No. 05-16-00118-CV

In the Court of Appeals
for the Fifth District of Texas

Rmax Operating, LLC,
Plaintiff-Appellant,

v.

GAF Materials Corporation of America,
Defendant-Appellee.

Appeal from the 134th District Court of Dallas County
Honorable Dale Tillery, Judge Presiding

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

Oral argument would help the Court review the important issues presented about implied warranty obligations under the Uniform Commercial Code.

ABBREVIATIONS AND RECORD REFERENCES

Abbreviations

"Rmax" refers to Rmax Operating, LLC.

"GAF" refers to GAF Materials Corporation of America.

Record References

"CR [page number]" refers to the Clerk's Record on the indicated page.

"SCR [page number]" refers to the Supplemental Clerk's Record on the indicated page.

"[volume] RR [page]" refers to the indicated volume and page of the Reporter's Record.

STATEMENT OF THE CASE

Nature of the Case:	GAF purchased insulation from Rmax. Rmax sued GAF for an unpaid balance. (CR 35-36.) GAF counterclaimed, alleging, *inter alia*, that the insulation did not comply with applicable warranties. (CR 16-25.)
Trial Court:	Honorable Dale Tillery 134th District Court Dallas County, Texas
Course of Proceedings and Trial Court's Disposition:	The jury returned its verdict on August 25, 2015. (CR 64-77.) It found that Rmax complied with the parties' Specification Agreement, but did not satisfy the requirements of the implied warranty of merchantability. (CR 66, 68-69.) Each side moved for judgment in its favor. (CR 190-93; 10 RR 6:20.) The trial court entered judgment in favor of GAF for $14,421.04 in actual damages, $493,747.50 in attorneys' fees through trial, and appellate attorneys' fees. (CR 430-33.)

JURISDICTIONAL STATEMENT

Rmax timely appealed from the final judgment below on February 4, 2016, after the denial of its motion for new trial. (CR 438-40.) This Court has jurisdiction over the final judgment of a district court of Dallas County under Tex. Gov't Code §§ 22.201(f) & 22.220(a).

ISSUES PRESENTED

1. ***Scope of warranty liability***. GAF drafted – and GAF and Rmax then signed – a written Specification Agreement to govern GAF's orders of insulation from Rmax. One of those specifications said how flat the insulation had to be. GAF refused to pay Rmax's invoices, claiming problems with the flatness of the insulation, but the jury found that Rmax satisfied the express specification in the agreement about flatness. Did Rmax's compliance with the parties' express Specification Agreement foreclose liability for breach of general, implied UCC warranties?

2. ***Relevant time for warranty liability***. The Texas Supreme Court holds that "[a] plaintiff in an implied warranty of merchantability case has the burden of proving that the goods were defective at the time they left the manufacturer's or seller's possession." *Plas-Tex, Inc. v. US Steel Corp.*, 772 S.W.2d 442, 444 (Tex. 1989). Did the trial court err by not instructing the jury as to this requirement, when GAF introduced no

evidence that the alleged defect was present at that time, and Rmax showed that the product met specifications then?

3. ***Fact of damage.*** After full and proper credit for all payments and offsets, did GAF establish any actual damages?

4. ***Attorneys' fees.*** GAF argued for recovery of its attorneys' fees based on its claim for breach of implied warranty. The Texas Supreme Court treats such claims as arising in tort. Did the trial court err by awarding attorneys' fees on this legal basis? And, did sufficient evidence support the trial court's award of attorneys' fees?

5. ***Rendition.*** If the judgment below is reversed for one or more of the above reasons, should this Court render judgment for Rmax as the prevailing party?

STATEMENT OF FACTS

Rmax is a Dallas-based company that manufactures polyisocyanurate, commonly called "polyiso," insulation. In simplest terms, polyiso insulation is foam insulation poured into sheet form, then faced with either paper or glass-coated facer, and finally cut into specific sizes. (4 RR 11:5-15, 13:4-17.)

In 2008, GAF began purchasing polyiso insulation panels from Rmax. (*See* 6 RR 151:12.) GAF had a "private label" deal with Rmax; Rmax would manufacture insulation for GAF, GAF would put its logo on the insulation, and then GAF would sell the insulation to a GAF customer for construction use. (*See* 5 RR 115:21-25, 116:1.)

In 2010, GAF wrote a list of specifications for Rmax to follow in manufacturing polyiso insulation for GAF. (4 RR 35:19-24; *see also* 11 RR 40-46 [PX 3 at 2-9].) Rmax then accepted GAF's specifications in a written agreement signed by both parties. (11 RR 46 [PX 3 at 9].) GAF intended those written specifications to govern Rmax's manufacture of polyiso roofing insulation for GAF. (4 RR 36:13-15; 5 RR 116:2-5; *see also* 2 RR 155:1-7.) Those

written specifications were the only specifications that Rmax had to follow for the manufacture of polyiso insulation for GAF. (7 RR 162:4-8.)

In other words, GAF required Rmax to manufacture polyiso insulation in accordance with GAF's product specifications – and that was all. (*See* 2 RR 153:12-25, 154:1, 155:20-23.) GAF did not rely on Rmax to select appropriate products for any jobs and Rmax was not involved in designing the roof systems in which Rmax's polyiso insulation would be used. (*See* 2 RR 153:12-25, 154:1; 5 RR 116:17-25, 117:1-12.) In fact, when Rmax manufactured polyiso insulation for GAF, Rmax did so without knowledge of how the products would be used. (2 RR 153:12-25, 154:1.) As Rmax's Chief Executive Officer testified:

> We simply manufacture the board to a specification . . . . But when we sell it to an end user we have no idea what the design of the roof is, or how it's going to be used . . . . We're simply selling a board and they're responsib[le] to do all of the surface prep as well as the design of the roof system.

(2 RR 153:12-15, 154:1.)

Although the specifications agreement contains numerous provisions, the only specification at issue here is the specification for flatness. (4 RR

38:23-25, 39:1.) Rmax and GAF agreed that Rmax would manufacture polyiso insulation boards that complied with the industry standard ASTM C-550. (11 RR 41 [PX 3 at 4].) That standard permits a board to deviate from perfect flatness by an eighth of an inch per board foot, which means that a four foot by six foot polyiso insulation board could lift off of a perfectly flat surface by a quarter of an inch on the four-foot side, and a half of an inch on the six-foot side, and still be considered within product specifications. (11 RR 41 [PX 3 at 4]; *see also* 2 RR 156:12-21; 4 RR 39:16-25.)

In accordance with its specifications, GAF could order either paper-faced polyiso insulation or glass-coated polyiso insulation from Rmax. (4 RR 46:24-25, 47:1-16.) As GAF knew, paper-faced polyiso insulation is not as stable as glass-coated polyiso insulation because the paper facer can absorb moisture, shrink when the moisture dries out, and then pull the foam core up or down with the shrinkage, thereby creating a polyiso insulation board that "cups" or "curls." (11 RR 318 [PX 73 at 2]; *see also* 2 RR 168:15-18; 4 RR 46:2-23.) Even a small amount of moisture, such as ambient humidity, can seep into a paper-faced polyiso insulation board and result in cupping

or curling. (4 RR 46:10-23.) If paper-faced polyiso insulation is used in a construction environment with more water than ambient humidity, then the insulation is even more likely to cup or curl. (5 RR 84:24-25, 85:1; *see also* 5 RR 119:7-21.)

The insulation is also more likely to curl when exposed to high temperatures, such as temperatures over 90°. (*See* 11 RR 691 [PX 81 at 81].) And that likelihood becomes a near-certainty when one side is exposed to sunlight while the other is not, because the exposed side becomes drier than the other, and the resulting force on the board produces curling. (4 RR 88:14-25, 89: 1-15; 5 RR 74:12-25, 84:7-23.)

These properties are why GAF's own guidelines for polyiso insulation use make recommendations intended to keep moisture out of paper-faced polyiso insulation boards. (*See* 11 RR 691 [PX 81 at 81]; 11 RR 693 [PX 81 at 83]) To prevent such cupping or curling GAF could order glass-coated facer (although glass-coated facer is more expensive). (4 RR 46:24-25, 47:1-20.) But Rmax was not responsible for selecting the appropriate products for any job; rather, GAF was responsible for ordering the appropriate products from

Rmax depending on the application and environment, and GAF was responsible for ordering either paper facer or glass coated facer as dictated by GAF's customer. (5 RR 116:24-25, 117:1-12, 122:15-17.)

In April 2012, severe hail damaged the roofs of several buildings in Coppell, Texas. (5 RR 108:3-8.) The buildings' owner, Duke Realty Corp. ("Duke Realty") hired Baker Roofing Company ("Baker") to make repairs to the buildings. (*See* 11 RR 186 [PX 42].) In particular, Duke hired Baker to repair the building located at 635 Freeport Parkway in Coppell. (*See* 11 RR 186 [PX 42].) That building consisted of two main spaces: an office area and a warehouse. (*See* 11 RR 186 [PX 42].) The hail damage to that building was so severe that there were 188 holes in the roof. (5 RR 113:4-7; *see also* 13 RR 846 [PX 389 at 4].)

To repair the 635 Freeport roof, Baker ordered insulation from a distributor, who in turn ordered insulation from GAF. (*See* 5 RR 164:18-25, 165:1-2.) GAF placed orders with Rmax to fulfill Baker's purchase. (11 RR 65 [PX 10].) Rmax then manufactured insulation for GAF in accordance with GAF's specifications and tested the insulation before delivering it to the 635

Freeport building. (3 RR 21:3-5, 4 RR 24:5-18.) That testing showed that the insulation satisfied GAF's specifications when it left Rmax's manufacturing facility. (3 RR 21:6-10; 4 RR 101:12-15; *see also* 12 RR 96-109 [PX 92].)

Carriers began delivering the Rmax-manufactured polyiso insulation to the 635 Freeport building on or about June 19, 2012. (11 RR 323 [PX 75 at 1].) No one from GAF inspected or tested the insulation on delivery. (*See* 4 RR 31:5-11.) And, although GAF provided Baker with specifications for job site storage, no one from GAF witnessed how Baker stored Rmax's insulation before installation. (*See* 7 RR 137:13-25, 138:1-6.)

On June 20, 2016, Baker began installing Rmax's polyiso insulation on the 635 Freeport warehouse roof. (14 RR 196 [PX 409].) Notwithstanding the 188 holes in the roof, Baker elected to leave the majority of the pre-existing roof, remove only the top layer of plastic roof sheeting that was pierced by hail, and then install Rmax's polyiso insulation above the pre-existing layer of paper-faced polyiso insulation. (*See* 12 RR 369 [PX 175].)

On June 28, 2016, eight days after Baker began installing Rmax's polyiso insulation, Baker told GAF that the paper-faced polyiso insulation

was shrinking and curling. (11 RR 257 [PX 56 at 2].) Baker did not, however, reject Rmax's polyiso insulation. (11 RR 257 [PX 56 at 2].) Instead, Baker suggested adding additional fasteners to the polyiso insulation or placing an additional layer of product over the Rmax insulation. (11 RR 257 [PX 56 at 2].) GAF then contacted Rmax about the curling. (4 RR 83:4-8.)

Rmax immediately investigated the curling. (2 RR 162:19-25, 163:1-7.) By examining its testing records, which were for testing performed at the time of manufacture, according to the testing protocols that GAF required, Rmax determined that the insulation was within GAF's specifications when loaded for delivery to the jobsite. (4 RR 84:2-20.) GAF's own initial investigations confirmed these results, as GAF sent a representative to the jobsite on June 28, 2016 who did not report any observations outside of GAF's product specifications. (11 RR 187-196 [PX 43].) Subsequent correspondence from GAF to Baker confirmed GAF's initial opinion that Rmax's polyiso insulation was not curling beyond the acceptable levels as noted in the specifications:

> [I]t appears that the curling of the [Rmax] board has decreased over time and test cuts reveal that the spacing between the

> boards is ¼" or less. GAF requirements as outlined in our EverGuard Specifications Manual states that roof insulation should be butted together with a ¼" maximum space between adjoining boards which follows NRCA guidelines.

(11 RR 288 [PX 67 at 3].)

Baker ultimately completed the roof of the warehouse at 635 Freeport with Rmax's insulation. Rmax's polyiso insulation remains on the roof today, continuing to adequately perform its main function, which is insulating the roof. (2 RR 157:4-8.) Importantly, notwithstanding its complaints, Baker paid GAF—**in full**—for all of the Rmax insulation that Baker installed on the 635 Freeport warehouse roof. (5 RR 164:11-14.)

Baker, however, was unsatisfied with the appearance of the roof due to the curling. (*See* 12 RR 201 [PX 119 at 2].) Baker decided not to use Rmax insulation on the remaining Coppell jobs and in July 2012, GAF began returning insulation to Rmax. (11 RR 87 [PX 19].) Rmax incurred costs to remove, transport, and store the unused insulation. (6 RR 24-25, 149:1-11.) Rmax examined each individual insulation board—thousands of boards—that were returned for damage and sorted the insulation into groups according to how Rmax could re-sell the product, *i.e.*, sellable as "like new"

product, sellable as useable, but not "like new" product, or unsellable and unusable. (11 RR 111 [PX 22].) Unfortunately, because of improper jobsite storage, and because of wear-and-tear associated with moving the insulation, some of the material was unusable. (5 RR 309:15-25, 312:7-14.)

Given GAF and Baker's complaints, Rmax also tested the polyiso insulation that GAF and Baker returned. (4 RR 98:14-17.) The testing confirmed that Rmax's product met GAF's specifications, including the specification for flatness. (2 RR 161;6-12; 4 RR 98:18-20, 101:16-19, 104:19-22; *see also* 13 RR 678-681 [PX 369].)

Rmax also inspected the 635 Freeport warehouse roof in October 2012. (*See* 12 RR 133-135 [PX 98 at 2-4].) During that inspection, Rmax cut open sections of the roof and while it found some evidence of "cupping" or "curling" in those sections, most of the panels revealed no surface alterations or problems. (*See* 12 RR 133-135 [PX 98 at 2-4].) And the few panels that did show evidence of "cupping" or "curling" had measured gaps between installed panels that were within GAF's specifications. (*See* 12 RR 133-134 [PX 98 at 2-3].)

Importantly, although GAF told Baker that Rmax's insulation was within specifications, although Rmax's insulation remained on the 635 Freeport warehouse roof, and although Baker paid GAF in full for that insulation, GAF did not pay Rmax for **any** of the Rmax-manufactured insulation installed on the warehouse. (5 RR 171:9-10.) Similarly, GAF refused to pay Rmax for **any** of the retuned polyiso insulation that was damaged, for the restocking fees for the returned and damaged insulation, or for the fees that Rmax incurred to store the returned and damaged insulation. (6 RR 148:13-25, 149:1-11.)

In August 2012, approximately two months after Baker installed Rmax's insulation, Duke Realty notified Baker that Duke Realty was unhappy with the appearance of the 635 Freeport warehouse roof because Duke Realty was concerned that the appearance of the roof would affect the building's resale value. (*See* 12 RR 201 [PX 119 at 2].) In light of Baker and Duke's dissatisfaction, GAF voluntarily agreed—without notice to Rmax, much less Rmax's approval—to pay Baker for contractor costs and remedial

costs that Baker claimed were associated with Rmax's polyiso insulation. (*See* 12 RR 293-295 [PX 153].)

Notwithstanding GAF's complaints in the underlying lawsuit, GAF continued to order polyiso insulation from Rmax from July 2012 through March 2013. (3 RR 1-7, 24-25, 55:5-12.) GAF paid for much of that insulation, but in 2013 GAF started to allow unpaid invoices to accumulate. (13 RR 795-95 [PX 388 at 2-3].) Then, without warning to Rmax, once $373,844.79 of additional unpaid and unrelated invoices had accumulated, GAF issued an internal directive to stop placing all orders with Rmax effective April 10, 2013. (5 RR 60:2-9; 112 RR 336 [PX 165].)

On April 10, GAF sent Rmax a letter stating that GAF would not pay Rmax for the outstanding invoices (which did not relate to the underlying Coppell job) because GAF was withholding those amounts based on GAF's independent, voluntarily agreement to pay Baker. (11 RR 182 [PX 38 at 2]; 12 RR 320 [PX 159].) GAF declared that it would withhold "$351,108.00 from the outstanding invoices otherwise currently owed by GAF to Rmax." (11 RR 182 [PX 38 at 2].)

At the time of trial, GAF owed Rmax $513,208.08, excluding interest, for unpaid invoices for the polyiso delivered to Coppell, the polyiso installed on the 635 Freeport warehouse roof, and unpaid 2013 invoices that GAF wrongfully "offset" and refused to pay. (*See* 6 RR 148:6-25, 149:1-25.)

At trial, the jury found that Rmax had complied with the relevant specifications, but at the same time, found that Rmax did not comply with unspecified requirements of the UCC's implied warranty of merchantability. (CR 66-69.) Each side moved for judgment in its favor and, after a further evidentiary hearing on attorneys' fees, the district court ultimately ruled for GAF. Rmax's motion for new trial was denied and this appeal followed.

SUMMARY OF THE ARGUMENT

Rmax won at trial and should have had judgment in its favor.

The jury made two findings about liability: (1) Rmax complied with the parties' Specification Agreement, and (2) Rmax did not comply with the implied UCC warranty of merchantability. Under the correct application of the UCC, the jury's finding about the Specification Agreement controls and forecloses liability for breach of implied warranty.

Without a predicate liability finding, GAF cannot recover damages. Moreover, GAF suffered no damage as a matter of law. It offered no evidence of a warranty problem at the time of manufacture, as required by applicable law. Furthermore, GAF had no right of indemnity from Rmax, and GAF voluntarily made the payments that it sought to recover as damages from Rmax.

GAF had no legal basis to recover attorneys' fees. And, it did not establish the amount awarded with sufficient evidence under the controlling legal standards.

The parties never disputed that GAF did not pay for the insulation delivered by Rmax. The parties also never disputed the amount owed to Rmax by GAF. For the unrelated invoices ($373,844.79). Accordingly, this Court may render that amount from GAF, along with Rmax's reasonable and necessary attorneys' fees as the prevailing party.

ARGUMENT

As this Court recently held while reversing a favorable judgment after jury trial on a DTPA warranty claim, a judgment is not supported by legally

sufficient evidence if "a directed verdict would have been proper because a legal principle precludes recovery," and a legally improper theory of a warranty obligation is such a principle. *Varel Int'l Indus., L.P. v. PetroDrillbits Int'l., Inc.*, No. 05-14-01556-CV, 2016 WL 4535779, *4 (Tex. App.—Dallas Aug. 30, 2016, pet. filed) (*applying City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)). Questions of law, such as those raised in this appeal by Rmax, are reviewed de novo. *See, e.g.*, *Goldman v. Olmstead*, 414 S.W.3d 346, 360–61 (Tex. App.–Dallas 2013, pet. denied).

A. The parties' express Specification Agreement forecloses liability for breach of implied warranty.

1. Rmax and GAF entered a comprehensive Specification Agreement.

Rmax and GAF entered a comprehensive Specification Agreement for purchases of insulation by GAF from Rmax. (11 RR 39-46 [PX 3 at 2-9].) That agreement set specifications for the insulation's "Moisture Vapor Transmission," "Water Absorption," and "Flatness," and lets GAF choose insulation that is "faced" (covered on the top and bottom) with either "universal coated glass fiber" or "combination glass fiber/organic felt

reinforced facers." (11 RR 39, 41 [PX 3 at 2, 4]; *see also* 4 RR 37:5-8 ["Q. Is the facer at issue in this case, the glass reinforced facer or the paper facer, one of the facers that's governed by this standard in Exhibit 3? A. Yes, ma'am."].) GAF based its warranty claim on the "Flatness" specification. (4 RR 38:23-25, 39:1 ["Q. Ms. Hill, do you know what standard in the table that we see on Page 4 [of Exhibit 3] is at issue in this lawsuit? A. They're [sic] claim is with regard to the flatness at ASTM C550."]; *see also* 11 RR 41 [PX 3 at 4].)

The Specification Agreement controls all GAF-Rmax dealings, stating: "Products . . . must not deviate from these specifications." (11 RR 43 [PX 3 at 6]; *see also* 4 RR 36:6-15 ["Q. Are these the specifications that govern Rmax's manufacture of product for GAF? A. Yes, ma'am."]; 5 RR 130:1-6[2] ["Q. So Rmax has got – it's locked up in handcuffs. It cannot change anything on this board, the facer, the polyiso and dimensions and the other characteristics that this spec talks about, can't change it because of those handcuffs, correct? A. That's accurate, yes, sir."].) GAF created these specifications. (4 RR 35:19-

[2] Matthew Gimbert, who gave this particular testimony, is a director with GAF and was GAF's Director of Strategic Outsourcing in 2012. (5 RR 172:2-3, 173:2-4.)

25, 36:1-2 ["Q. Who wrote these specifications, Rmax or GAF? A. GAF. Q. Is that GAF's logo and specification number at the top? A. Yes, ma'am."].)

For good business reasons, this specification controls. As Rmax's president explained: "We simply manufacture the board to a specification. . . . But when we sell it to an end user we have no idea what the design of the roof is, how it's going to be used . . . We're simply selling a board and they're responsib[le] to do all of the surface prep as well as the design of the roof system." (2 RR 153:12-15, 154:1.) In other words, Rmax had no idea about the ultimate use of the product. It knew only that a customer, via GAF, wanted to buy product with certain specifications. (2 RR 157:18-23 ["Q. Did Rmax have anything to do with that design? A. We didn't. Q. Did you even know what the design was when . . . they ordered the board feet they wanted to install? A. We did not."].)

2. The comprehensive Specification Agreement controls.

The express Specifications Agreement between Rmax and GAF eliminated the implied warranty of merchantability. The UCC comments explain:

> The situation in which the buyer gives precise and complete specifications to the seller is not explicitly covered in this section, ***but this is a frequent circumstance by which the implied warranties may be excluded***. The warranty of fitness for a particular purpose would not normally arise since in such a situation there is usually no reliance on the seller by the buyer. The warranty of merchantability in such a transaction, however, must be considered in connection with the next section on the cumulation and conflict of warranties. Under paragraph (c) of that section in case of such an inconsistency the implied warranty of merchantability is displaced by the express warranty that the goods will comply with the specifications. Thus, ***where the buyer gives detailed specifications as to the goods, neither of the implied warranties as to quality will normally apply*** to the transaction unless consistent with the specifications.

TEX. BUS. & COMM. CODE § 2.316, comment 9 (emphasis added).

The District of Minnesota applied that comment in the leading recent case, *Marvin Lumber & Cedar Co. v. Sapa Extrusions, Inc*. The plaintiff sued for breach of express and implied warranties, alleging defects in the

defendants' "lineals" – parts used to make aluminum-clad windows and doors. That court reasoned:

> In situations 'where the buyer has taken upon himself the responsibility of furnishing the technical specifications, . . . the buyer is not relying on the seller's skill and judgment. ***If the seller produces goods that conform to the specifications but are nonetheless defective, presumably the buyer's specifications are at fault***, not the seller's skill or judgment. To avoid holding the seller liable under such circumstances, many courts hold that no implied warranties arise.

964 F. Supp. 993, 1005-06 (D. Minn. 2013) (emphasis added). Based on that standard, the court granted summary judgment to the defendant seller:

> In this case, Marvin provided Sapa detailed specifications covering the pretreatment, coating, and testing of its lineals instead of having Sapa choose what the best specifications would be for their use in Marvin's windows and doors. . . . The decision to utilize AAMA's 2605 specifications, for example, was – at least in part – a collaborative effort among Marva, Sapa, and Valspar. But in the end, the decision to provide specifications to Sapa (and which ones) rested with Marvin alone. Marvin may pursue a breach of warranty claim for Sapa's alleged failure to meet its specifications, but ***its decision to provide those specifications precludes any implied warranties that might otherwise have arisen between the parties***.

Id. at 1006 (emphasis added).

The U.S. Court of Appeals for the Fifth Circuit agrees. In *School Supply Service Co. v. J.H. Keeney & Co.* the defendant was required to pay the full

purchase price for several vending machines. The defect at issue – a problem with the coin mechanism – resulted from a design change asked for by the defendant. Citing comment 9, the Fifth Circuit held: "While the UCC, which governs this case, has strengthened the buyer['s] rights, it did not change the common law rule that in order [for] there to be an implied warranty of the sufficiency of a design the seller must be responsible for the design, either by initiation or adoption." 410 F.2d 481, 483 (5th Cir. 1969). This case arose under Florida law, but the statute is the same as Texas's and nothing in the opinion is unique to Florida.

The Northern District of Texas also agrees. The plaintiff in *Momax LLC v. Rockland Corp*. alleged a breach of the implied warranty of merchantability as to bottles of a weight loss product that "began to bulge, leak, wobble and explode while on warehouse and retailer's shelves[.]" No. 3:02-CV-2613-L, 2005 WL 839402, *2 (N.D. Tex. Apr. 11, 2005). Judge Lindsay denied summary judgment to the plaintiff, citing comment 9 and noting fact issues about the scope of the plaintiff's product specifications. *Id.* at *5. His opinion has been widely cited in UCC commentary. *See* CLARK & SMITH, 1

LAW OF PRODUCT WARRANTIES § 5:14.50 (2007) (citing *Momax* and observing: "[S]o far as the specifications are to blame and not the workmanship or materials, the loss should fall on the buyer. . . [W]hen a buyer provides a seller with detailed product specifications, the seller will often be deemed to have rightfully withheld the implied warranties."); *see also* 1 QUINN'S UCC COMMENTARY & LAW DIGEST § 2-316[A][16] (rev'd 2d ed. 2010) (citing *Momax* and observing: "Without the statutory formulations in § 2-316, yet another disclaimer might arise in situations where the buyer has provided the specification for the manufacture of the product in question.")

Other jurisdictions also agree.[3] And so does a leading expert. Professor Larry Garvin of Ohio State's law school – one of the pre-eminent UCC scholars in the nation, with ten years of service as a Commissioner on Uniform State Laws – who summarizes: "The implied warranty of

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[3] *Air Techniques, Inc. v. Calgon Carbon Corp.*, No. 93-1422, 1995 WL 29018, *2 (4th Cir. Jan. 26, 1995); *Hatch v. Trail King Indus., Inc.*, 656 F.3d 59, 63, 70 (1st Cir. 2011); C*umberland Farms, Inc. v. Drehmann Paving & Flooring Co.*, 520 N.E.2d 1321 (Mass. App. 1988), *limited by Commonwealth v. Johnson Insulation,* 682 N.E.2d 1323 (Mass. 1997); *Blockhead, Inc. v. The Plastic Forming Co.*, 402 F. Supp. 1017, 1026 (D. Conn. 1975); *Mohasco Indus., Inc. v. Anderson Halverson Corp.,* 520 P.2d 234 (Nev. 1974).

merchantability is a 'gap filler' to provide a baseline level of protection to a buyer of goods. When sophisticated parties negotiate a customized agreement about specifications, that purpose is no longer served. Comment 9 to section 2-316 of the UCC recognizes this point and also ***supports Rmax's position in this case***." (emphasis added)[4]

Accordingly, when GAF argued below that some other specification should control the parties' relationship, it completely missed the mark. If sophisticated parties chose particular specifications to govern their relationship, then that is the bargain they have struck. In other words, what to ***not*** include in the bargain is every bit as important as what ***to*** include.

And this conclusion – that negotiated, specific specifications control over implied, general ones – comports with three other bodies of Texas law.

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[4] *See also* 1 WHITE, SUMMERS & HILLMAN, UNIFORM COMMERCIAL CODE § 13:16, at 1121 n.1 (6th ed. 2012); ("Where it is the specifications of the buyer that render a product defective, there is no breach of the implied warranty of merchantability."); 18 RICHARD A. LORD, WILLISTON ON CONTRACTS § 52:71 (4th ed. 2015) "[W]where the buyer gives detailed specifications as to the goods, i.e., precise and complete specifications, the implied warranty does not apply. . . . Thus, if the buyer provides the specifications regarding the goods, and the goods are built to those specifications, the buyer may not be able to bring a claim for breach of the implied warranty of merchantability.")

The first is a basic canon for reading statutes, contracts, and pleadings -- that the specific controls over the general. *See, e.g.*, *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 1990) (statutes); *Forbay v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133-34 (Tex. 1994) (contracts); *Monsanto Co. v. Milam*, 494 S.W.2d 534, 536 (Tex. 1973) (pleadings). Consistent with this principle, specific, agreed-upon requirements should control over general, implied ones.

The second is the "contractor defense" in products liability law, in which "[t]he contractor is not subject to liability if the ***specified*** design or material turns out to be insufficient to make the chattel safe for use, unless it is so obviously bad that a competent contractor would realize that there was a grave chance that his product would be dangerously unsafe." RESTATEMENT (SECOND) OF TORTS § 404 comment 1 (1965) (emphasis added). That defense is generally seen as consistent with the UCC's implied warranty for a manufacturer. *See Hatch*, 656 F.3d at 70. Here, that can only happen when particularized specifications prevail over general implied warranties.

The third is uniformity. *See,* TEX. GOV'T CODE § 311.028 ("A uniform act included in a code shall be construed to effect its general purpose to make uniform the law of those states that enact it."). Texas law should comport with national trends and best practices. *See generally* TEX. BUS. & COMM. CODE § 1.103(a)(3) ("This title must be liberally construed and applied to promote its underlying purposes and policies, which [include]: … to make uniform the law among the various jurisdictions."); *Vemex Trading Corp. v. Technology Ventures, Inc.*, 563 Fed. Appx. 318, 326 (5th Cir. 2014) ("Because we have found no Texas authority addressing this issue and because Texas law directs that uniform acts such as the U.C.C. be interpreted to make the law consistent throughout the states that have enacted it, we may look to authority from other jurisdictions . . .").

To be sure, a secondary line of cases requires more than the UCC's plain text, and asks whether the specification affirmatively called for the defect at issue. *See, e.g.*, *Commonwealth* v. *Johnson Insulation*, 682 N.E.2d 1323 (Mass. 1997). But even under that secondary view, the jury's finding about the Specifications Agreement controls.

At trial, GAF claimed that the paper facing around the edges of the insulation retained water, which then led to "cupping" and "curling" of the insulation itself. (*See* 4 RR 114:24-25, 115:1-5 ["Q. And Mr. Halterbaum [of GAF] wrote back that it's happening due to moisture on the facer and the drying on the one side. A. Yes, ma'am. Q. And does that comport with your understanding of what can cause polyiso insulation to cup or curl? A. Yes, ma'am."]) But as detailed above, the Specification Agreement ***that GAF prepared*** allowed either paper or fiberglass facing. *See supra* at 2. And GAF asked for paper facing, knowing full well that paper is more likely to retain water than fiberglass:

> "Q. Ms. Hill, how would water cause a polyiso insulation board to cup or curl?
>
> A. The – this product has – it's paper facer essentially. So paper is very susceptible to absorbing moisture and it doesn't have to be water. It can just be vapor and small amounts of it. And any difference in the moisture between the top and bottom surface and then any heat added in top of that is going to cause one side to dry out faster than the other side because of that unevenness and heat temperature and/or moisture. So when it does that, the paper naturally wants to pull in or shrink. And when it does that, it pulls the foam with it and it curls or cups in

the direction of which the moisture is -- was applied and dried out faster.

Q. Are there any other products that a -- or --that a roofer could order from Rmax that would not be susceptible to cupping or curling the way that paper facer is?

A. Yes, ma'am, specifically in the roofing industry as well we have a product called Ultra Max that has a coated glass facer. It is inorganic so it doesn't have paper in it that would be susceptible to that moisture absorption and then drying out at different rates.

. . .

Q. Will the glass facer curl the way the paper facer will?

A. No, ma'am."

(4 RR 46:10-25, 47:1-16; *see also* 4 RR 132:103 ["I know that coated faced glass iso, the alternative to paper face, is more water-resistant . . . ." [M. Gimbert testimony]).[5]

In other words, GAF holds responsibility for the design problem that led to the alleged defect. *See Rust Eng'g Co. v. Lawrence Pumps, Inc*., 401 F.

[5] In the chain of relationships behind the legal issues in this case, a roofer would order from GAF, who in turn ordered from Rmax. (*See* 5 RR 115:21-25, 116:1; *see also* 5 RR 122:15-17 ["Q. And Rmax doesn't tell anyone what facer to order, correct? A. That's correct sir."].)

Supp. 328, 332-33 (D. Mass. 1975) ("[T]he contract documents, particularly specifications, were substantially under the control of plaintiff . . . ."). GAF – a sophisticated, knowledgeable, leading player in the insulation industry — may not now second-guess Rmax in the guise of an implied legal obligation. The jury's first finding should have controlled and eliminated liability for implied general warranties.

B. GAF had no evidence of a defect at the relevant time.

The Texas Supreme Court makes clear that "[a] plaintiff in an implied warranty of merchantability case has the burden of proving that the goods were defective at the time they left the manufacturer's or seller's possession." *Plas-Tex, Inc. v. US Steel Corp*., 772 S.W.2d 442, 444 (Tex. 1989). This timing requirement plays a vital role in the practical implementation of this liability theory, separating a manufacturer's "duty to place merchantable goods into the stream of commerce" from "how much use and abuse a product suffers at the hands of its owners." *See MAN Engines & Components, Inc. v. Shows*,

434 S.W.3d 132, 139 (Tex. 2014). And in at least three cases, it has been case-dispositive.[6]

But the trial court refused to even instruct the jury about that important aspect of the warranty claim. (8 CR 236 *et seq.* & Court Ex. 1.) And, GAF offered no evidence about it. Indeed, as shown previously, the only relevant evidence on the point in fact showed that the product ***met*** specification at the relevant time. Accordingly, judgment should be rendered for Rmax under a full and correct statement of the law. At a minimum, the case must be remanded for new trial with instruction to focus

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[6] *See Coppock v. Nat'l Seating & Mobility, Inc*., 121 F. Supp.3d 661, 669 (W.D. Tex. 2015) (granting summary judgment on implied warranty claim when the first machine failure did not occur until give months after purchase); *Omni USA, Inc. v. Parker-Hannifin Corp*., 964 F. Supp.2d 805, 837 (S.D. Tex. 2013) (granting summary judgment on implied warranty of merchantability claim when the plaintiff "failed to produce admissible evidence that shows the condition of the gearboxes at the crucial time"); *Fseelasheed v. Church & Dwight Co*., No. 5:11CV80, 2012 WL 262619,*5 (E.D. Tex. Jan. 12, 2012) (granting summary judgment on implied warranty of merchantability claims when "plaintiff presented no evidence regarding the condition of the allegedly defective [good] when it left Defendant's possession"); *cf. McManus v. Fleetwood Enters., Inc*., 320 F.3d 545, (5th Cir. 2003) (affirming class certification when the alleged breach of implied warranty related to a towing hitch placed on every motor home of a certain type).

on the legally relevant time. While the trial court has discretion in how it charges the jury, it has no discretion to apply the law incorrectly.

C. GAF did not prove its alleged damages.

GAF sought recovery of $383,865.00, less the $368,443.96 that GAF admits it already paid itself, for a total recovery of $14,421.04. But GAF failed to account for any amount that GAF was paid for Rmax's polyiso insulation installed on the 635 Freeport Warehouse roof. The evidence at trial proved that GAF was paid—*in full*—for the insulation installed. (5 RR 165:3-5 ["Q. So as to 100 percent of the insulation on 635 Freeport, GAF has been paid? A. I believe as its installed."); 5 RR 273:16-17 ["Q. You've been paid for that product, correct? A. We have, yes."]; 8 RR 203:23-25, 204:1-6 ["Q. You were also paid for the actual insulation that Rmax provided, correct? A. Yes. Q. So the – there is the money that has changed hands actually buying the Rmax insulation from GAF, correct? A. Yes. We paid GAF. Now what their deal is and who they paid at Rmax or did not, I have no personal knowledge of."].) GAF, admittedly, did not pay Rmax for any of the insulation installed on the 635 Freeport Warehouse roof. (5 RR 171:9-10 ["Q. And to this day GAF hasn't

paid Rmax, correct? A. No, sir, that's correct."]; 5 RR 273:18-20 ["Q. You didn't pay us on that product after you have been paid, correct? A. That's accurate."].)

By not paying Rmax for the product installed on the 635 Freeport Warehouse, GAF retained at least $79,903.52. (6 RR 148:6-12.) That $79,903.52 is in excess of the $368,443.96 that GAF admits it paid itself through other invoices. (*See* 6 RR 149:12-25 [testifying to non-payment of $373,844.79, which is $5,400.83 more than GAF admits to withholding].) Thus, in truth, GAF actually withheld or offset at least $448,347.48. That amount is $65,482.48 *more than* what GAF claimed as total damages and the judgment awarded. That portion of the judgment is erroneous.

Two potential counterarguments do not change this result.

First, Rmax owed no indemnity obligation to GAF as to its alleged damages. Because GAF and Rmax exchanged inconsistent forms about indemnity, both of their proposed terms were "knocked out" of their ultimate contract pursuant to the UCC's "battle of the forms" provision. As comment 7 to TEX. BUS & COMM. CODE § 2-207 explains:

> In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. *See* Section 2-204. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule.

Section 2-207(3) in turn states:

> Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree . . .

See Northrop Corp. v. Litronic Indus., 29 F.3d 1173, 1178 (7th Cir. 1994) ("The Uniform Code, as we have said, does not say what the terms of the contract are if the offer and acceptance contain different terms, as distinct from cases in which the acceptance merely contains additional terms to those in the offer. The majority view is that the discrepant terms fall out and are replaced by a suitable UCC gap-filler."). Accordingly, any right of indemnity of GAF from Rmax fell out of the parties' ultimate contract.[7]

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[7] Any appeal to "common law indemnity" does not change this result. That doctrine is all but dead, and does not apply to a purchaser like GAF, capable of dictating its own

Second, GAF's voluntary payment defeats any purported right of recovery. GAF was not under a contractual obligation to pay a dime of its purported damages, all of which involve its reimbursement of its customer for alleged "remediation." Accordingly, they are not compensable as damages against Rmax. *See, e.g.*, *MG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 768 (Tex. 2005) ("[M]oney voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, deception, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability.").

D. GAF is not entitled to recovery of its attorneys' fees.

Recovery of attorneys' fees in Texas must be authorized by statute or contract. Here, GAF's only possible basis for the recovery of fees is its implied warranty claim. But, the Texas Supreme Court characterizes implied warranty claims as arising in ***tort*** rather than in contract. *See, e.g., JCW Elecs.,*

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product specifications. *See Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 819-20 (Tex. 1984) ("Only a vestige of common law indemnity remains. . . . [An] indemnity right survives in products liability cases to protect the innocent retailer in the chain of distribution. This is all that remains of the common law doctrine of indemnity.").

Inc. v. Garza, 257 S.W.3d 701, 704 (Tex. 2008) ("Implied warranties are created by operation of law and are grounded more in tort than in contract."). It recently confirmed that position in its analysis of a case regarding a jury charge error as to an implied warranty claim. *See Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 667-668 (Tex. 1999) ("For breach of an implied warranty a plaintiff may recover only actual damages, but recovery under the DTPA may include statutory damages and attorney fees; in an action for strict liability a plaintiff may recover actual and punitive damages, but not attorney fees.").[8] Therefore, a successful plaintiff on an implied warranty claim cannot recover attorneys' fees under Texas Civil Practices and Remedies Code Chapter 38, which is limited to contract claims.

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[8] *But see Howard Indus., Inc. v. Crown Cork & Seal Co.*, 403 S.W.3d 347, 352 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("Here, Crown sought only the economic damages that it had suffered as a result of the transformer's failure. It sought no other damages. Given the nature of the injury alleged, we conclude that Crown's breach of implied warranty claim was based in contract. Accordingly, we further conclude that it is a claim to which section 38.001(8) applies."). *Howard Industries* does not apply here. GAF pleaded its implied warranty claim separately from its contract claim. (*See* CR 19-21.) Moreover, the damages that GAF sought were not GAF's own economic damages; rather, GAF sought reimbursement for amounts that GAF voluntarily agreed to pay Baker Roofing Company to reimburse it for back charges that Baker allegedly suffered and reroof costs that Baker voluntarily agreed to pay.

E. The award of attorneys' fees to GAF is not supported by legal or factually sufficient evidence.

To review the reasonableness of an attorneys' fees award, the Court must look for evidence of the *Anderson* factors, as testified to by an expert witness. *E.g., McCalla v. Ski River Dev., Inc.*, 239 S.W.3d 374, 381 (Tex. App.—Waco 2007, pet. denied). GAF was not entitled to the amount of attorneys' fees that it sought because those fees were not proportionate to the results it obtained, because GAF did not segregate its fees, and because GAF cannot recover fees for non-legal work.

GAF obtained actual damages of $14,421.04. In sharp contrast, it sought and recovered $501,247.50 in attorneys' fees and a conditional award of $150,000.00 for appellate fees. Those numbers are not remotely proportionate to one another and cannot be sustained. *See Arthur Anderson & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818-19 (Tex. 1997) (holding that one factor to be considered when determining the reasonableness of fees is "the amount involved and the results obtained"); *Waugneux Bldrs., Inc. v. Candlewood Bldrs., Inc.*, 651 S.W.2d 919, 922-23 (Tex. App.–Fort Worth 1983, no writ) ("Attorney's fees, where recoverable, must

be reasonable under the particular circumstances of the case and must bear some reasonable relationship to the amount in controversy.").

Additionally, Chapter 38 does not let a plaintiff recover the attorneys' fees incurred in pursuit of any tort claims. *E.g., AU Pharm., Inc. v. Boston,* 986 S.W.2d 331, 337 (Tex. App.—Texarkana 1999, no pet.). A plaintiff must segregate fees between its contact and non-contractual claims. *E.g., Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006). Although an "exception to this duty to segregate arises when the attorneys' fees rendered are in connection with claims arising out of the same transaction and are so interrelated that their 'prosecution or defense entails proof or denial of essential the same facts,'" the Texas Supreme Court has admonished that this exception should not swallow the basic rule. *Id.* at 311-13 (quoting *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11-12 (Tex. 1991)).

When segregating recoverable attorneys' fees from unrecoverable fees, the trier of fact must look not to whether the facts of the claims are intertwined, but rather to whether the *legal services* advance both recoverable and unrecoverable claims and whether the *legal services* are so intertwined

that the associated fees cannot be segregated. *Id.* at 313-14; *see also A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704, 710 (Tex. 2007). By way of example, the court noted that some legal services, such as disclosures, proof of background facts, and depositions, may be necessary to advance a breach of contract claim regardless of whether a tort claim is also presented. *Id.* at 313. However, the court noted that discrete legal tasks, such as drafting the tort sections of a petition, warrant an opinion regarding segregation. *Id.* at 313.

Here, GAF made no effort to segregate its fees between its breach of contract claim, its breach of warranty claims, and its defense of Rmax's claims, including Rmax's fraud claim. (*See* 8 RR 68-70, 72-73.) A review of GAF's work in this case indicates that GAF's attorneys spent a significant amount of time on GAF's non-contractual claims, namely GAF's breach of warranty claims, and defending Rmax's non-contractual claims, including Rmax's fraud claim. (8 RR exes. 1, 2; *see also* Rebuttal Aff. of Michael Lynn ¶ 17, *in* Supp. CR req'd Dec. 7, 2016.) GAF ultimately went to trial on its breach of implied warranty claims and Rmax proceeded to trial on its fraud claim.

Indeed, from the outset of this case GAF has asserted that its breach of warranty claims were distinct from its breach of contract claim. (*See* CR 19-21.) As the Texas Supreme Court noted in *Tony Gullo Motors,* a plaintiff (or in this case, counter-plaintiff) cannot assert throughout litigation that its contract and tort claims are distinct and then, when seeking fees, then claim that they are inextricably intertwined. 212 S.W.3d at 313.

Finally, to recover fees incurred by legal assistants, including paralegals, GAF must prove that the work performed by them was work that "has traditionally been done by an attorney." *All Seasons Window & Door Mfg., Inc. v. Red Dot Corp*., 181 S.W.3d 490, 504 (Tex. App.—Texarkana 2005, no pet.). GAF must introduce evidence to establish: "(1) the qualifications of the legal assistant to perform the substantive legal work; (2) that the legal assistant performed the substantive legal work under the direction and supervision of an attorney; (3) the nature of the legal work performed; (4) the legal assistant's hourly rate; and (5) the number of hours expended by the legal assistant." *Id.* (reducing an attorneys' fees award by the amount of

the legal assistant's fees when the plaintiff did not introduce evidence other than the legal assistant's hourly rate and the number of hours expended).

Here, like the plaintiff in *All Seasons*, GAF introduced no evidence about the legal assistants and paralegals' qualifications to perform substantive legal work. And GAF did not introduce evidence that the legal assistants and paralegals performed entirely substantive legal work. In fact, a review of the fee statements indicates that the legal assistants and paralegals performed work that *was not* substantive legal work. (*See* Lynn Aff. *supra*.) Accordingly, those fees were not recoverable. The minor adjustment made at the hearing below, *see* 8 CR 71-72, did not overcome these more fundamental issues.

F. Judgment should be rendered for Rmax.

Once the basis for liability by Rmax disappears, only Rmax's damages remain, because the jury found that Rmax delivered product that satisfied the agreed-upon specifications which GAF refused to accept.

Undisputed evidence showed that GAF owes Rmax: (a) $79,903.52 for the Coppell Jobsite; (b) $26,137.27 for returns from the Coppell Jobsite;

(c) $33,322.50 for restocking fees and freight costs in connection with those returns; and (d) $373,844.79 for orders GAF placed with Rmax after the Coppell Jobsite deliveries, which GAF did not pay – all, for a total of $513,208.08. (6 RR 148:2-25, 149:1-25.) And there was no dispute that GAF has not paid those amounts (or, that GAF was paid those amounts). (*See, e.g.*, 5 RR 165:10-12 ["Q. Has [GAF] paid for any of the goods sent back to Rmax? A. No, I don't believe so."], 5 RR 171:9-10 ["And to this day GAF hasn't paid Rmax, correct? A. No, sir, that's correct."], 5 RR 273:21-25, 274:1 ["So you collected from your party that you sold it to on what you have told us is a defective product, but you won't pay us on that product. Is that what your answer is?" A. Yes, based off of the significant cost that GAF had to incur to remedy the situation."].)

Accordingly, this Court should render judgment for Rmax in that amount, reflecting Rmax's direct damages from GAF's breach of contract. *See Hess Die Mold, Inc. v. American Plasti-Plate Corp.*, 653 S.W.2d 927, 929 (Tex. App.—Tyler 1983, no writ) ("Direct damages— are those which naturally and necessarily flow from a wrongful act . . . and are conclusively presumed

to have been foreseen or contemplated by the party as a consequence of [its] breach of contract."). And as the prevailing party on its breach of contract claims, Rmax is also entitled to recovery of its reasonable and necessary attorneys' fees, established as $654,728. (*See* CR 198.)

CONCLUSION

For the foregoing reasons, Rmax respectfully requests that this Court reverse the judgment below, and grant Rmax all consistent relief to which it is justly entitled.

Dated: December 7, 2016

Respectfully submitted,

/s/Michael P. Lynn, P.C .

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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing document on counsel listed below on December 7, 2016:

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the typeface requirements of Tex. R. App. P. 9.4(3) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 7261 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(l).

DATED: December 7, 2016.

/s/ David S. Coale
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4838-2022-7133, v. 1

No. 05-16-00118-CV

In the Court of Appeals
for the Fifth District of Texas

Rmax Operating, LLC,
Plaintiff-Appellant,

v.

GAF Materials Corporation of America,
Defendant-Appellee.

Appeal from the 134th District Court of Dallas County
Honorable Dale Tillery, Judge Presiding

APPENDIX

NO.	DATE	DESCRIPTION	C.R. PAGE NOS.
A	08/25/15	Jury Charge	64-77
B	07/08/15	Final Judgment	430-433
C	11/06/15	Letter from Larry Garvin	429

4838-2022-7133, v. 1

A

ORIGINAL

CAUSE NO. DC-13-04125

RMAX OPERATING LLC	IN THE DISTRICT COURT
VS.	134TH JUDICIAL DISTRICT
GAF MATERIALS CORPORATION OF AMERICA	DALLAS COUNTY, TEXAS

JURY CHARGE

LADIES AND GENTLEMEN OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are included in this Jury Charge, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. I have previously given you a number where others may contact you in case of an emergency.

Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on the evidence admitted in Court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence unless you are told otherwise. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence.

The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. Unless otherwise instructed, the answers to the questions must be based on the decision of at least 10 of the 12 jurors. The same 10 jurors must agree on every answer. Do not agree to be bound by a vote of anything less than 10 jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

DEFINITIONS

"Circumstantial Evidence" A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

"2013 Orders" refers to Rmax's furnishing of ISO insulation to GAF for other job sites in 2013.

"Coppell Project" refers to the roof repair project performed by Baker Roofing at commercial buildings located at 635 Freeport Parkway and 240 Dividend Drive in Coppell, Texas.

"GAF" refers to Building Materials Corporation of America, doing business as GAF.

"Rmax" refers to Rmax Operating, LLC.

"Rmax ISO" refers to the polyisocyanurate roofing insulation that Rmax delivered to the Coppell Project in June 2012.

"Specifications Agreement" refers to the 2010 GAF Specification Agreement for Faced Polyisocyanurate, Specification Number OFP-064, executed by and between Rmax and GAF on December 7, 2010.

JURY QUESTIONS

QUESTION NO. 1:

Did Rmax furnish Rmax ISO to GAF for the Coppell Project that complied with the Specifications Agreement?

Answer "Yes" or "No."

Answer: Yes

QUESTION NO. 2:

Did Rmax furnish Rmax ISO to GAF for the Coppell Project that was merchantable?

You are instructed that implied in every contract for the sale of goods is a warranty that the goods shall be merchantable.

You are further instructed that Goods are "merchantable" if they:

a) pass without objection in the trade under the contract description; and

b) are of fair average quality within the description; and

c) are fit for the ordinary purposes for which such goods are used.

Answer "Yes" or "No."

Answer: No

If you answered "Yes" to Question No. 1 and Question No. 2, answer the following Question. Otherwise, do not answer the following Question.

QUESTION NO. 3:

Did GAF accept Rmax ISO furnished by Rmax for the Coppell Project?

Answer "Yes" or "No."

Answer: _____

Also, in connection with Question No. 3:

You are instructed that if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

1) reject the whole;

2) accept the whole; or

3) accept any commercial unit or units and reject the rest.

You are instructed that acceptance occurs if the buyer:

1) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that it will take or retain the goods in spite of their non-conformity; or

2) fails to make an effective rejection, but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect the goods; or

3) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

You are instructed that rejection of goods must be within a reasonable time after their delivery or tender.

You are instructed that a reasonable time for taking any action depends upon the nature, purpose, and circumstances of that action.

You are instructed that upon rejection of goods, if any, a buyer has a legal duty to reasonably prevent any further loss to the buyer.

You are instructed that the buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it (1) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or (2) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

You are instructed that revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

You are instructed that a buyer who so revokes its acceptance has the same rights and duties with regard to the goods involved as if he had rejected them.

You are instructed that after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller. If the buyer has before rejection taken physical possession of goods, he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them.

You are instructed that the buyer's attempts in good faith to dispose of defective goods where the seller has failed to give instructions within a reasonable time are not to be regarded as acceptance.

You are instructed that a tender or delivery of goods made pursuant to a contract of sale, even though wholly non-conforming, requires affirmative action by the buyer to avoid acceptance. If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept.

You are instructed that upon rejection of goods, if any, a buyer is held only to good faith and good faith conduct is neither acceptance nor conversion nor the basis of an action for damages.

You are instructed that, where the buyer has accepted goods and given notification of breach to the seller, he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

QUESTION NO. 4:

Did Rmax furnish Rmax ISO to GAF for the Coppell Project that failed to comply with the Specifications Agreement?

Answer "Yes" or "No."

Answer: No

If you answered "Yes" to Question No. 4, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 5:

Was Rmax's failure to comply as found by you in Question No. 4 excused?

You are instructed that a party's failure to comply is excused if compliance is waived by the other party.

You are instructed that waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

You are instructed that upon rejection of goods, if any, a buyer has a legal duty to reasonably prevent any further loss to the buyer.

You are instructed that upon rejection of goods, if any, a buyer is held only to good faith and good faith conduct is neither acceptance nor conversion nor the basis of an action for damages.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question No. 4, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 6:

Is GAF estopped from asserting Rmax's failure to comply as found by you in Question No. 4?

You are instructed that estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit.

You are instructed that upon rejection of goods, if any, a buyer has a legal duty to reasonably prevent any further loss to the buyer.

You are instructed that upon rejection of goods, if any, a buyer is held only to good faith and good faith conduct is neither acceptance nor conversion nor the basis of an action for damages.

Answer "Yes" or "No."

Answer: _____

QUESTION NO. 7:

Did Rmax fail to comply with its obligation to furnish Rmax ISO to GAF that was merchantable?

You are instructed that implied in every contract for the sale of goods is a warranty that the goods shall be merchantable.

You are instructed that goods are "merchantable" if they:

a) pass without objection in the trade under the contract description; and

b) are of fair average quality within the description; and

c) are fit for the ordinary purposes for which such goods are used.

Answer "Yes" or "No."

Answer: Yes

If you answered "Yes" to Question No. 7, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 8:

Was Rmax's failure to comply as found by you in Question No. 7 excused?

You are instructed that a party's failure to comply is excused if compliance is waived by the other party.

You are instructed that waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.

You are instructed that upon rejection of goods, if any, a buyer has a legal duty to reasonably prevent any further loss to the buyer.

You are instructed that upon rejection of goods, if any, a buyer is held only to good faith and good faith conduct is neither acceptance nor conversion nor the basis of an action for damages.

Answer "Yes" or "No."

Answer: No

If you answered "Yes" to Question No. 7, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 9:

Is GAF estopped from Rmax's failure to comply as found by you in Question No. 7?

You are instructed that estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. Estoppel applies when it would be unconscionable to allow a party to maintain a position inconsistent with one to which the party acquiesced, or from which the party accepted a benefit.

You are instructed that upon rejection of goods, if any, a buyer has a legal duty to reasonably prevent any further loss to the buyer.

You are instructed that upon rejection of goods, if any, a buyer is held only to good faith and good faith conduct is neither acceptance nor conversion nor the basis of an action for damages.

Answer "Yes" or "No."

Answer: No

If you answered "Yes" to Question Nos. 1, 2, and 3, and "No" to Question Nos. 4 and 7, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 10:

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Rmax for its damages, if any, resulting from the Rmax ISO accepted by GAF as found by you in your answer to Question No. 3?

Consider the following elements of damages, if any, and none other. Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages, if any.

1. The price agreed to between Rmax and GAF for the Rmax ISO delivered to 635 Freeport Parkway that was not returned.

   Answer: $_____

2. The price agreed to between Rmax and GAF for the Rmax ISO delivered to 240 Dividend that was returned and not re-sold by Rmax.

   Answer: $_____

3. The price agreed to between Rmax and GAF, if any, for freight and re-stocking of the returned Rmax ISO from 240 Dividend Drive.

   Answer: $_____

If you answered "No" to Question 1 or 2 or "Yes" to Question 4 or 7, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 11:

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate GAF for its damages, if any, that resulted from Rmax's failure to comply?

You are instructed that, in answering this Question, you are not to consider any amounts relating to the 2013 Orders or any offset by GAF of those amounts.

Consider the following element of damages, if any, and none other. Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages, if any.

1. The commercially reasonable costs incurred by GAF in loading the Rmax ISO for return to Rmax; temporary installation pending receipt of the replacement ISO; unloading the replacement ISO; construction delays on the Coppell Project; and any reasonable expense incident to the delay or other breach.

   Answer: $ 109,770.00

2. The reasonable and necessary costs incurred by GAF in remediating the roof at 635 Freeport Parkway, Coppell, Texas.

Answer: $ 273,095.00

If you answered "No" to Question Nos. 1 or 2 or "Yes" to Question Nos. 4 or 7, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 12:

Did Rmax fail to fully indemnify and reimburse GAF for all damages, losses, and expenses, if any, resulting from Rmax's failure to comply?

Answer "Yes" or "No."

Answer: Yes

If you answered "Yes" to Question No. 12, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 13:

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate GAF for its damages, if any, that resulted from Rmax's failure to comply?

You are instructed that, in answering this Question, you are not to consider any amounts relating to the 2013 Orders or any offset by GAF of those amounts.

Consider the following element of damages, if any, and none other. Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages, if any, for:

a) The commercially reasonable costs incurred by GAF in loading the Rmax ISO for return to Rmax; temporary installation pending receipt of the replacement ISO; unloading the replacement ISO; construction delays on the Coppell Project; and any reasonable expense incident to the delay or other breach.

Answer: $ 109,770.00

b) The reasonable and necessary costs incurred by GAF in remediating the roof at 635 Freeport Parkway, Coppell, Texas

Answer: $ 273,095.00

If you answered "Yes" to Question Nos. 1, 2, and 3 and "No" to Question Nos. 4 and 7, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 14:

Did GAF commit fraud against Rmax?

You are instructed that, in answering this question, you are only to consider the facts and circumstances relating to the 2013 Orders and none other.

You are instructed that fraud occurs when:

a. A party makes a material misrepresentation, and

b. The representation is made with knowledge of its falsity or make recklessly without any knowledge of the truth and as a positive assertion, and

c. The representation is made with the intention that it should induce the other party into entering an agreement; and

d. The other party relies on the misrepresentation and thereby suffers injury.

You are instructed that misrepresentation means a promise of future performance made with an intent, at the time the promise was made, not to perform as promised.

You are instructed that GAF may be liable for fraud because of an act of one of its employees only if the employee was a vice-principal and was acting in the scope of employment. You are instructed that the term "vice-principal" means:

a. A corporate officer; or

b. A person who has authority to employ, direct, and discharge an employee of GAF; or

c. A person to whom GAF has confided the management of the whole or a department or division of the business of GAF.

You are instructed that that the same corporate agent must commit all the elements of fraud before the corporation may be held liable for the fraud.

You are instructed that a party's failure to perform under an agreement is not sufficient, standing alone, to show the party made a promise of future performance with the intent, at the time the promise was made, not to perform as promised. A failure to perform an agreement is a circumstance you may consider with other facts to establish a lack of intent to perform.

You are instructed that when available, the legal right of setoff (also called "offset") allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A.

Answer "Yes" or "No."

Answer: _____

QUESTION NO. 15:

Did GAF have a good-faith belief that it was entitled to exercise the right of offset with respect to the 2013 Orders?

Answer "Yes" or "No."

Answer: Yes

Answer the following Question only if you unanimously answered "Yes" to Question No. 14; otherwise do not answer the following Question.

To answer "Yes" to any part of the following question, your answer must be unanimous. You may answer "No" to the following question only upon a vote of ten or more jurors. Otherwise, you must not answer that part the following question.

QUESTION NO. 16

Do you find by clear and convincing evidence that the harm to Rmax resulted from fraud?

You are instructed that clear and convincing evidence means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

You are instructed that, in answering this question, you are only to consider the facts and circumstances relating to the 2013 Orders and none other.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question No. 14, then answer the following question. Otherwise, do not answer the following question.

QUESTION NO. 17:

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Rmax for its damages, if any, that resulted from such fraud?

Consider the following element of damages, if any, and none other. Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages, if any.

1. The difference, if any, in the value Rmax received from the 2013 Orders and the value it would have received had the 2013 Orders been as represented.

   Answer: $_____

Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:
   a. have the complete charge read aloud if it will be helpful to your deliberations;
   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
   c. give written questions or comments to the bailiff who will give them to the judge;
   d. write down the answers you agree on;
   e. get the signatures for the verdict certificate; and
   f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. You may answer the questions on a vote of 10 jurors. The same 10 jurors must agree on every answer in the charge. This means you may not have one group of 10 jurors agree on one answer and a different group of 10 jurors agree on another answer.

2. If 10 jurors agree on every answer, those 10 jurors sign the verdict.

   If 11 jurors agree on every answer, those 11 jurors sign the verdict.

   If all 12 of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all 12 of you agreeing on some answers, while only 10 or 11 of you agree on other answers. But when you sign the verdict, only those 10 or 11 who agree on every answer will sign the verdict.

4. There are some special instructions before Question No. 16 explaining how to answer Question No. 16. Please follow the instructions.

Do you understand these instructions? If you do not, please tell me now.

JUDGE PRESIDING

Verdict Certificate

Check one:

_____ Our verdict is unanimous. All 12 of us have agreed to each and every answer. The presiding juror has signed the certificate for all 12 of us.

_____ _____

Signature of Presiding Juror **Printed Name of Presiding Juror**

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

✓ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

	SIGNATURE	NAME PRINTED
1.		Rebecca Piroga
2.		Susan E Overbey
3.		Carlos Zuniga
4.		Edward Ralston
5.		Joe Murphy
6.		Phil Stringer
7.		Jaime Marquez
8.		Julio Reyes
9.		Jose C Olvera
10.		Preston Wacker
11.		

Additional Verdict Certificate

I certify that the jury was unanimous in answering the Question No. 16. All twelve of us agreed to each of the answers. The presiding juror has signed the certificate for all twelve of us.

_____ _____

Signature of Presiding Juror Printed Name of Presiding Juror

B

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CAUSE NO. 13-04125

RMAX OPERATING, LLC	§	**IN THE DISTRICT COURT**
	§	
Plaintiff,	§	
	§	
v.	§	**DALLAS COUNTY, TEXAS**
	§	
GAF MATERIALS CORPORATION OF AMERICA,	§	
	§	
Defendant.	§	**134th JUDICIAL DISTRICT**

FINAL JUDGMENT

On August 17, 2015, this case was called for jury trial. Plaintiff/Counter-Defendant Rmax Operating, LLC appeared through counsel and announced ready for trial. Defendant/Counter-Plaintiff Building Materials Corporation of America d/b/a GAF appeared through counsel and announced ready for trial. A panel of twelve qualified jurors was selected, and the case proceeded to trial. The parties concluded evidence on August 24, 2015, when the parties, through their attorneys, announced in open court that they had presented all their evidence, rested, and closed. The Court submitted the case to the jury on August 25, 2015. On August 25, 2015, the jury returned a verdict against Rmax and in favor of GAF. The jury's verdict is expressly incorporated into this Final Judgment for all purposes and by reference.

In its verdict, the jury determined that (1) Rmax did not furnish goods to GAF for the Coppell Project that were merchantable; (2) Rmax failed to comply with its obligation to furnish goods to GAF that were merchantable; (3) Rmax's failure to comply was not excused; (4) GAF was not estopped from asserting Rmax's failure to comply; (5) GAF is entitled to recover $382,865.00 in damages that resulted from Rmax's failure to comply;

(6) Rmax failed to fully indemnify and reimburse GAF for all damages, losses, and expenses resulting from Rmax's failure to comply; (7) GAF is entitled to recover $382,865.00 in damages that resulted from Rmax's failure to fully indemnify GAF; and (8) GAF had a good-faith belief that it was entitled to exercise the right of offset with respect to the 2013 Orders.

After considering the jury's verdict, any motions, responses, or replies, the arguments of counsel, the evidence, offset, GAF's Application for Attorneys' Fees, and the applicable law, the Court finds that (1) Defendant/Counter-Plaintiff GAF's Application for Attorneys' Fees and Motion for Entry of Final Judgment is GRANTED in its entirety, (2) Plaintiff/Counter-Defendant Rmax's post-verdict motions are DENIED in their entirety, and (3) final judgment should be entered in favor of GAF and against Rmax as set forth herein. The Court hereby RENDERS judgment for Defendant/Counter-Plaintiff GAF.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that GAF have and recover from Rmax the amount of $382,865.00 in actual damages, less $368,443.96 in amounts previously offset, for a total recovery to GAF in the amount of $14,421.04.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that GAF have and recover from Rmax the amount of $493,747.50 in reasonable and necessary attorneys' fees up through and including the trial of this cause, with post-judgment interest accruing on that amount at the rate applicable under Texas Finance Code section 304.003 beginning the date this Final Judgment is signed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that GAF have and recover from Rmax the following additional amounts for reasonable and necessary

attorneys' fees conditioned on success on appeal, as follows:

a. $150,000.00 for representation through appeal to the court of appeals, with post-judgment interest accruing on this amount from the date of the notice of appeal to the court of appeals ("Appeal Date") at the rate applicable under Texas Finance Code section 304.003 on the Appeal Date; and

b. $50,000.00 for representation at the petition for review stage in the Texas Supreme Court, with post-judgment interest accruing on this amount from the date the petition for review is filed in the Texas Supreme Court ("Petition Date") at the rate applicable under Texas Finance Code section 304.003 on the Petition Date;

and

c. $75,000.00 for representation at the full briefing on the merits stage and through oral argument and the completion of proceedings in the Texas Supreme Court, with post-judgment interest accruing on this amount from the date full briefing is requested by the Texas Supreme Court ("Briefing Date") at the rate applicable under Texas Finance Code section 304.003 on the Briefing Date.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff/Counter-Defendant Rmax take nothing in this cause by way of any of its claims against Defendant/Counter-Plaintiff GAF.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, in addition to the sums set forth above, GAF have and recover from Rmax all of GAF's taxable costs of court, including post-judgment interest to begin accruing on the date this Final Judgment is signed.

All writs and process for the enforcement and collection of this Final Judgment or the costs of court may issue as necessary.

All relief requested by any party and not expressly awarded herein is hereby DENIED and this Final Judgment finally disposes of all claims and all parties and is appealable.

SIGNED this 13 day of November, 2015.

The Honorable Dale B. Tillery
Judge, 134th Judicial District Court

C

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November 6, 2015

Michael P. Lynn, P.C.
Lynn, Tillotson, Pinker & Cox, LLP
2100 Ross Ave. Suite 2700
Dallas, TX 75201

Re: *Rmax Operating LLC v. GAF Materials Corp. of America*,
No. 13-04125 (134th District Court, Dallas County)

Dear Mr. Lynn:

At your request, I have reviewed the jury verdict in this case, the post-verdict briefing to date, and the parties' Specification Agreement.

As you know, the law of sales under the Uniform Commercial Code is one of my main areas of academic interest. I have served as a Commissioner on Uniform State Laws for ten years, I was a member of the ABA Task Force on the Revision of Article Two, and for some time I was co-author of the annual review of the law of sales published by the ABA's Business Law Section in *Business Lawyer* . My C.V. is attached to this letter.

I agree with the legal position that Rmax has taken about the UCC in this case, and wanted to emphasize Rmax's basic point.

The analysis of the District of Minnesota in *Marvin Lumber & Cedar Co. v. Sapa Extrusions, Inc.* is well-reasoned and, in my view, fundamentally correct. The implied warranty of merchantability is a "gap filler" that provides a basic level of protection to a buyer of goods. When sophisticated parties negotiate a customized agreement with detailed specifications, those specifications are the source of the buyer's warranty claims, not a one-size-fits-all implied warranty. Comment 9 to section 2-316 of the UCC recognizes this point and also supports Rmax's position in this case. Furthermore, Rmax's position is consistent with a large majority of the decisions under the UCC, and it has been the position taken by leading commentators ever since the UCC received most of its enactments.

Sincerely,

Larry Garvin
Lawrence D. Stanley Professor of Law