestrained for a long period of time (two
11 and a half years). Rutila's method augments wood movement.
12 In addition, Rutila's method alters the shingles tested from
13 the ones originally installed undermining the comparison of
14 the two. Since Rutila's expertise is deemed inadmissible
-01:-55 15 based on his qualifications and its reliability, the Court now
16 turns to Dr. Goddell and whether his testimony is admissible.
17 Generally, plaintiffs argue that Goodell does not
18 possess the experience with Canadian Standard Association
19 standards to opine that "Maibec's eastern white cedar shingles
-01:-54 20 are not defective in any way, and that they are produced to be
21 of very high quality according to the CSA standards."
22 Plaintiffs assert that Goodell's testimony should not be
23 considered because he concluded the same based on comparing
24 the shingles to the CSA standards, and found that Maibec
-01:-54 25 shingles to exceed the standards in many cases. In response,

1 Maibec argues that Goodell is qualified to testify to the
2 quality of the shingles because his education and years of
3 particularized experience in the eastern white cedar shingles,
4 and decay, provide him with the qualifications to opine that
5 Maibec's eastern white cedar shingles are of a superior
6 quality. Goodell is qualified to provide his expertise on the
7 quality of the shingles because he has many years of education
8 and experience in the field. Goodell's educational background
9 is in wood science and engineering. In 1983, Goodell received
10 his Ph.D. in wood science from Oregon State University. And
11 Goodell has over 30 years of experience, including research
12 and teaching on the topic of wood science, which has given him
13 a global recognition as one of the leading experts in the
14 brown rot fungal degradation of wood in wood structures, wood
15 composites and wood hybrid materials. Wood science appears to
16 be a study of the wood as a material that is used for
17 processes and tools in the realm of wood technology. This is
18 particularly relevant in the instant case, because the eastern
19 white cedar shingles made by Maibec are made of wood, and
20 therefore their material properties and manufacturing methods
21 are relevant here to determine their longevity and durability.
22 As such, Goodell is qualified to provide his expert testimony
23 on the matter of the eastern white cedar shingles produced by
24 Maibec.

25 Plaintiffs argue that Goodell's expert testimony

1 regarding whether the shingles retrieved from the plaintiffs'
2 homes experienced decay are not based on his expertise and
3 practical knowledge in wood science. Dr. Goodell's basis for
4 his testimony relies upon scientific treatises and
-01:-49 5 peer-reviewed research articles on decay, such as the American
6 Chemical Society, Oxford University Press. Dr. Goodell
7 appears to be relying on peer-reviewed articles which are
8 generally accepted in the scientific community to provide
9 expert testimony on what constitutes decay. As such, the
-01:-48 10 Court does not find plaintiffs' argument persuasive that
11 Goodell's testimony is not reliable because it draws legal
12 conclusions. According to Goodell's testimony on decay, it
13 pertains to the wood shingles taken from plaintiffs' homes as
14 reliable.

-01:-48 15 In conclusion, the Court finds that Goodell's
16 testimony is admissible because it is based on his
17 qualifications, his testing was reliable, and there's a causal
18 connection between his opinions and the facts of the case.

19 One final Maibec expert is Mr. Jan Kalas.

-01:-45 20 Plaintiffs argue that Kalas is not qualified to offer opinions
21 regarding wood rot, because the practice of architecture does
22 not overlap with wood science; as such, his opinions
23 concerning rot and movement of wood must be excluded. Maibec
24 argues that Kalas' particularized experience in the
-01:-45 25 installation and evaluation of eastern white cedar shingles

1 qualifies him to testify about the aforementioned issues. Mr.
2 Kalas' testimony is based upon his "decades of experience in
3 designing and observing construction, and doing some
4 construction myself on residences with eastern white cedar
-01:-44 5 shingles." As such, Maibec asserts that Kalas has specific
6 experience with wood siding design and remediation, which
7 renders him qualified to opine about the existence of wood
8 decay and other factors. The Court's analysis is similar as
9 to the analysis performed when evaluating Mr. Rutila's
-01:-44 10 qualification. Here, Mr. Kalas is not qualified to provide
11 expert testimony as to the product design and manufacturing
12 process of the shingles. Based on a review of Kalas'
13 educational background, he's been practicing architecture, and
14 his areas of expertise include such things as: Condition
-01:-43 15 assessments, remediation, property loss claims, roofing,
16 water-proofing, design of corporate buildings, single family
17 and multi-family residential homes, design of large and small
18 office building facades, and things of that nature. And Mr.
19 Kalas' expertise includes a Bachelor's in architecture, and a
-01:-43 20 graduate certificate in engineering and policy program.
21 Obviously Mr. Kalas' background does not pertain to eastern
22 white cedar shingles, their manufacturing process, determining
23 whether the types of shingles have experienced decay, the
24 science of wood, and how a variation in the manufacturing
-01:-42 25 process could result in a defect in the shingles. Mr. Kalas

1 lacks the expertise and special knowledge regarding wood
2 science in order to provide such testimony. Accordingly, the
3 Court finds Mr. Kalas not to be qualified as an expert
4 regarding the aforementioned issues.

-01:-42 5 In summary, the Court finds Dr. Goddell is qualified
6 to provide expert testimony on the quality of the shingles
7 produced by Maibec, and whether the shingles retrieved from
8 the plaintiffs' homes experienced decay; where as, with regard
9 to Mr. Rutila and Mr. Kalas, the Court finds that their expert
-01:-42 10 testimony is stricken and inadmissible under Rule 702 because
11 they are not qualified, and/or their testing methodologies
12 were unreliable.

13 Decay and Express Warranty.

-01:-40 14 Maibec provides its customers with a 50 year limited
15 warranty, which as stated earlier, against decay for its
16 eastern white cedar shingles. It recites in part that:
17 "Maibec warrants the product against "decay" for a period of
18 50 years from the date of purchase." To state a valid claim
19 for breach of express warranty under New Jersey law, a
-01:-39 20 plaintiff must allege: "(1) The defendant made an affirmation,
21 promise or description of the product; (2) that the
22 affirmation, promise or description became part of the basis
23 of the bargain for the product; and (3) that the product
24 ultimately did not conform to the affirmation, promise or
-01:-39 25 description." *Snyder v. Farnam*, 792 F.Supp.2d 712, 721

1 (D.N.J.) 2011). See also, *In re Avandia Marketing*, 581 Fed.
2 App'x 171, 175 (3d. Cir. 2014). In addition, the plaintiff
3 needs to allege a proximate cause and damages. *Miller v.*
4 *Samsung*, 2015 WL 3965608 at *14 (D.N.J. June 29, 2015).

-01:-22 5 Lastly, New Jersey has adopted the notice requirement of the
6 Uniform Commercial Code, meaning that the statutory notice to
7 the seller is a condition precedent to filing a suit for
8 breach of warranty. *Id.* The plaintiff, however, need not be
9 in privity with the defendant in order to state a claim.

-01:-22 10 *Dzielak v. Whirlpool*, 26 F.Supp.3d 304, 322 (D.N.J. 2014).
11 Express warranties are created through "any affirmation of
12 fact or promise made by the seller to the buyer which relates
13 to the goods, and becomes part of the basis of the bargain,
14 creates an express warranty that the goods should conform to
-01:-21 15 the affirmation or promise." N.J.S.A. 12A:2-313(1)(a). No
16 specific language or intent is necessary to create an express
17 warranty. *Id.* See also, *Cipollone v. Liggett*, 893 F.2d 541,
18 574 (3d. Cir. 1990). Ultimately the question of whether a
19 particular representation made by the seller amounts to an
-01:-20 20 express warranty as opposed to mere puffery is normally a
21 question for the trier of fact. *Gladden v. Cadillac*, 83 N.J.
22 320, 325 (1980).

23 In the present matter, Dr. Rutila notes the word
24 "decay" fits within the meaning: "The gradual decline in
-01:-20 25 strength, soundness or prosperity or in degree of excellence

1 or perfection", as set forth in Merriam-Websters Dictionary.
2 By applying this definition, Rutila equates wood decay with
3 wood movement, and because plaintiffs' shingles have cupped or
4 curled, Rutila purports that they have experienced decay. As
-01:-20 5 such, based on Rutila's opinion, plaintiffs assert that
6 Maibec's shingles have decayed.

7 Dr. Goddell notes in his report that decay is
8 defined and is recognized in the industry as a deterioration
9 of wood caused by fungi, typically Basidiomycota, resulting in
-01:-07 10 mass and strength loss of wood. Dr. Goddell notes that the
11 wood decay is caused by a specific fungus that creates enzymes
12 and other metabolites that will break down or deconstruct the
13 natural polymers present in the wood. Decay occurs when the
14 wood moisture content exceeds what is known as the fiber
-01:-07 15 saturation point, from which the content of the wood remains
16 high enough for long enough period, then the fungal and
17 inoculum can land on the wood and early stage infection can
18 result if conditions are appropriate; where as, if wood is not
19 protected by natural extractives and synthetic biocidal
-01:-06 20 treatments. Dr. Goddell further notes that decay does not
21 constitute mold. Goodell states that as opposed to wood
22 decay, cupping, curling and buckling are associated with wood
23 that undergoes different amounts of shrinkage and swelling
24 within the same piece of wood. This type of wood movement is
-01:-05 25 associated with changes in moisture content of the wood as

1 wetting and drying occur on or as changes in humidity occur.

2 Lastly, there is Mr. Kalas, and Mr. Kalas stated
3 that the shingles from the Stern and the McCarthy houses show
4 movement, wood movement of shingles, and such movement was due
-01:-04 5 to improper installation, environmental factors and/or extreme
6 weather conditions. In the *PMW* case, the court in
7 Pennsylvania construed the term "hidden decay", which was not
8 specifically defined in an insurance policy. The court noted
9 the words of common usage in the insurance policy are to be
-01:-03 10 construed in their natural plain and ordinary sense, and the
11 court may inform its understanding of these terms by
12 considering dictionary definitions. See, *PMW v. State Farm*,
13 2013 WL 3993759 at *5 (W.D. Pa. Aug. 2013). In that case, the
14 court noted the term decay means decomposition, a process of
-01:-02 15 wasting away, a decline in quality. *Id.* Decay has also been
16 defined as "wasting or wearing away, disintegration,
17 dilapidation, ruinous condition." *Id.* Lastly, the court in
18 *PMW* noted that there was sufficient evidence in the record
19 that *PMW* had met its burden to show that the collapse was
-01:-02 20 caused by decay on the rear foundation wall.

21 Similarly, in the *Buczek* case, the Third Circuit
22 noted decay to be synonymous with "rot" and "deterioration".
23 *Buczek v. Continental*, 378 F.3d 284, 287 (3d. Cir. 2004).
24 Within that case it was noted that "wood samples from the
-01:-01 25 pilings were analyzed and it was determined that

1 wood-destroying fungi and anaerobic bacteria were present in
2 the pilings in addition to brown rot and decay." See also,
3 *Lansa v. Universal*, 302 U.S. 556, 569 (1938).

01:40 4 As noted above in the *Daubert* motions, Rutila and
5 Kalas' testimony is excluded construing certain areas, and it
6 should also be excluded in this matter construing the word
7 decay.

01:41 8 Assuming arguendo if the expert testimonies of
9 Rutila and Kalas were admitted, the Court would still construe
10 the term "decay" as noted in Maibec's warranty according to
11 its plain language in view of the definitions provided by the
12 expert reports, as well as the cases cited above. The term
13 "decay" is construed to mean rot or decomposition through the
14 action of bacteria and fungi. The Court does not find
01:41 15 plaintiffs' position persuasive that "decay" means wood
16 movement, because such definition is contradictory to the
17 plain meaning of the term. Decay or rot is often associated,
18 especially in the wood industry, to mean decomposition, a
19 process of wasting away, declining in quality. See, *PMW* 2013
01:42 20 WL 3993759 *5. In looking at the Canadian standards for
21 shingles, it's noted that cupping is defined as deforming of
22 the face of the shingle across the width of the shingle, and
23 curling as deforming of the shingle across the length of the
24 shingle. These terms as defined by the CSA and noticed in
01:44 25 Rutila's report do not pertain to decay, rot or decomposition;

01:44 1 the aforementioned term pertain to the deformation or
2 deconfiguration of the wood shingles which can be attributed
3 to other factors such as improper installation or affixing of
4 the shingles or external environmental conditions, and not
5 necessarily to decay or rotting of the shingle itself.

01:45 6 Generally, decay is commonly understood or associated with,
7 for example, fruit decay or tooth decay, where the inside of
8 the fruit (apple) or a tooth turns brown and begins rotting or
9 decomposing. With respect to wood decay, Dr. Goddell presents
10 several pictures which are attached to his opinion, and they
11 accurately depict the decay or the rotting of brown and white
12 wood respectively. Accordingly, the Court notes that the term
13 decay is construed to mean rot or decomposition through the
14 action of bacteria or fungi.

01:45 15 Class Certification.

01:45 16 The class action is an exception to the usual role
17 that litigation is conducted by and on behalf of an individual
18 as the main parties only. *Comcast v. Behrend*, 133 S.Ct. 426,
19 432 (2013). In order to meet the requirements of the class
01:45 20 exception, a party moving to represent a class "must
21 affirmatively demonstrate his compliance with Rule 23."
22 *Wal-Mart Stores v. Dukes*, 131 S.Ct. 2541, 2551-2552 (2011).
23 The Third Circuit has emphasized that actual, not presumed,
24 performance with Rule 23 requirements is essential. *Marcus v.*
01:46 25 *BMW*, 687 F.3d 583, 591 (3d. Cir. 2012). The party seeking

1 certification bears the burden of establishing each element of
2 Rule 23 by a preponderance of the evidence.

3 A party seeking certification bears the burden of
4 proving that the proposed class satisfies the requirements of
5 Rule 23. *Johnson v. HBO*, 265 F.3d 178, 183-84 (3d. Cir.

6 2001). To meet this burden the plaintiff must satisfy the
7 four prerequisites of Rule 23(a) and show that the action can
8 be maintained under at least one of the three subsections of
9 Rule 23(b). These four requirements are referred to as

10 numerosity, commonality, typicality and adequate

11 representation. These requirements are meant to assure that

12 both the class action treatment is necessary and efficient,

13 and that it is fair to the absentees under the particular

14 circumstances. *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d. Cir.

15 1994). In the Third Circuit we look beyond the pleadings at

16 the class certification stage of litigation. "In reviewing a

17 motion for class certification a preliminary inquiry into the

18 merits is sometimes necessary to determine whether the alleged

19 claims can be properly resolved as a class action." *Newton v.*

20 *Merrill Lynch*, 259 F.3d 154, 168 (3d. Cir. 2001.) Class

21 certification is proper only after rigor analysis. *In re*

22 *Hydrogen Peroxide*, 552 F.3d 305, 309 (3d. Cir. 2008). In

23 assessing whether the plaintiff has satisfied its burden, a

24 district court "cannot be bashful", and must resolve all

25 factual and legal disputes relevant to class certification,

01:49 1 including disputes touching on the elements of the causes of
2 action and the merits of the case. *Gonzalez v. Corning*, 317
3 F.R.D. 443, 489. The Third Circuit recently set forth a
4 district court's duty in ruling on motions to certify a class
5 by stating that "it is now clear that the district court must:
6 (1) conduct a rigorous analysis; (2) review all avenues of
7 inquiry in which it may have doubts; (3) be satisfied; (4)
8 make a definitive determination on the requirements of Rule
9 23; or even (5) require the plaintiff demonstrate actual not
01:49 10 presumed conformance with Rule 23 requirements." *Id.*
11 Plaintiffs, however, need not establish validity of their
12 claims at the class certification stage.

13 Here, the Court notes plaintiffs have moved to
14 certify a class under six different grounds. These proposed
01:50 15 classes include: Breach of express warranty; written express
16 warranty under 23(b) (3); breach of express warranty
17 advertising statements under class 23(b) (3); breach of implied
18 warranty on merchantability under 23(b) (3); breach of contract
19 under 23(b) (3); claims under the General Business Law, Section
01:50 20 349 under 23(b) (2); and limited issues class under 23(c) (4).
21 During oral argument plaintiffs' counsel indicated that
22 determining the meaning of decay is a cornerstone to
23 plaintiffs' certification claim. Here, as noted above, the
24 Court construed decay to mean rot or decomposition through the
01:53 25 action of bacteria and fungi. This definition is similar to

1 the one proposed by Maibec and contrary to plaintiffs'
2 position that decay is cupping curling or lifting, i.e., wood
3 movement. Even assuming that Rutila and Kalas were allowed to
4 provide their expert testimony, the Court would maintain the
01:53 5 same interpretation of decay. That is, wood movement does not
6 equal rot or decomposition. As such, the Court notes that on
7 the basis of the aforementioned interpretation of decay,
8 plaintiffs' proposed class under 23(b)(3), (b)(2) and (c)(4)
9 fail to comply with the Rule 23 requirements. *Wal-Mart*, 131
01:53 10 S.Ct. At 2551-2552.

11 Further, upon a closer review of Maibec's 50 year
12 limited warranty, the Court notes the language of the warranty
13 requires individualized inspections and subjective assessments
14 of each and every shingle, owned or used by every class member
01:54 15 in order to determine whether the class members have a claim
16 under the warranty. For example, Maibec's 50 year warranty
17 states: "Maibec reserves the right to void all warranties if
18 the installation requirements are not respected; (2) purchaser
19 recognizes the product is subject to naturally occurring
01:54 20 variations (contraction/expansion, texture, minor dimensional
21 differences); and (3) Maibec reserves the right to inspect the
22 product prior to any repairs and to conform that the product
23 displays the defect covered by the warranty." The
24 aforementioned language in the warranty raises the issue of
01:55 25 individualized assessment inspections that would prevent the

01:56 1 Court from certifying the class. Assuming arguendo that
2 Maibec's manufacturing process as Dr. Rutila set forth is
3 inadequate, which in turn is placing some defective shingles
4 into the stream of commerce, this argument still fails to pass
5 muster on class certification requirements. The language in
6 Maibec's limited warranty clearly states: "All warranties are
7 void if the installation requirements are not respected;
8 shingles are subject to naturally occurring variations, and
9 Maibec has the right to inspect the shingles to determine that
01:57 10 it displays the defects covered by the warranty." All of
11 these aforementioned condition precedence require
12 individualized assessment and inspection of the shingles to
13 determine whether the Maibec warranty applies. The plaintiffs
14 have not satisfied their burden in establishing how they would
01:57 15 ascertain that all the class members followed the installation
16 requirements when installing the shingles, and that the
17 shingles for all the class members experienced the same
18 naturally occurring variations. See *Marcus v. BMW*, 687 F.3d
19 583, 592-593 (3d. Cir. 2002).

01:57 20 Accordingly, the Court denies plaintiffs' request
21 for class certification under the above six grounds as they
22 have not established each element of Rule 23 by a
23 preponderance of the evidence.

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