

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCKHILL DIVISION**

DAVID and PATRICIA DICKSON,)
on behalf of themselves and all others)
similarly situated,)
)
Plaintiffs,)
)
v.)
)
ATLAS ROOFING CORPORATION,)
)
Defendant.)
_____)

C.A. No.: _____

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiffs, David and Patricia Dickson, by and through undersigned counsel, on behalf of themselves and all other persons and entities similarly situated, sue Defendant, Atlas Roofing Corporation (hereinafter referred to as “Atlas” and/or “Defendant”), and for their Class Action Complaint allege, as follows:

NATURE OF ACTION

1. This is a class action asserting breach of express warranty, breach of implied warranties of merchantability and fitness for a particular purpose, negligence/gross negligence/negligent design, strict products liability, fraudulent concealment, violation of the Magnuson-Moss Warranty Act, unjust enrichment and seeking damages and declaratory relief in connection with defective shingles designed, manufactured, marketed, advertised and sold by Atlas.

2. At all times material hereto, Atlas designed, manufactured, and marketed its Atlas Chalet Shingles (“the Shingles” or (“Atlas’ Shingles”), and represented, marketed, and warranted them to be durable, reliable, free from defects and compliant with ASTM standards appropriate for

use on the homes, residences, buildings, and other structures of Plaintiffs and the Class.

3. In contrast to Atlas' warranties and representations concerning the Shingles, the Shingles are defective and problematic at the time of sale and thereafter. They blister and crack, leading to early granule loss, increased moisture absorption, and otherwise do not perform as expressly warranted and represented and permit other property damage to the other building components and to property on the interior of the house. Nevertheless, Atlas sold and continues to sell Shingles to the public and to make false representations and warranties, despite the defects that will eventually cause consumers enormous property damage and substantial removal and replacement costs.

4. As a result of Atlas' defective Shingles, Plaintiffs and the Class members have suffered and continue to suffer extensive damages, this class action seeks damages, punitive damages, injunctive relief, costs, attorneys' fees, and every other relief available.

INTRODUCTION AND BACKGROUND

5. Atlas designed, manufactured, supplied, and distributed the Shingles. Upon information and belief, Atlas was made aware of the potential for blistering of its Shingles but did nothing to correct the defective design or formulation that resulted in blistering or degradation of the life expectancy of the Shingles, or other defects alleged herein.

6. Atlas' warranties concerning the Shingles, which were widely distributed to building professionals and generally available to the Plaintiffs and the Class at the time of the sale, provided, among other things, that Atlas warrants that the Shingles are free from manufacturing defects, and the warranty applies to inherent manufacturing defects. Plaintiffs and the Class relied upon Atlas' warranties in purchasing the Shingles and the representations contained in said warranties became a basis of the bargain when Plaintiffs and the Class purchased the Shingles.

7. Atlas represented to Plaintiffs and the Class in documents available to the public that its Chalet Shingles would be free from defects for at least 30 years, or that Atlas would remedy the situation. Atlas made this representation before purchase and at the time of purchase via sales brochures and marketing materials discussed herein. Plaintiffs and the Class relied upon this representation and it became a basis of the bargain when Plaintiffs and the Class purchased the Shingles.

8. In addition, Atlas represented and warranted that the Shingles conformed to all applicable building codes and industry standards. It was a part of the basis of the bargain that the Shingles conformed to applicable building codes and industry standards when Plaintiffs and the Class purchased the shingles.

9. Upon information and belief, Atlas discovered that its Shingles were defective, and these defects cause the Shingles to blister, leading to early granule loss, increased moisture absorption, and reduced life-expectancy.

10. In addition, the Shingles are so defectively designed and manufactured that they prematurely fail and cause physical injury to the underlying structures and other property of the Plaintiffs and the Class. Specifically, there is a defect in the design and manufacture that permits blisters to occur because Atlas designed the Shingles to be manufactured in a manner that permits moisture to intrude creating a gas bubble that permits blistering and cracking.

11. The defects present in Atlas' Shingles make the Shingles unfit for their intended use and are so severe that Plaintiff and members of the Class must repair or replace their Shingles sooner than reasonably expected by ordinary consumers who purchase shingles generally or by consumers who purchased Atlas' Shingles.

12. Atlas knew or should have known the building codes in effect in all or substantially all

jurisdictions, and that these building codes included industry standard conformance requirements for shingles within those jurisdictions.

13. Atlas knew or should have known that its shingles did not satisfy industry standards, and as a result, Atlas knew or should have known its shingles failed to satisfy the building codes adopted in all or substantially all jurisdictions in the United States.

14. Atlas also knew or should have known that its shingles were defective in design, were not fit for their ordinary and intended use, were not merchantable, and failed to perform in accordance with the advertisements, marketing materials and warranties disseminated by Atlas or with the reasonable expectations of ordinary consumers such as Plaintiffs and the Class.

15. Indeed, because the Shingles blister, which leads to early granule loss and degradation in life expectancy of the Shingles, the Shingles are neither durable nor suitable for use as a building product.

16. This defective condition is common among the Plaintiff and the Class because the Shingles fail to satisfy the industry standard conformance requirements included in the building codes adopted by all or substantially all jurisdictions in the United States.

17. Thus, Atlas' Shingles have not lived up to the Atlas representations and warranties, and, given the blistering and leaking of and the premature deterioration of the life expectancy of the Shingles that requires unexpected maintenance, wear, and replacement, the Shingles have not proven to be of value when compared to other roofing products.

PARTIES

18. Plaintiffs, David and Patricia Dickson, are citizens and residents of the State of South Carolina and are domiciled at 211 Farris Road, Clover, South Carolina.

19. Plaintiffs' home contains the Shingles. In addition, Plaintiffs purchased additional

Shingles to construct a shed. Plaintiffs timely filed a warranty claim with Atlas, but, as described herein, Atlas failed to properly respond to Plaintiffs' warranty claim.

20. Defendant Atlas Roofing Corporation is a Mississippi corporation with its principal place of business located at 802 Hwy 19 N., Suite 190, Meridian, Mississippi 39301.

21. Atlas holds itself out to both the construction industry and the public at large as being knowledgeable in the design and manufacture of roofing products and as being providers of quality roofing products, including the Shingles that are the subject of this litigation.

22. Atlas claims to be “an industry leader with 17 plants in North America and worldwide product distribution”¹ and represents that its roofing products “are designed to give our customers value, design and long lasting quality.”

JURISDICTION AND VENUE

23. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d)(2) (diversity jurisdiction) and the Class Action Fairness Act, in that (i) there is complete diversity (Plaintiffs are citizens of South Carolina and Defendant is domiciled and incorporated in Mississippi and maintains its principal place of business in Mississippi, (ii) the amount in controversy exceeds \$5,000,000.00 (Five Million Dollars) exclusive of interests and costs, and (iii) there are 100 or more members of the proposed Plaintiff class.

24. This Court also has subject matter jurisdiction over this class action pursuant to 28 U.S.C. § 1332(a) because the Plaintiffs and Atlas are of diverse citizenship and the matter in controversy exceeds seventy-five thousand dollars (\$75,000.00) exclusive of interest and costs.

25. Defendants conduct substantial business in South Carolina, including the sale and distribution of the Shingles in South Carolina, and have sufficient contacts with South Carolina or

¹ http://www.atlasroofing.com/general2.php?section_url=141 (May 20, 2013)

otherwise intentionally avail themselves of the laws and markets of South Carolina, so as to sustain this Court's jurisdiction over Defendant.

26. Venue lies in this District, pursuant to 28 U.S.C. §1391, because Plaintiffs reside in this Judicial District, and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this Judicial District. In addition, Atlas does business and/or transacts business in this Judicial District, and therefore, is subject to personal jurisdiction in this Judicial District and resides here for venue purposes.

27. Furthermore, as a result of Atlas' manufacturing, marketing, distributing, promoting, and/or selling, either directly or indirectly through third parties or related entities, the Shingles to purchasers throughout South Carolina, including Plaintiffs, Atlas obtained the benefits of the laws of South Carolina and profited from South Carolina commerce.

28. Atlas conducted systematic and continuous business activities in and throughout the State of South Carolina and otherwise intentionally availed itself of the markets of the State of South Carolina through the promotion and marketing of its business to consumers in South Carolina, including Plaintiffs.

CLASS ACTION ALLEGATIONS

29. Plaintiffs bring this class action pursuant to Rule 23 of Federal Rule of Civil Procedure, and case law thereunder on behalf of themselves and all others similarly situated, with the Class defined as follows:

DAMAGES CLASS:

All persons and entities that have owned, own, or acquired homes, residences, buildings, or other structures physically located in the State of South Carolina on which Atlas Chalet Shingles are or have been installed and which have blistered

and/or cracked or are in the process of blistering and/or cracking.

DECLARATORY RELIEF CLASS:

All persons and entities that own homes, residences, buildings, or other structures physically located in the State of South Carolina on which Atlas Chalet Shingles are or have been installed and which have not blistered and/or cracked.

Excluded from the Class are: (a) any Judge or Magistrate presiding over this action and members of their families; (b) Atlas and any entity in which Atlas has a controlling interest or which has a controlling interest in Atlas and its legal representatives, assigns and successors of Atlas; and (c) all persons who properly execute and file a timely request for exclusion from the Class.

30. *Numerosity:* The Class is composed of a thousand or more persons geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical. Moreover, upon information and belief, the Class is ascertainable and identifiable from Atlas' records or identifying marks on the Shingles.

31. *Commonality:* The critical question of law and fact common to the Plaintiff Class that will materially advance the litigation is whether the Shingles are inherently defective, contrary to the expectations imparted by Atlas through its representations and omissions.

32. Furthermore, other questions of law and fact common to the Class that exist as to all members of the Class and predominate over any questions affecting only individual members of the Class include the following:

- a. Whether the Shingles have not or will not perform in accordance with the reasonable expectations of ordinary consumers;
- b. Whether the Shingles conform to the applicable building code and/or relevant standards;
- c. Whether Atlas knew or should have known of the defect;

- d. Whether Atlas concealed from consumers and/or failed to disclose to consumers the defect;
- e. Whether Atlas failed to provide adequate installation instructions;
- f. Whether Atlas' express warranty fails of its essential purpose;
- g. Whether Atlas' limitations on its express warranty are unconscionable;
- h. Whether Atlas failed to properly disclaim any limitation to pay for installation of replacement Shingles;
- i. Whether Atlas failed to warn of potential defects in its product or omitted critical information regarding defects in its product in its marketing, sales and installation materials;
- j. Whether Atlas breached implied warranties of merchantability and fitness for a particular purpose;
- k. Whether Plaintiffs and the Class are entitled to compensatory damages, including, among other things: (i) compensation for all out-of-pocket monies expended by members of the Class for replacement of the Shingles and/or installation costs; (ii) the failure of consideration in connection with and/or difference in value arising out of the variance between the Shingles as warranted and the Shingles containing the defect; and (iii) the diminution of resale value of the residences and buildings resulting from the defect in the Shingles;
- l. Whether Plaintiffs and the Class are entitled to all costs associated with replacement of their defective Shingles with non-defective shingles;
- m. Whether Plaintiffs and the Class are entitled to restitution and/or disgorgement;
- n. Whether Plaintiffs and the Class are entitled to specific performance of the warranty;

33. *Typicality*: Plaintiffs' claims are typical of the claims of the members of the Class, as all such claims arise out of Atlas' conduct in designing, manufacturing, marketing, advertising, warranting and selling the defective Shingles and Atlas' conduct in concealing the defect in the Shingles to owners, contractors, developers, and suppliers.

34. *Adequate Representation*: Plaintiffs will fairly and adequately protect the interests of the members of the Class and have no interests antagonistic to those of the Class. Plaintiffs have

retained counsel experienced in the prosecution of complex class actions, including but not limited to consumer class actions involving, *inter alia*, breach of warranties, product liability and product design defects.

35. *Predominance and Superiority:* This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class members be required to bring separate actions, this Court and/or courts throughout South Carolina would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single court.

COMMON FACTUAL ALLEGATIONS

A. Design and Manufacturing of Atlas' Shingles and Atlas' Warranties

36. Atlas represents to Plaintiffs and the proposed Class, in documents generally available to the public, that its Shingles will last for a specified period of time without problems, or the company would remedy the situation. It also represents that the Shingles meet industry accepted building code and industry standards. Atlas makes these representations before purchase and at the time of purchase via sales brochures, marketing materials (including but not limited to store displays, sales seminars, and training materials), and on the Shingles packaging. These representations became the basis of the bargain when Plaintiffs and Class Members purchased the Shingles, and Plaintiffs and

Class Members would not have purchased the Shingles and would have instead purchased a competitor's shingles, had they known the Shingles did not meet the applicable standards.

37. Atlas also markets and represents that its Shingles are “products that will give your home the curb appeal, lasting protection, and peace of mind needed to shelter your family and protect your investment.”

38. These bold and definitive statements directly contradict the experiences of Plaintiffs and the Class and amount to a substantial misrepresentation of material facts.

39. Atlas provides a limited 30-year warranty that its products will be “free from manufacturing defects”.

40. Atlas also warrants and guarantees that its Shingles conform to all applicable industry standards and building codes such as ASTM D 3018, Type 1; ASTM D 3161, ASTM D 3462 and ASTM E 108. However, the Shingles do not conform to these warranties.

41. In order to comply with the applicable building codes and industry standards represented by Atlas, asphalt shingles are manufactured from a rolled glass fiber felt that is impregnated and coated with an asphaltic material.

42. The asphaltic material used to impregnate, laminate and coat the glass felt is permitted to be compounded with a mineral stabilizer. Glass fibers are permitted to be compounded with the asphalt in addition to, or instead of, the mineral stabilizer. The bottom side of the Shingles is required to be covered with a suitable material such as pulverized sand, talc, or mica to prevent the shingles from sticking together in the package.

43. The weather surface shall be uniform in finish and may be embossed to simulate a grainy texture. The mineral granules shall cover the entire surface and shall be firmly embedded in the asphalt coating. The granules may project into the mat to a limited degree.

44. The finished Shingles are required to be free of visible defects such as holes, edges, blisters, cracks or indentations and should not have excessive moisture.

45. Throughout the design and manufacturing process, blisters can be caused by moisture which creates gas bubbles that flatten and will later expand when exposed to moisture and the sun resulting in blistering and cracks in the Shingles.

46. Atlas' design and manufacturing process of the Shingles permits moisture to intrude into the Shingle which creates a gas bubble that expands when the Shingles are exposed to the sun resulting in cracking and blistering of the Shingles. Due to the defect in Atlas' design and manufacturing of the Shingle, the Shingles do not conform to Atlas' express representations and warranties and do not conform to the applicable building codes or industry standards.

B. Atlas Refused to Notify Customers That Defects and Failures are Associated With Its Shingles.

47. Atlas has received hundreds of warranty claims alleging the same design and/or manufacturing defect that is the subject of this class action. Some of these warranty claims have been improperly rejected, and other of the warranty claims have been settled in a manner not strictly consistent with the warranty terms.

48. Atlas' response to customers' warranty submissions and other reasonable requests for assistance and compensation is woefully inadequate.

49. Specifically, Atlas' response to Plaintiffs' and Class Members' warranty claims are inadequate and unconscionable. For instance, on January 30, 2013, after noticing that the Shingles on their house and porch were cracking, splitting and blistering, Plaintiffs submitted a warranty claim in accordance with Atlas' warranty requirements notifying Atlas of the defects present in the Shingles.

50. On March 14, 2013, Atlas responded to Plaintiffs' warranty claim by denying their

request for warranty coverage. Instead of disclosing that there was a design and manufacturing defect in the Shingles that results in the aforementioned cracking, blistering and splitting, Atlas asserted that there was no manufacturing defect present in the Shingles. Instead, Atlas asserted that the damages Plaintiffs identified in their warranty claim were due to the fact that the Shingles “may have been exposed to hail.”

51. Despite receiving complaints from consumers such as Plaintiffs and other members of the Class regarding the defect in design and manufacturing, Atlas has refused to convey effective notice to consumers concerning the defects associated with the Shingles and refused to fully repair the damage caused by the premature failure(s) of its product. Instead, Atlas has asserted that the defects in the Shingles are due to weather damage and/or installation.

52. The damages suffered by Plaintiffs were a foreseeable result of Atlas’ design and manufacture of a product with the defects discussed herein. Likewise, the manufacturing, production, marketing, distribution, and sale of its defective product are in the complete control of Atlas, and, thus, the defects were foreseeable to Atlas.

53. Atlas has received and continues to receive numerous complaints and claims from homeowners, property owners, developers and installers regarding the failure of Atlas Shingles, and, thus, Atlas knew or should have known that its product was and is defective.

54. Atlas failed to take any steps to notify Plaintiffs and the Class members of the defects in its Shingles. Furthermore, Atlas has failed to take steps to adequately compensate Plaintiffs and the Class in order to make them whole for the damage they have suffered and continue to suffer as a result of the defective Shingles.

55. As a result of the defects and failures alleged herein, Plaintiffs and the Class have suffered actual damages. The Shingles on their homes, residences, buildings, and other structures

have and will continue to fail prematurely compared to the time expected by ordinary consumers, the time marketed by Atlas, and the time warranted by Atlas, resulting in and requiring them to expend large sums of money to repair the damage caused by the defective Shingles and to prevent such damage from continuing.

56. At all relevant times, Atlas had a duty to disclose to Plaintiffs and the Class that its Shingles were and are defective, prone to foreseeable and uniform problems such as the problems described herein, and otherwise were inherently flawed in design such that the Shingles are not reasonably suitable for use as an exterior building material.

57. Since the defects in the Shingles are latent and not detectable until manifestation, Plaintiffs and the Class members were not reasonably able to discover their Shingles were defective until after installation, even with the exercise of due diligence.

58. The Shingles designed, manufactured, produced, marketed, and sold by Atlas are defectively designed and manufactured such that they fail prematurely, causing damage to the property of Plaintiffs and members of the Class and forcing them to repair or replace their Shingles sooner than reasonably expected, marketed, and warranted.

59. Plaintiffs seek to recover for themselves and the Class the costs of repairing the damage to their property and replacing their Shingles. They also seek injunctive relief requiring Atlas to replace the defective Shingles and modify the warranty claims process to uniformly provide relief in accordance with its obligations under the law.

ESTOPPEL FROM PLEADING THE STATUTE OF LIMITATIONS

60. Plaintiffs are within the applicable statute of limitations for the claims presented hereunder because Plaintiffs did not discover the defect, and could not reasonably have discovered the defect. Plaintiffs have brought the warranty claim prior to the expiration of the warranty.

Plaintiffs also assert that this action has been filed within all applicable time frames from the date of initial use or consumption of the Shingles.

61. Defendant is estopped from relying on any statutes of limitation or repose by virtue of their acts of fraudulent concealment, which include Defendant's intentional concealment from Plaintiffs and the general public that their Shingles were defective, while continually marketing the Shingles as a durable and suitable product.

62. Atlas had a duty to disclose that its Shingles were defective, unreliable, and inherently flawed in design and/or manufacture.

63. Plaintiffs and the Class had no knowledge of, and no reasonable way of discovering, the latent defects found in Atlas' Shingles at the time they purchased the product or when the Shingles were installed on their homes, residences, buildings, and other structures.

64. Atlas did not notify, inform, or disclose to Plaintiffs and the Class that there were defects in the Shingles. After discovering the defective nature of the Atlas Shingles, Plaintiffs adequately notified Atlas and participated fully in Defendant's warranty claim process.

65. Furthermore, Atlas representatives fraudulently misrepresented to Plaintiffs and the Class members that the damage they observed was not the result of manufacturing defects. Statements such as these constitute an active effort by Atlas to conceal and misrepresent the true cause of the damage and hide the fact that the product is defective.

66. Because Atlas failed in its duty to notify Plaintiff and Class members that its product was defective and actively attempted to conceal this fact, the statute of limitations should be tolled on Plaintiffs' claims.

COUNT I
BREACH OF EXPRESS WARRANTY

67. Plaintiffs reallege and incorporate each of the preceding allegations as though fully set forth herein.

68. Atlas marketed and sold Shingles into the stream of commerce with the intent that the Shingles would be purchased by Plaintiffs and members of the Class.

69. Through its written warranties, brochures, and marketing materials regarding the durability and quality of the Shingles, Atlas created express warranties that became part of the basis of the bargain with Plaintiffs and the members of the Class.

70. Atlas expressly warranted to Plaintiffs and Class members that the structural integrity of the Shingles purchased by Plaintiffs and Class members was free from defects in materials and workmanship that substantially impair their operation or performance and that they would last at least 30 years.

71. Atlas also expressly represented that the Shingles would conform to all applicable building codes and industry standards.

72. These representations became the basis of the bargain when Plaintiffs and the Class members purchased the Shingles. Plaintiffs and Class members would have purchased Shingles from a competitor of Atlas if it was disclosed that the Shingles did not conform to Atlas' express representations and warranties.

73. Atlas breached its express warranties to Plaintiffs and the Class in that its Shingles did not, and do not, maintain their structural integrity or perform as promised or conform to all applicable building codes and industry standards. Atlas' Shingles blister and have early granule loss, wear pits, increased moisture absorption, premature failure, reduced life expectancy, and otherwise do

not perform as warranted by Defendant.

74. Atlas' warranties fail their essential purpose because they purport to warrant that the Shingles will be free from manufacturer defects for at least 30 years when in fact the Shingles fall far short of the applicable warranty period. To the contrary, due to the blisters in the Shingles, Atlas' Shingles begin failing after only several years' or less use.

75. Moreover, Atlas' warranties are woefully inadequate to repair and replace failed Shingles, let alone reimburse for any damage suffered to the underlying structure due to the inadequate protection provided by the product. The remedies available in Atlas' warranties are limited to such an extent that they do not provide a minimum adequate remedy. Further, the warranty is inadequate because Atlas asserts that the defect is caused by the weather and/or installation.

76. The limitations on remedies and the exclusions in Atlas' warranties are unconscionable and unenforceable.

77. Atlas has denied, failed to pay in full, or failed to respond to warranty claims.

78. As a result of Atlas' breach of its express warranties, Plaintiffs and the Class have suffered actual damages in that they purchased and installed on their homes, residences, buildings, and other structures an exterior Shingle product that is defective and that has failed or is failing prematurely due to blistering, granule loss, and increased moisture absorption problems. This failure has required or is requiring Plaintiff and the Class to incur significant expense in repairing or replacing their Shingles. Replacement is required to prevent on-going and future damage to the underlying structures or interiors of Plaintiff's and Class members' homes and structures.

79. As a direct and proximate result of Atlas' breach of the express warranties, Plaintiffs and Class Members have suffered actual and consequential damages.

COUNT II
BREACH OF IMPLIED WARRANTIES OF MERCHANTABILITY
AND FITNESS FOR A PARTICULAR PURPOSE

80. Plaintiffs reallege and incorporate each of the preceding allegations as though fully set forth herein.

81. Atlas is a designer, manufacturer and supplier of the Shingles and for a number of years, marketed, warranted, distributed, and/or sold the Shingles in South Carolina.

82. Atlas manufactured and sold its Shingles to Plaintiff and the Class members, and, in so doing, impliedly warranted to them that the product was of merchantable quality and fit for its intended use.

83. However, Atlas' Shingles were not of merchantable quality and not fit for intended use when they left the factory due to the defects in the Shingles described herein.

84. The numerous and serious defects described herein make the Shingles unfit and inappropriate for its intended use as a covering for building exteriors.

85. The Shingles are also unfit for their particular purpose. Atlas manufactured and marketed its Shingles for climates with multiple seasons, including rainy weather seasons. Atlas knew, or should have known, that its Shingles would be subjected to varying temperatures and weather conditions, including rain cycles, throughout each year. Due to the increased moisture absorption after the Shingles blister, the Shingles are unfit for their particular purpose.

86. Even after Plaintiffs became aware of the blistering and gave proper notice to Atlas, Atlas failed to provide an adequate remedy.

87. As a result, Atlas breached its implied warranties to Plaintiffs and Class members by producing, manufacturing, distributing and selling them a defective product that was unfit for its intended use and for a particular purpose.

88. Plaintiffs and the Class members suffered and will continue to suffer losses as alleged herein, in an amount to be determined at trial.

89. As a direct and proximate result of Atlas' breach of the express warranties, Plaintiffs and Class Members have suffered actual and consequential damages.

COUNT III
NEGLIGENCE/GROSS NEGLIGENCE/NEGLIGENT DESIGN

90. Plaintiffs reallege and incorporate each of the preceding allegations as though fully set forth herein.

91. At all times material hereto, Atlas designed and manufactured the Shingles.

92. Atlas had a duty to Plaintiff and the Class to exercise reasonable and ordinary care in the formulation, testing, design, manufacture, and marketing of the Shingles either through its own testing or by verifying third-party test results.

93. Atlas had a duty to Plaintiffs and Class Members to ensure that the Shingles complied with all applicable building codes and industry standards.

94. Atlas breached its duty by producing and selling a defective product to Plaintiffs and the Class members.

95. Atlas failed to exercise ordinary and reasonable care in the design and manufacture of the Shingles.

96. As described herein, Atlas' defective Shingles have failed in numerous ways, including blistering, early granule loss, wear pits, increased moisture absorption, premature failure, and reduced life expectancy.

97. Atlas further breached its duty by failing to notify Plaintiff and the Class members of the defects in the Shingles they were purchasing and installing and by failing to take any remedial

action once Atlas was on notice that its product was defective.

98. Atlas knew or should have known that the Shingles were defective, would fail prematurely, were not suitable for use as an exterior Shingles product, and otherwise were not as warranted and represented by Atlas.

99. It was also completely foreseeable to Atlas that Plaintiffs and the Class members would rely upon Atlas' marketing claims of long-term durability and a supposedly inclusive warranty when purchasing Atlas Shingles.

100. As a direct and proximate cause of Atlas' negligence, Plaintiff and the Class have suffered actual damages in that they purchased and installed on their homes, residences, buildings, and other structures an exterior Shingles product that is defective and that fails prematurely due to blistering, early granule loss, wear pits, premature failure, reduced life expectancy, moisture penetration, and other inherent defects. On information and belief, the defect has caused damage to Plaintiffs' and Class members' existing homes, residences, buildings, and other structures, in addition to damage to the Shingles themselves, by allowing moisture to enter through the Shingles. These failures have caused and will continue to cause Plaintiffs and the Class to incur expenses repairing or replacing their Shingles as well as the resultant progressive property damage.

COUNT IV
STRICT PRODUCTS LIABILITY
DESIGN DEFECT, MANUFACTURING DEFECT AND FAILURE TO WARN

101. Plaintiffs reallege and incorporate each of the preceding allegations as though fully set forth herein.

102. At all times relevant to this Complaint, Atlas was engaged in the design, manufacture, and sale of the Shingles and had a statutory duty of care.

103. Atlas breached its duty because the Shingles were defectively designed and posed a substantial likelihood of harm including the risk of blistering, early granule loss, wear pits, increased moisture absorption, premature failure, reduced life expectancy, and deteriorating prematurely, at the time they were sold.

104. Were the design defects known at the time of the manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner.

105. Because Atlas defectively designed the Shingles, the Shingles were unreasonably dangerous to the Plaintiffs' property and to the proposed Class members' properties at the time Atlas sold the Shingles for its intended use on customers' structures.

106. Feasible alternatives existed to make the Shingles safer for intended use at the time of design. Atlas was very knowledgeable about the product and aware that feasible alternatives existed that would maintain the usefulness of the Shingles and eliminate the harm.

107. The defectively designed Shingles reached consumers without substantial or significant changes in the condition from when Atlas sold them. Atlas knew that the Shingles would reach consumers without a substantial or significant change.

108. The defective Shingles caused, among other damages and expense, structural damage and repair and replacement costs.

109. The injuries caused to Plaintiffs and the putative Class as a result of the defective Shingles could and should have been reasonably foreseen by Atlas.

110. Because of Atlas' defective design of the Shingles, Plaintiffs and the putative Class members have been, currently are, and will be damaged in an amount to be determined at trial.

111. Plaintiffs, on behalf of themselves and all others similarly situated, demand judgment against Defendants for compensatory damages for themselves and each member of the Class, for the establishment of the common fund, plus attorney's fees, interest and costs..

COUNT V
FRAUDULENT CONCEALMENT

112. Plaintiffs reallege and incorporate each of the preceding allegations as though fully set forth herein.

113. At all times mentioned herein, Atlas, through its experience, was in a position of superiority to Plaintiffs and the Class Members and as such had a duty and obligation to disclose to Plaintiffs the true facts and their knowledge concerning the Shingles; that is that said product was defective, would prematurely fail, and otherwise were not warranted and represented by Atlas. Atlas made the affirmative representations as set forth in this Complaint to Plaintiffs, the Class, and the general public prior to the dates Plaintiffs purchased the Shingles, while at the same time concealing the material defects described herein. All of these facts were material to consumers' (such as Plaintiffs) purchase decisions.

114. The material facts concealed or not disclosed by Atlas are those which a reasonable person would have considered to be important in deciding whether or not to purchase Shingles.

115. At all times mentioned herein, Atlas intentionally, willfully, and maliciously concealed or suppressed the facts set forth above from Plaintiffs and with the intent to defraud as herein alleged.

116. At all times mentioned herein, Atlas misrepresented that its Shingles met the applicable building codes and industry standards. Further, when it denied Plaintiffs' warranty claim, Atlas misrepresented that the defects in the Shingle were due to "hail" rather than a defect in the

design and manufacturing of the Shingles.

117. At all times mentioned herein, Plaintiffs and members of the Class reasonably relied on Atlas to disclose to those material facts as set forth above. If Atlas had disclosed the above facts to Plaintiffs and Class and they had been aware of said facts, they would have either negotiated additional warranty coverage, negotiated a lower price to reflect the risk or simply avoided the risk all together by purchasing different shingles from one of Atlas' competitors.

118. Atlas continued to conceal the defective nature of its Shingles even after members of the Class began to report problems. Indeed, Atlas continues to cover up and conceal the true nature of the problem. Based on information and belief, Atlas has received thousands of warranty claims concerning its Shingles.

119. As a result of the previous and continued concealment or suppression of the facts set forth above, Plaintiffs and the Class members sustained damages in an amount to be determined at trial.

COUNT VI
VIOLATION OF THE MAGNUSON-MOSS WARRANTY ACT
15 U.S.C. § 2301, ET SEQ. ("MMWA")

120. Plaintiffs reallege and incorporate each of the preceding allegations as though fully set forth herein.

121. The MMWA provides a private right of action by purchasers of consumer products against manufacturers or retailers who, *inter alia*, fail to comply with the terms of an implied or written warranty. 15 U.S.C. § 2310(d)(1). As alleged above, Atlas has failed to comply with the terms of its express and implied warranties with regard to the Shingles that it sold.

122. The Shingles are consumer products, as that term is defined in 15 U.S.C. § 2301(a).

123. Atlas is a warrantor, as that term is defined in 15 U.S.C. § 2301(5).

124. The Plaintiffs and each member of the Classes are consumers, as that term is defined in 15 U.S.C. § 2301(3).

125. The MMWA provides a cause of action for breach of warranty or other violations of the Act. 15 U.S.C. § 2310(d)(1). Atlas has also breached its warranty to provide goods that are free from material defects in workmanship and materials. It also has breached its implied warranty of merchantability, which it cannot disclaim under the MMWA, 15 U.S.C. § 2308(a)(1), by failing to provide merchantable goods. Plaintiffs have suffered damages as a result of Atlas' breaches of express and implied warranties as set forth herein; thus, this action lies. 15 U.S.C. § 2310(d)(1)-(2).

126. Atlas was provided notice of the breach of warranty claims that were raised by Plaintiffs from the sale of the Shingles and afforded a reasonable opportunity to cure, but Atlas never cured its breach which is common to other members of the Class. Once Plaintiffs' representative capacity is determined, however, notice and opportunity to cure on behalf of the Class - through Plaintiffs - can again be provided under 15 U.S.C. § 2310(e).

127. Atlas' warranty disclaimers, exclusions, and limitations were unconscionable because they disclaimed a defect known but not disclosed.

128. In addition, Atlas' written warranty contains terms purportedly limiting its liability relative to defective products. However, these terms appear in the same font and type-size as the rest of the terms of the warranty; they are not bolded; and they are not printed in a contrasting color. In short, they are inconspicuous, and that lack of conspicuousness violates the MMWA. 15 U.S.C. § 2302(a).

129. Atlas' acts and omissions in violation of the MMWA are “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,” and they are unlawful. 15 U.S.C. § 2310(b); 15 U.S.C. § 45(a)(1).

130. Plaintiffs and the Class members have suffered damages as a result of Atlas' breaches of warranty and violations of the MMWA.

131. Additionally, or in the alternative, the MMWA provides for "other legal and equitable" relief where there has been a breach of warranty or failure to abide by other obligations imposed by the MMWA. 15 U.S.C. § 2310(d)(1). Plaintiffs and the Injunctive Relief Class seek declaratory relief relating to the defect alleged herein, the remediation of that defect and its coverage under available express and implied warranties. In addition, Plaintiffs ask that Defendant be enjoined from acting unlawfully as alleged herein, including with respect to its practices aimed at discouraging customers who purchased defective Shingles from seeking the full panoply of remedies available to them.

132. Plaintiffs also seek and an award of costs and expenses, including attorneys' fees, under the MMWA to prevailing consumers in connection with the commencement and prosecution of this action. 15 U.S.C. § 2310(d)(2). Plaintiffs and the prospective class intend to seek such an award, including expert witness costs and other recoverable costs, as prevailing consumers at the conclusion of this lawsuit.

COUNT VII
UNJUST ENRICHMENT

133. Plaintiffs reallege and incorporate each of the preceding allegations as though fully set forth herein.

134. Substantial benefits have been conferred on Defendant by Plaintiffs and the Class and Defendant has knowingly and willingly accepted and appreciated these benefits.

135. Defendant either knew or should have known that the payments rendered by Plaintiffs and the Class were given and received with the expectation that the Shingles would perform

as represented and warranted. For Defendant to retain the benefit of the payments under these circumstances described herein would be inequitable.

136. Defendant's acceptance and retention of these benefits under the circumstances make it inequitable for Defendant to retain the benefits without payment of the value to the Plaintiffs and the Class.

137. Defendant, by the deliberate and fraudulent conduct complained of herein, have been unjustly enriched in a manner that warrants restitution.

138. Plaintiffs and the Class are entitled to recover from Atlas all amounts wrongfully collected and improperly retained by Atlas, plus interest thereon.

139. As a proximate consequence of Defendant's improper conduct, the Plaintiffs and the Class members were injured. Defendant has been unjustly enriched, and in equity, should not be allowed to obtain this benefit.

COUNT VIII
DECLARATORY RELIEF

140. Plaintiffs, individually, and on behalf of all others similarly situated, adopt and incorporate by reference all allegations contained in paragraphs 1 through 143 as though fully set forth herein.

141. Defendants have acted or refused to act on grounds that apply generally to the Declaratory Relief Class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the Class as a whole within the meaning of Fed. R. Civ. P. 23.

142. Plaintiffs seeks a ruling that:

- a. The Shingles has a defect which results in premature failure;
- b. Defendant's warranty fails of its essential purpose;

- c. Certain provisions of Defendant's warranty are void as unconscionable;
- d. Defendant must notify owners of the defect;
- e. Defendant will reassess all prior warranty claims and pay the full costs of repairs and damages; and
- f. Defendant will pay the costs of inspection to determine whether any Class member's Shingles needs replacement.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray for a judgment against Atlas Roofing Corporation as follows:

- a. For an Order certifying the Class, pursuant to Rule 23, appointing Plaintiffs as representatives of the Class, and appointing the law firms representing Plaintiffs as counsel for the Class;
- b. For compensatory damages, and all other damages allowable under the law, sustained by Plaintiffs and the Class;
- c. For equitable and/or injunctive relief;
- d. For an Order declaring all Atlas Chalet Shingles have defects causing them to blister, crack, fail and leak; declaring all Atlas Shingles have a defect in workmanship and material that causes failures; declaring Atlas knew of the defects in its Shingles and that the limitations contained in its purported limited warranties are unenforceable; declaring Atlas shall re-audit and reassess all prior warranty claims on the Shingles, including claims previously denied in whole or in part, where the denial was based on warranty or other grounds; and declaring Atlas shall establish an inspection program and protocol to be communicated to Class members that will require Atlas to inspect, upon request, a Class member's structure to determine whether a Shingle failure is manifest;

e. For an Order declaring that Atlas must account and disgorge for the benefit of the Class all or part of the ill-gotten profits it received from the sale of Atlas materials, or ordering Atlas to make full restitution to Plaintiffs and the members of the Class

f. For payment of costs of suit herein incurred;

g. For both pre-judgment and post-judgment interest at the maximum rate allowable at law on any amounts awarded;

h. For payment of reasonable attorneys' fees and expert fees as may be allowable under applicable law; and

i. For such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury on all claims so triable.

[SIGNATURE PAGE TO FOLLOW]

Associated Local Counsel

By: s/Justin Lucey
Justin Lucey (Fed. ID No. 5613)
Dabny Lynn (Fed. ID No. 11411)
415 Mill Street
Post Office Box 806
Mount Pleasant, SC 29465-0806
T: (843) 849-8400
F: (843) 849-8406
Email: jlucey@lucey-law.com
dlynn@lucey-law.com

Of Counsel to be Admitted Pro Hac Vice

By: s/Jordan L. Chaikin
Jordan L. Chaikin
Florida Bar Number 0878421
PARKER WAICHMAN LLP
3301 Bonita Beach Road, Suite 101
Bonita Springs, Florida 34134
Telephone: 239.390.1000
Facsimile: 239.390.0055
Email: jchaikin@yourlawyer.com

Attorneys for Plaintiff

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Charleston, South Carolina