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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES WILSON, an individual, and JACK WHITE, an individual, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

METALS USA, INC., a Delaware Corporation; and DOES 1-100, inclusive,

Defendants.

CASE NO. 2:12-CV-00568-LKK-DAD

THIRD AMENDED CLASS ACTION COMPLAINT FOR:

1. **BREACH OF EXPRESS WARRANTIES (CAL. CIV. CODE § 1790 *ET SEQ.*);**
2. **BREACH OF EXPRESS WARRANTIES (CAL. COMM. CODE § 2313 *ET SEQ.*);**
3. **VIOLATIONS OF CALIFORNIA CONSUMER LEGAL REMEDIES ACT (CAL. CIV. CODE § 1750 *ET SEQ.*); AND**
4. **VIOLATIONS OF CALIFORNIA UNFAIR COMPETITION LAW (CAL. BUS. & PROF. CODE § 17200).**

DEMAND FOR A JURY TRIAL

Plaintiffs James Wilson, Jack White and Rita White (collectively "Plaintiffs"), on behalf of themselves and all others similarly situated, complain and allege upon, among other things, the investigation made by Plaintiffs by and through their attorneys, as follows:

I.

INTRODUCTION

1. This is a class action against Defendant Metals USA, Inc. ("Defendant Metals USA"), on behalf of Plaintiffs and all similarly situated individuals and entities who own homes or other structures located in the State of California on which Dura-Loc Roofing Systems Limited's ("Dura-Loc") Continental, Shadowline, or Wood Shake stone coated steel roof shingles (the "Tiles") were installed.

2. The present case arises from Dura-Loc's fraudulent transfer of assets to Defendant Metals USA in an attempt to avoid liability for its knowingly defective Tiles and to evade the financial obligations undertaken by it pursuant to the 25 year warranty Dura-Loc issued with the Tiles. Dura-Loc's fraudulent transfer is evidenced by the fact that as early as 1993, it was aware that the Tiles suffered from an inherent design defect as its use of 3M's Colorquartz granules as the surface coating of the Tiles allowed UV rays to penetrate the Tiles which, in turn, caused the bonding material to erode which would inevitably cause the Colorquartz surface granules to separate from the Tiles. As a result of this defect, the Tiles lose their coating, granular texture, and leave the Tiles significantly discolored. Knowing this defect, Dura-Loc sought to avoid its obligations under the express warranties issued with the Tiles by selling its assets to Defendant Metals USA while absconding with profits from the sale to the detriment of warranty holders.

3. Dura-Loc, though, did not perpetrate its fraud on warranty holders alone. To the contrary, Defendant Metals USA assisted Dura-Loc in the perpetration of Dura-Loc's fraud on its warranty holders by and through, among others, its: (i) acquisition of Dura-Loc despite direct knowledge that Dura-Loc had received a significant number of warranty claims alleging granule loss on the Tiles, and knowledge that these claims were increasing each year, and would continue to increase each year, in proportion to Dura-Loc's past sales; (ii) acquisition of Dura-

Loc despite direct knowledge that the Tiles suffered from an inherent defect; (iii) deprivation of monies available to warranty holders by agreeing to monetary settlements with Dura-Loc, and taking substantial amounts of money from, its Principals; (iv) divesting itself of its warranty payment obligations and requiring Dura-Loc to be solely responsible to administer and pay warranty claims despite knowledge that Dura-Loc was not honoring warranty claims; and (v) failure to pay adequate consideration to Dura-Loc so that Dura-Loc had sufficient sums to pay its creditors, and specifically, the warranty holders.

4. Defendant Metals USA is culpable under the fraudulent transfer theory of successor liability and it is both equitable and appropriate to impose liability upon Defendant Metals USA in this action.

II.

JURISDICTION AND VENUE

A. Subject Matter Jurisdiction

5. This action is within the original jurisdiction of this Court by virtue of 28 U.S.C. section 1332(d)(2). Plaintiffs and Defendant are citizens of different states and the amount in controversy of this class action exceeds the sum of $5,000,000, exclusive of interest and costs.

B. Venue

6. Venue is proper in this District under 28 U.S.C. section 1391 (b) and (c). A substantial part of the events and conduct giving rise to the violations of law complained of herein occurred in or emanated from this District. Plaintiffs are domiciled in this District, the wrongs complained of herein originated or emanated from this District, and Defendant Metals USA conducts business with consumers in this District.

III.

PARTIES

A. Plaintiff James Wilson

7. Plaintiff James Wilson ("Plaintiff Wilson") is an individual over the age of eighteen (18) years old and who is and was, at all times mentioned herein, a resident of the State of California.

8. Plaintiff Wilson lives in a single-family home located in Roseville, California. In or about June 2004, Plaintiff Wilson contacted All American Roofing, Inc. ("AAR"), an authorized seller of the Tiles, to select and purchase a new roof for his home. AAR represented to Plaintiff Wilson that the Tiles would be UV resistant and that the Tiles would not deteriorate to the extent that the appearance of the roof was substantially affected for a period of twenty-five (25) years.

9. This representation - that the Tiles would be UV resistant and that the Tiles would not deteriorate to the extent that the appearance of the roof was substantially affected for a period of twenty-five (25) years - was communicated to Plaintiff Wilson in the marketing, advertising, and sales materials which were written, approved, and distributed by Dura-Loc and provided to AAR to market, advertise, and sell the Tiles and was further memorialized in the express written warranty that accompanied the Tiles. *See* Exhibit 'A'.

10. Dura-Loc's representation that the Tiles would be UV resistant and that the Tiles would not deteriorate for twenty-five (25) years was false. Dura-Loc failed to disclose to Plaintiff Wilson that the Tiles are, and were, inherently defective. Specifically, nowhere in its advertising and marketing materials, website, and/or its warranty did Dura-Loc disclose that the Tiles were each defectively designed and manufactured such that the Tiles suffered from an inherent defect known as "degranulation". Degranulation is a process whereby the stone coated portion of a metal shingle becomes loose or detaches from the metal substructure. *See* Exhibit 'B' at MUSA000007 at ¶14. As a result of this degranulation defect, the Tiles inevitably lose their coating, granular texture, and color well in advance of the warranted twenty-five (25) year period. *See* Exhibit 'C'.

11. In or about June 2004, Plaintiff Wilson purchased the Tiles in "Wood Shake" style. Plaintiff Wilson purchased the Tiles as opposed to other roofing tiles that were equally effective but less expensive, in reliance on Dura-Loc's representations, which were memorialized and confirmed in the express written warranty issued by Dura-Loc, that the Tiles would be UV resistant and would not deteriorate for a period of at least twenty-five (25) years after installation. Plaintiff Wilson's reliance was reasonable and justified because Dura-Loc

specifically represented in its advertising, marketing, sales materials, and its express written warranty that the Tiles would be UV resistant and that the Tiles would not deteriorate for a period of at least twenty-five (25) years after installation.

12. Plaintiff Wilson paid money for his Tiles, which he would not have done was it not for the misrepresentations and material omissions by Dura-Loc.

13. In or about June 2011, Plaintiff Wilson noticed, for the first time, that the Tiles installed on his home began to deteriorate with the Tiles losing their stone coating and granular texture, as well as the shedding of their aggregate and acrylic coating. Currently, Plaintiff Wilson's Tiles have lost most of their original color, coating, and texture. *See* Exhibit 'C'.

B. Plaintiff Jack White

14. Plaintiff Jack White and Rita White ("Plaintiff White") is an individual over the age of eighteen (18) years old, and who is and was, at all times mentioned herein, a resident of the State of California.

15. Plaintiff White lives in a single-family home located in Orangevale, California. In or before June 2004, the Plaintiff White contacted AAR, an authorized seller of the Tiles, to select and purchase a new roof for his home. AAR represented to Plaintiff White that the Tiles would be UV resistant and that the Tiles would not deteriorate to the extent that the appearance of the roof was substantially affected for a period of twenty-five (25) years.

16. This representation - that the Tiles would be UV resistant and that the Tiles would not deteriorate to the extent that the appearance of the roof was substantially affected for a period of twenty-five (25) years - was communicated to Plaintiff White in the marketing, advertising, and sales materials which were written, approved, and distributed by Dura-Loc and provided to AAR to market, advertise, and sell the Tiles and was further memorialized in the express written warranty that accompanied the Tiles.

17. Dura-Loc's representation that the Tiles would be UV resistant and that the Tiles would not deteriorate for twenty-five (25) years was false. Dura-Loc failed to disclose to the Whites that the Tiles are, and were, inherently defective. Specifically, nowhere in its advertising and marketing materials, website, and/or its warranty did Dura-Loc disclose that the Tiles were

each defectively designed and manufactured such that the Tiles suffered from an inherent defect known as "degranulation". Degranulation is a process whereby the stone coated portion of a metal shingle becomes loose or detaches from the metal substructure. *See* Exhibit 'B' at MUSA000007 at ¶14. As a result of this degranulation defect, the Tiles inevitably lose their coating, granular texture, and color well in advance of the warranted twenty-five (25) year period.

18. In or before June 2004, Plaintiff White purchased the Tiles in "Wood Shake" style. Plaintiff White purchased the Tiles as opposed to other roofing tiles that were equally effective but less expensive, in reliance on Dura-Loc's representations, which were memorialized and confirmed in the express written warranty issued by Dura-Loc, that the Tiles would be UV resistant and would not deteriorate for a period of at least twenty-five (25) years after installation. Plaintiff White's reliance was reasonable and justified because Dura-Loc specifically represented in its advertising, marketing, sales materials, and its express written warranty that the Tiles would be UV resistant and that the Tiles would not deteriorate for a period of at least twenty-five (25) years after installation.

19. Plaintiff White paid money for his Tiles, which he would not have done was it not for the misrepresentation and material omissions by Dura-Loc.

20. In or about April 2009, Plaintiff White noticed, for the first time, that the Tiles installed on his home began to deteriorate with the Tiles losing their stone coating and granular texture, as well as the shedding of their aggregate and acrylic coating. Currently, Plaintiff White's Tiles have lost most of their original color, coating, and texture.

C. Defendant Metals USA, Inc.

21. Defendant Metals USA, Inc. is a corporation organized under the laws of the State of Delaware with its principal place of business in Florida. At all times mentioned herein, Metals USA did business throughout the State of California, including the Eastern District of California.

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/ / /

D. Doe Defendants

22. Plaintiffs are unaware of the true names, capacities, or basis for liability of Defendants Does 1 through 100, inclusive, and therefore sues said Defendants by their fictitious names. Plaintiffs will amend their complaint to allege their true names, capacities, or basis for liability when the same have been ascertained. Plaintiffs are informed and believe, and on that basis allege, that Defendants Does 1 through 100, inclusive, and each of them, are in the some manner liable to Plaintiffs and/or are proper and necessary parties to this action in light of the relief requested.

E. Aiding and Abetting

23. Plaintiffs are informed and believe, and on that basis allege, that all Defendants, including fictitious Doe Defendants, were at all relevant times acting as actual agents, conspirators, ostensible agents, partner and/or joint venturers and employees of all other Defendants, and on that all acts alleged herein occurred within the course and scope of said agency, employment, partnership, and joint venture, conspiracy or enterprise, and with the express and/or implied permissions, knowledge, consent, authorization and ratification of their Co-Defendants; however, each of these allegations are deemed "alternative" theories whenever doing so would result in a contradiction with the other allegations.

IV.

DURA-LOC'S FRAUDULENT MISREPRESENTATIONS

A. Dura-Loc

24. Dura-Loc was founded in 1984 in Courtland, Ontario, Canada. Since 1984, Allan Reid served as Dura-Loc's President as well as a member of its Board of Directors. Since its formation in 1984 through its sale of its assets to Defendant Metals USA in May of 2006, Dura-Loc was in the business of designing, engineering, developing, manufacturing, marketing, and selling of the Tiles. *See* Exhibit 'D' at ¶14.

25. In the early 1990s, Dura-Loc began an expansion of its business into United States and other world markets. To assist Dura-Loc with its expansion, Dura-Loc utilized the services of Andrew Spriet, founder of the Vytec Corporation, a vinyl siding manufacturer in

London, Ontario with experience in export marketing. Mr. Spriet was also a member of the Board of Directors of Dura-Loc.

26. As of 1997, approximately eighty (80%) percent of Dura-Loc's product was exported to the United States with a majority of the product being sold in California as the threat of fires and earthquakes made Dura-Loc's Tiles more popular.

B. The Warranty and Dura-Loc's Misrepresentations

27. Since at least 1995, Dura-Loc offered a warranty with the Tiles. *See* Exhibit 'E' at MUSA000427. The material terms of the warranty were consistent from July 1, 1995 through May 12, 2006 - the time period covered by this Third Amended Class Action Complaint (the "Class Period"). *See id*; *see also* Exhibit 'F' at 000055-67. Specifically, beginning July 1, 1995 and continuing through May 12, 2006, Dura-Loc offered the following warranty with the Tiles:

> That, for a period of 50 years following proper installation, the Dura-Loc Product will be free of manufacturing defects...
>
> *****
>
> That, for a period of 25 years following proper installation, the surface coating of the Dura-Loc Product will be UV resistant and will not deteriorate to the extent the appearance of the roof is substantially affected... (the "Warranty"). *See* Exhibits 'A'; 'E'; and 'F'.

28. The foregoing Warranty accompanied every Tile sold by Dura-Loc during the Class Period, and while the exact wording and other non-material terms of the Warranty may have moderately changed from year to year, throughout the entire Class Period the material warranties of "free from defect" and "UV resistant" were made by Dura-Loc for each Tile it sold throughout the United States and the State of California. *See* Exhibit 'B' at MUSA000005 at ¶9.

29. In addition to the express warranty, Dura-Loc, in its marketing, advertising, and sales materials provided on its website and to potential purchasers, specifically represented that the Tiles were and would remain UV resistant. Some of these Dura-Loc's representations are as follows:

(a) "Enhancing any home's beauty, the lightweight Dura-Loc roof is resistant to U.V., algae and most air born pollutants and is supported by our 25 year appearance warranty.";

(b) "*Permanent* colour, texture and sound deadening."; and

(c) "[p]rotected with a UV Resistant Coating."

30. Dura-Loc's representation that the Tiles would be UV resistant and be free of manufacturing defects for twenty-five (25) years was false. To the contrary, the Tiles suffered, and continue to suffer, from a defect which causes the Tiles' surface coating, granules, and color to deteriorate, degrade, and ultimately separate from the Tiles upon exposure to UV rays.

31. Dura-Loc, at no time, and by no means, disclosed to Plaintiffs and the Class that the Tiles contained an inherent defect and/or that the Tiles were not UV resistant, despite being under a duty to do so since Dura-Loc's omissions are, and were, directly contrary to its representations regarding the Tiles. Dura-Loc's omission was material because a reasonable consumer would deem an inherent defect that causes the Tiles to lose their granule texture and color important in determining whether to purchase the Tiles.

32. As a result of Dura-Loc's failure to convey these material facts, Dura-Loc fraudulently, unfairly, and unlawfully caused Plaintiffs and the Class to believe that the Tiles would remain UV resistant and free from defect when they were not.

C. The Tiles

33. Dura-Loc designed, engineered, developed, and manufactured the Tiles with surface coating granules manufactured by 3M Company. *See* Exhibit 'G' at MUSA000834; *see also* Exhibit 'H' at MUSA002779 and MUSA002798.

34. The granules used on the Tiles, named "Colorquartz," were translucent and allowed UV rays to penetrate the surface of the Tiles. As early as 1993, 3M Company had informed Dura-Loc that Colorquartz granules should not be used as surfacing coating on roofing products due to its translucent qualities. On January 29, 1993, 3M specifically informed Dura-Loc, through a letter sent to its President Allan Reid entitled "Re: January 28, 1993 telephone conversation related to Colorquartz use on metal roofing material." that:

> ...the primary function of 3M roofing granules is to protect the roofing material from the ultra-violet rays of the sun upon exposure. Base rocks used to produce 3M coloured granules have been selected for their opaque qualities to block uv light, in other words, allowing little or no transmission through the base rock. The 3M Colorquartz product is a quartz base mineral which is not opaque and readily allows light transmission. 3M does not recommend the use of Colorquartz as a surfacing mineral on roofing product. *See* Exhibit 'I' at PLS000009 and

PLS000020, and PLS000042-43.

35. Thereafter, 3M issued a "Technical Bulletin" regarding "Ultraviolet Transmission and Colorquartz Aggregate" which was provided by 3M to all customers utilizing its Colorquartz stone, including Dura-Loc, wherein 3M specifically stated as follows:

> Quartz, the base rock used in Colorquartz aggregate, is a naturally occurring mineral made up of more than 99% silicon dioxide. Quartz is recognized as being largely transparent to ultraviolet light, including sunlight in the 290 to 400 nanometer range, and is employed in scientific instruments for that purpose.
>
> *****
>
> The ceramic coating is designed to be tough and durable. It is formulated with inorganic pigments that retain color under normal use conditions. However, the colored ceramic coating is not designed to modify the light transmission characteristics of the base quartz particle outside the visible spectrum. Hence, Colorquartz aggregate transmits ultraviolet light much like uncoated quartz.
>
> *****
>
> Since Colorquartz aggregate transmits ultraviolet light, it is not suitable for applications that require protection of a substrate material from ultraviolet exposure. One such example is asphalt roofing, where an organic binder must be protected from the sun... *See* Exhibit 'I' at PLS000025 and PLS000017.

36. Since at least January of 1993, Dura-Loc had exclusive knowledge that the Tiles suffered from a defect which caused, and continues to cause, the Tiles' surface coating, granules, and color to deteriorate, degrade, and ultimately separate from the Tiles upon exposure to UV rays. The "3M Technical Bulletin" plainly stated, "Since Colorquartz aggregate transmits ultraviolet light, it is not suitable for applications that require protection of a substrate material from ultraviolet exposure...Suitable materials are in the range of 0 to 20% ultraviolet transmission, with zero being most desirable. Colorquartz... ranges from 50% to 93% ultraviolet transmission..." *See* Exhibit 'I' at PLS000009, PLS000020, PLS000042-43, PLS000025, and PLS000017.

D. The Degranulation Defect

37. Dura-Loc's use of Colorquartz granules resulted in an inherent, common, and absolute defect in the Tiles as its use of Colorquartz granules permitted UV rays to penetrate the surface of the Tiles which, in turn, caused the bonding material used by Dura-Loc to bind the Colorquartz granules to the Tiles to deteriorate, degrade, erode such that the bonding material was incapable of providing sufficient adhesion between the Colorquartz granules and the

substrate metal.

38. The defect, though, does not manifest itself immediately upon installation or even within two (2) or three (3) years after installation; rather, the defect manifests itself after years of exposure to UV rays, i.e., direct sunlight which varies from region to region. However, once the defect manifests itself the result is the same as the UV ray penetration through the Colorquartz surfacing granules causes the bonding material used to adhere the Colorquartz surfacing granules to the metal substrate to erode, dissolve, and/or degrade to the extent the bonding material loses its adhesive qualities thus causing the Colorquartz surfacing granules to become detached from the Tiles. In other words, as a result of the defect, the Colorquartz granules are literally baked off the Tiles upon exposure to the sun, are permanently removed from the Tiles upon normal exposure to weathering elements such as wind and rain, and the Tiles are left with their bare metal undercoating exposed. *See* Exhibit 'C'.

39. Dura-Loc was at all times aware that the "degranulation" defect described in the preceding Paragraph would not manifest itself immediately or even in a matter of several years after installation of the Tiles. Indeed, in 1996, several years after Dura-Loc began manufacturing the Tiles with Colorquartz granules as the surface coating, Dura-Loc made special note of the fact in discussions with 3M, that they had used Colorquartz without incident. *See* Exhibit 'I' at PLS000054. Moreover, Dura-Loc was aware that the defect was most likely to manifest itself in regions in which the Tiles were exposed to constant sunshine, high humidity, and/or exceedingly high temperatures such as: California, Texas, Kentucky, and Florida. Even then, Dura-Loc was aware that the defect would not manifest itself immediately after installation and that, even under the worst conditions, the defect was unlikely to manifest itself for years after installation as evidenced by the average number of years between the Tiles being installed and the date of the customer's warranty claim which was, on average, eight (8) years. *See* Exhibit 'J'.[1]

40. The prevalence of the Tiles' degranulation defect, as well as the time in which the defect manifests itself after installation, is evidenced by complaints from owners of the Tiles throughout the United States, examples of such complaints are as follows:

[1] Exhibit 'J' is Plaintiffs' summary of data as set forth on Exhibit 'K' at MUSA002446.

"dura-loc failures install contractor" **Date created**: 2011-08-13

I am roofing contractor who has installed hundreds of dura-loc roofs over the last few years, 2 years ago the calls started coming in, coating failure after and more coating failure, dura-loc (now Allmet) is total fraud, Brian Cosyns, Al Reid are the owners who sold this product to me, and I truly believed in it, they were very convincing, now they will do nothing to honor their warranties...

"They lied about a 'lifetime' warranty" **Date created**: 2011-05-04

Our DuraLoc roof was installed in 1998 and has lost most of it's aggregate coating. We notice a great deal of granules on the ground after a rainfall. I'm not talking about a few granules here....we're sweeping up about a 1/2 bucketful each rainfall. Most of the roof is down to just red metal now. This is the shoddiest roofing product around and involves the shadiest business practices. It is outright deception to the consumer.

"Dura-Loc (now AllMet) Product Fraud!" **Date created**: 2010-06-28

I too have the stand unacceptable performance experience from the Dura-Loc metal shake shingle finish. After 9 years, my blue-white roof is now mostly red (primer). The installer... is still in business but "really can't do anything short of paying for an entirely new roof". Dura-Loc folded into AllMet, who refuses to honor the Fraud of a 50 year written warrantee for this now defunct shingle finish. B. Madoff isn't the only criminal ripping off the public!

"Condo Assoc President" **Date created**: 2011-04-02

We replaced concrete tiles on 62 houses with duraloc stone coated metal roofs 5 years ago. The granules are now washing off. The company has been sold and their successor seems to have no responsibility to honor the warranty... [2]

41. Moreover, as the Tiles were manufactured with an inherent defect, Dura-Loc was aware that the number of warranty claims alleging loss based upon the Tiles' degranulation defect would increase proportionately with its sales. In other words, as Dura-Loc's sales increased from 2000 to 2001 by 13%, from 2001 to 2002 by 14%, from 2002 to 2003 by 9%, from 2003 to 2004 by 28%, from 2004 to 2005 by 42%, Dura-Loc expected warranty claims eight (8) years after each of these fiscal years to increase proportionately to sales; thus, Dura-Loc expected that the number of warranty claims alleging loss based upon the Tiles' degranulation defect would increase more than 250% in 2008 (from installation occurring on average in 2000) compared to 2013 (from installation occurring on average in 2005). *See* Exhibit 'J' (average time between installation and claim approximately 7.8 years); Exhibit 'L' at MUSA002515.

/ / /

[2] http://www.roofery.com/shingles/reviews/dura-loc/

E. *Darby v. Dura-Loc Roofing Systems, et al.*

42. In 2004, a purchaser of the Tiles in Plano, Texas, Mr. Ted Darby sued Dura-Loc and various other entities alleging that the granular coating of his Tiles was coming off prematurely due to a manufacturing defect. *See* Exhibit 'M' at MUSA 004059-62 at ¶6. Mr. Darby's roof was installed in June of 1996. *Id*. at ¶4.

43. The *Darby* case, however, was not filed against Dura-Loc until Mr. Darby spent two (2) years attempting to have Dura-Loc honor his Warranty. As part of these negotiation efforts, Mr. Darby commissioned, at his own expense, two (2) independent expert reports to determine the cause of the granule loss on the Tiles. The first of these expert reports was written by Joe W. Tomaselli of Joe W. Tomaselli & Associates who opined as follows:

> ... that the relative directional exposure to infrared and ultraviolet light in the intensities experienced in this geographical location explains the granule loss differences exhibited on the various roof slopes of the Darby residence. The degree of granule loss on the south and west roof slopes currently constitutes a safety hazard to a person who would attempt to walk in a vertical direction on either of these slopes. This product quality deficiency is, in our opinion, a clear manufacturing defect. Specifically, the ultraviolet and infrared light resistance of the "clear acrylic" and "acrylic bonder" components of this Dura-Loc product are failing or have failed to perform their intended function. One may offer alternative explanations such as damage caused by storage prior to installation, ambient chemical exposure to pollutants or physical abuse following installation. In each of these circumstances the physical evidence on the roof surface does not support a reason to give credence to any such alternative explanation. *See* Exhibit 'N' at MUSA003756-57.

44. Likewise, and in addition to the report by Mr. Tomaselli, Mr. Darby also had an expert report prepared by Mr. Robert N. Fleishmann, P.E. of Haag Engineering Co. who opined as follows:

> The granules are being lost from normal weathering events with the expansion and contraction of shingles during heating and cooling cycles and even from the impact of rain. It appears the granules had not been applied adequately to withstand normal weather effects. Ridge shingles with the same exposure are not loosing [sic] their granules. In essence, the loss of granule coating is a manufacturing problem and is not hail related.
>
> We found evidence of hail up to 1/16 inch in diameter having fallen at the site. These shingles have a class 4 hail rating and should be able to withstand impact from this size hail. In fact, many rainstorms including raindrops of this size. If hail had caused the loss of granules, there would be circular areas of missing granules where the hailstone impacted. This pattern of granule loss was not observed. There was a general loss of granules, indicating a manufacturing defect

associated with a lack of overall adhesion between the granules and the shingle base. *See* Exhibit 'O' at MUSA003762-63.

45. The reports by Mr. Tomaselli and Mr. Fleishmann were delivered to Dura-Loc on May 19, 2003, over a year before Mr. Darby brought the lawsuit described above. As such, Dura-Loc was on notice in 2003 that the Tiles were defective and became aware that customers were beginning submit warranty claims based on the Tiles' inherent degranulation defect, and were willing take legal action based on the Tiles failure to perform as warranted and Dura-Loc's corresponding refusal to honor its obligations pursuant to the Warranty.

V.

DURA-LOC FRAUDULENTLY TRANSFERRED ITS ASSETS TO ESCAPE LIABILITY FOR ITS CURRENT AND FUTURE WARRANTY OBLIGATIONS

46. Beginning in 2005, Defendant Metals USA began to look for opportunities to expand its existing metal roof business in the eastern half of North America. One of the companies Defendant Metals USA became interested in was Dura-Loc, which was a manufacturer and distributor of roofing products, including stone coated metal roofing systems. *See* Exhibit 'B' at MUSA000004 at ¶7.

47. Ultimately, Defendant Metals USA and Dura-Loc reached an agreement in which Defendant Metals USA agreed to purchase the assets of Dura-Loc. On May 12, 2006, the parties executed the "Agreement for the Purchase of the Assets of Dura-Loc Roofing Systems Limited" (the "APA"). *See* Exhibit 'H'. The material terms of the APA are as follows:

(a) Dura-Loc's assets were purchased by Defendant Metals USA for $9,400,000 (USD) - nearly 1.6 million dollars less than Dura-Loc's total sales for 2005 and nearly 2.1 million dollars less than its projected total sales for 2006. *Compare* Exhibit 'P' and Exhibit 'L' at MUSA002515.

(b) Defendant Metals USA and Dura-Loc agreed to jointly administer the Dura-Loc warranty program following the sale of the assets of Dura-Loc to Defendant Metals USA. The parties further agreed to share jointly "Warranty Costs" arising from customer complaints and warranty claims regarding defective Dura-Loc product going forward, subject to a cost sharing arrangement and other terms and conditions established in the APA. *See* Exhibit 'H' at

MUSA002689 at §§2.9-2.10; Exhibit 'B' at MUSA000005 at ¶10;

(c) "Warranty Costs" was defined broadly in the APA to include the manufacturer's standard costs of replacement product, third party costs for inspection and repair as well as legal costs arising in respect of defective product sold by Dura-Loc prior May 12, 2006, for which Dura-Loc had received a customer complaint or warranty claim prior to that date, or in the case Defendant Metals USA received a customer complaint or warranty claim involving Dura-Loc product after May 12, 2006. *See* Exhibit 'H' at MUSA002682 at §1.1; Exhibit 'B' at MUSA000005 at ¶11;

(d) The Warranty Cost sharing agreement was governed by a Warranty Cost grid under which Defendant Metals USA would cover 100% of the costs between $0 and $65,000 in claims, 75% of the costs between $65,000.01 and $130,000, 50% of the costs between $135,000.01 and $195,000, 25% of the costs between $195,000.01 and $260,000, 0% of the costs above $260,000.01, for a maximum annual liability of $161,000. On the other hand, Dura-Loc would cover 0% of the costs between $0 and $65,000 in claims, 25% of the costs between $65,000.01 and $130,000, 50% of the costs between $135,000.01 and $195,000, 75% of the costs between $195,000.01 and $260,000, 100% of the costs above $260,000.01. Dura-Loc's annual Warranty liability had no maximum value. *See* Exhibit 'H' at MUSA002730 at Schedule 2.9;

(e) Subject to certain holdbacks, Defendant Metals USA agreed to pay into an escrow account the amount of $500,000. The escrow amount would be used, among other purposes, to satisfy any claims by Defendant Metals USA for any breach by Dura-Loc of the covenants, representations and warranties contained in the APA as well as any Warranty Costs incurred outside the warranty cost sharing agreement. *See* Exhibit 'H' at MUSA002687 at §2.4; Exhibit 'B' at MUSA000006 at ¶11;

(f) Pursuant to section 6.1 of the APA, Dura-Loc, Allan Reid, and Andrew Spriet agreed, on a joint and several basis, to indemnify Defendant Metals USA for, among other things: (a) any "incorrectness in or any breach of any representation or warranty…" contained in the APA; (b) any breach or non-fulfillment of any covenant or agreement on the part of the Dura-Loc, Allan Reid, and /or Andrew Spriet contained in the APA; (c) any "Warranty Costs"

subject to the cost sharing arrangement set out in the APA; and, (d) any legal proceedings related to the business of Dura-Loc, including legal proceedings to which Dura-Loc became a party after May 12, 2006. *See* Exhibit 'H' at MUSA002712 at §6.1; Exhibit 'B' at MUSA000006 at ¶11; and

(g) Defendant Metals USA agreed to employ Allan Reid. *See* Exhibit 'H' at MUSA002725 at §9.1.

48. At the time of the purchase, Dura-Loc had the following annual sales: (i) 2000 - $4,312,506; (ii) 2001 - $4,884,079; (iii) 2002 - $5,558, 591; (iv) 2003 - $6,060,409; (v) 2004 - $7,747,512; and (v) 2005 - $11,009,691. Thus, from 2000 through 2005, Dura-Loc's annual sales increased over 250%. *See* Exhibit 'L' at MUSA000515.

49. After execution of the APA, Dura-Loc subsequently ceased its manufacturing, marketing, and selling of the Tiles, and changed its name to 604471 Ontario, Inc. *See* Exhibit 'D'.

50. After purchasing Dura-Loc, Defendant Metals USA, on or about July 1, 2007, created a wholly-owned subsidiary known as Metals USA Building Products Canada, Inc. which does business as Allmet Roofing Products and changed stone coating and the basecoat on the Tiles. *See* Exhibit 'R' at 5:01-14.

A. Dura-Loc Fraudulently Misrepresented To Defendant Metals USA The Number, And Monetary Amount Of Outstanding Warranty Claims And Customer Complaints Regarding The Tiles And The Extent Of The Tiles' Degranulation Defect

51. During negotiations between Dura-Loc on the one hand and Defendant Metals USA on the other with regard to the purchase of Dura-Loc in May of 2006, Dura-Loc made various representations to Defendant Metals USA with respect to the number and type of warranty claims that had been made on the Tiles as well the number of customer complaints. *See* Exhibit 'Q' at MUSA002489; Exhibit 'H' at MUSA002801.

52. In 2007, shortly after execution of the APA, Defendant Metals USA alleged, in 2007, that the information provided to Defendant Metals USA by Dura-Loc was false and, specifically, that:

> [Dura-Loc, Allan Reid, and Andrew Spriet] had significantly misrepresented the extent of customer complaints and warranty claims regarding [Dura-Loc] products in breach of their contractual obligations to Metals pursuant to the APA. *See* Exhibit 'B' at MUSA000007 at ¶13; Exhibit 'R' at 8:01-11:15.

53. Defendant Metals USA also alleged, in addition to misrepresenting the extent of customer complaint and warranty claims regarding the Tiles, that Dura-Loc misrepresented to the extent of degranulation issues with respect to the Tiles which Defendant Metals USA described as follow:

> Degranulation is a process whereby the stone coated portion of a metal shingle becomes loose or detaches from the metal substructure. Where degranulation occurs, it has the potential to lessen the expected and warranted lifespan of a metal roof. *See* Exhibit 'B' at MUSA000007 at ¶¶13-14; Exhibit 'R' at 8:01-11:15.

54. Moreover, Dura-Loc, as to those warranty claims it actually disclosed to Metals USA during purchase negotiations, misrepresented the amounts of each warranty claim. Whereas, Dura-Loc, in the APA, represented that the estimated repair costs as being approximately $89,000 for claims it had received through 2005; however, the actual estimated repair costs for these same claims was approximately $358,050. Dura-Loc, on just those claims disclosed in the APA, misrepresented the costs to pay these claims by $268,450 - or 400%.[3]

55. Dura-Loc intentionally made these misrepresentations to Defendant Metals USA in order to make the company seem more valuable and more appealing to Defendant Metals USA. Moreover, Dura-Loc made these misrepresentations in order to assure the purchase of the company by Defendant Metals USA was completed so as to avoid its current warranty obligations - which it knew would significantly increase in the future - and to begin its scheme to avoid paying warranty claims made in the future in order to retain the maximum portion of the purchase price.

B. Dura-Loc Failed To Honor Its Warranty Obligations At All Times After The APA

56. After the execution of the APA, Dura-Loc and Defendant Metals USA agreed to share warranty costs on the Tiles pursuant to the cost sharing table set forth in Section 2.9 of the APA. Allan Reid, Dura-Loc's President and member of its Board of Directors and also an

[3] Exhibit 'S' is a comparison of the data contained on Exhibit 'H' at 002801 and Exhibit 'K' at 002446.

employee of Defendant Metals USA, was tasked with investigating and deciding whether to pay a warranty claim on the part of Defendant Metals USA and Dura-Loc. However, because any monies required to be paid by Dura-Loc under the APA would decrease Allan Reid's share of the purchase price or even come directly from Allan Reid himself, there was an inherent and unavoidable conflict of interest in having Allan Reid investigate these warranty claims and ultimately decide whether the claim should be paid.

57. The potential conflict of interest between Metals USA, Dura-Loc, and Allan Reid became a reality when Defendant Metals USA discovered that Dura-Loc was continually failing to honor warranty claims being made on the Tiles after the APA as well as failing to honor those claims that had been made prior to the APA. For example, Metals USA and Dura-Loc had received seventy-four (74) total warranty claims in 2006. *See* Exhibit 'T' at PLS000068-69.[4] As of April 26, 2007, more than one year after many of these claims were received, their collective status was as follows:

(a) Of the 74 claims made in 2006, 51 or 69% (51/74), remained unpaid as of April 26, 2007. *Id*. at PLS000072-73;

(b) Of the 74 claims made in 2006, 66 were for granule loss, or 89% (66/74), as of April 26, 2007. *Id*. at PLS000070-71;

(c) Of the 66 granule loss claims made in 2006, 45 remained unpaid, or 68% (45/66), as of April 26, 2007. *Id*. at PLS000074-75;

(d) The total amount of unpaid warranty claims made in 2006 was approximately $1,791,184.13 as of April 26, 2007. *Id*. at PLS000076-77;

(e) The total amount of unpaid granule loss warranty claims made in 2006 was $1,417,251.47 as of April 26, 2007. *Id*. at PLS000078-79;

(f) The total amount paid on warranty claims made in 2006 was $96,121.97 as of April 26, 2007. *Id*. at PLS000080;

(g) The total amount paid on granule loss warranty claims made in 2006 was $90,438.96, or 94% of the amounts of all claims paid ($90,438.96/$96,121.97), as of April 26,

[4] Exhibit 'T' is Plaintiffs' summary of data for the year 2006 as set forth on Exhibit 'K' at MUSA002446.

2007. *Id*. at PLS000081;

(h) The total amount of paid warranty claims in 2006 and outstanding warranty claims in 2006 was $1,887,306.10 as of April 26, 2007. *Id*. at PLS000082-83; and

(i) The total amount of paid and outstanding warranty claims alleging granule loss made in 2006, was $1,507,690.44 as of April 26, 2007. *Id*. at PLS000084-85.

58. Based on these numbers it is clear that, after the APA, warranty claims were not being paid timely and, in fact, were hardly being paid at all. The reason for the delays in payment and substantial non-payment is due to the fact that, as of April 26, 2007, Defendant Metals USA had already paid its $64,000 obligation on the warranty claims - an obligation Defendant Metals USA bore, pursuant to the APA, on its own and without any right to contribution from Dura-Loc. After Defendant Metals USA fulfilled its $64,000 obligation, Dura-Loc was contractually obligated by the APA to begin sharing 25% of all warranty claims paid.

59. Dura-Loc, however, and despite its agreement to do so under the terms of the APA, never had any intention of fulfilling its cost sharing obligations under the APA. To the contrary, at all times, Dura-Loc intended to, and did, avoid paying warranty claims after selling its assets to Defendant Metals USA.

60. Based on such an intention, Dura-Loc, by and through Allan Reid, at the time an employee of Defendant Metals USA, began formulating reasons to delay and/or deny legitimate warranty claims once any payment on these claims would require Dura-Loc, Allan Reid, and Andrew Spriet to contribute payment under the cost sharing agreement in the APA. This is evidenced by the fact that, pursuant to the cost sharing agreement under the APA, Dura-Loc only paid $8,030.50 of the $96,121.97 in warranty claims in 2006 ($96,121.97 - $64,000 = $32,121.97 x 25% = $8,030.50).

61. Yet, after total payment of $96,121.97, no further claims were paid on these warranty claims as of April 26, 2007. As such, as soon as Dura-Loc, pursuant to the APA, became financially responsible to contribute to the payment of warranty claims, Allan Reid, acting in his own interests and that of his company Dura-Loc, continually refused to pay any

warranty claims which both Allan Reid and Dura-Loc knew would, after accounting for Defendant Metals USA's maximum annual contribution of $161,000, exceed $1.72 million alone for claims made in 2006 ($1,887,306.10 - $161,000 = $1,726,306.10). This explains the reason so many warranty claims made in 2006 remained unresolved as of April 26, 2007.

62. Dura-Loc's intent to minimize its liability for warranty claims is further evidenced by the fact that, in or before 2004, Dura-Loc, under the terms of the Warranty, required claimants to provide Dura-Loc (or subsequently 604471 Ontario) with $400.00, to even begin the warranty claim process. This $400.00 was intended to, and did, deter a number of warranty claimants from submitting a warranty claim. *See* Exhibit 'A'.

63. Upon realization that Dura-Loc was failing to honor its warranty obligations pursuant to APA, Defendant Metals USA alleged that Dura-Loc committed various misrepresentations and/or failed to disclose various facts with respect to the number of customer warranty claims and complaints on the Tiles as well as the inherent degranulation defect in breach of Dura-Loc's obligations under the terms of APA.

64. As a result, on or about June 1, 2007, Defendant Metals USA and Dura-Loc, Allan Reid, and Andrew Spriet entered into the Settlement Agreement. *See* Exhibit 'U' at MUSA000023-37. The purpose of the Settlement Agreement was, among other things, to address certain claims made by Defendant Metals USA that Dura-Loc, Allan Reid, and Andrew Spriet committed various misrepresentations and/or failed to disclose various facts with respect to the number of customer warranty claims and complaints on the Tiles as well as the inherent degranulation defect related to breaches of the APA and to "alter the parties' future contractual obligations and liabilities regarding [...] Dura-Loc product, including warranty handling, administration and Warranty Costs, after the date of the Settlement Agreement." *See* Exhibit 'U' at MUSA000023-37; Exhibit 'B' at MUSA000007 at ¶15.

65. Under the terms of the Settlement Agreement, Dura-Loc, Allan Reid, and Andrew Spriet agreed that:

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/ / /

(a) Defendant Metals USA would not be required "…to expend any additional monies whatsoever on Old DL Product Matters,"[5] or take any actions to administer handle or respond "to any Old DL Product Matters…" that were ***pending*** as of June 1, 2007 or that may arise in the future. *See* Exhibit 'U' at MUSA000024 at §1; Exhibit 'B' at MUSA000007 at ¶16 (a) (emphasis added);

(b) Dura-Loc would assume "full and sole administrative and financial responsibility for the handling and resolution of all "Old DL Product Matters of any kind or character" from and after June 1, 2007. *See* Exhibit 'U' at MUSA000024 at §1; Exhibit 'B' at MUSA000008 at ¶16 (b);

(c) Dura-Loc would assume responsibility for handling and resolving any outstanding warranty claims and expense regarding Old DL Product Matters from and after June 1, 2007, including all warranty work and related expenses. *See* Exhibit 'U' at MUSA000024 at §2; Exhibit 'B' at MUSA000008 at ¶16 (c);

(d) Dura-Loc would pay Metals Canada the sum of $450,000 (CDN) within seven days of the execution of the Settlement Agreement. *See* Exhibit 'U' at MUSA000025 at §4; Exhibit 'B' at MUSA000008 at ¶16 (d);

(e) Dura-Loc, Allan Reid, and Andrew Spriet agreed to fully and finally release Defendant Metals USA from various obligations in the APA, including Metals obligations with respect to the administration and sharing of Warranty Costs related to "Old DL Products Matters". *See* Exhibit 'U' at MUSA000025 at §5; Exhibit 'B' at MUSA000008 at ¶16 (e);

(f) Allan Reid and Andrew Spriet each further agreed to jointly and severally guarantee the obligations of Dura-Loc pursuant to the Settlement Agreement. Pursuant to section 6 of the Settlement Agreement, Dura-Loc, Allan Reid, and Andrew Spriet further agreed to indemnify Defendant Metals USA as follows:

> Old Dura-Loc and each of the Principal Shareholders, individually and collectively, jointly and severally, agree to and hereby do indemnify and hold harmless Metals and its Affiliates, as well as all other Purchaser's Indemnified

[5] "Old Dura-Loc" refers to Dura-Loc Roofing Systems Limited which subsequently changed its name to 604471 Ontario Limited and "Old Dura-Loc Product Matters" includes and refers to the Tiles. *See* Exhibit 'B' at MUSA000009 at ¶17.

> Parties (collectively the "Indemnified Parties"), from and against all actions, causes of action, claims, demands and Legal Proceedings for damages, indemnity, Warranty Costs, Liabilities, costs, expense, interest and loss or injury of any kind and character whatsoever, whether direct or indirect, whether no known or unknown, or whether or not yet alleged or asserted which may be imposed upon, asserted against or suffered or incurred by any of the Indemnified Parties as a direct or indirect result of, or arising out of or in connection with or related in any manner whatever to, any Old DL Product Matters, including, without limitation, claims or demands alleging negligence on the part of Metals or its Affiliates. *See* Exhibit 'U' at MUSA000025 at §6; Exhibit 'B' at MUSA000009 at ¶18.

(g) Defendant Metals USA agreed to release Dura-Loc, Allan Reid, and Andrew Spriet as follows:

> Metals hereby fully releases and discharges [] Dura-Loc and its officers, directors, employees, agents, representatives, shareholders, partners, parent and subsidiary companies and successors and assigns and each of the Principal Shareholders [Allan Reid and Andrew Spriet] and their respective heirs, executors, administrators, successors and assigns from any and all past, present or future actions, causes of action, claims, demands, and Legal Proceedings for Liabilities, damages, indemnity, costs, expenses, interest and loss or injury for any misrepresentations in the Asset Purchase Agreement pertaining to any Old DL Product Matters, or any nondisclosure with respect thereto. Nothing in the foregoing shall be interpreted to constitute a release of any obligations set forth in this Agreement. *See* Exhibit 'U' at MUSA000026 at §9; Exhibit 'B' at MUSA000009 at ¶19.

66. Despite the promises and warranties by Dura-Loc in the Settlement Agreement, Dura-Loc refused to honor its obligations under the APA and the Settlement Agreement by failing to respond to, and satisfy, warranty claims made on the Tiles. Dura-Loc's continuing failure to adequately respond to, and satisfy, customer warranty claims is further evidenced by correspondence sent on behalf of Defendant Metals USA in which Defendant Metals USA expressly attacked Dura-Loc for its failure to adequately respond to, and satisfy, customer warranty claims and criticizes Dura-Loc's habitually boilerplate and bogus response to customer warranty claims.

67. Specifically, on or about May 9, 2008, Defendant Metals USA alleged that Dura-Loc was continuing to fail to honor its warranty obligations under the APA and the Settlement Agreement as follows:

> Metals Canada further believes that its business and customer relationships have also been damaged by the ongoing problems with the old Dura-Loc products, and Metals Canada's difficulty selling to customers who have experienced problems with the Dura-Loc product. Specifically, Metals Canada has repeatedly expressed its frustration and concerns regarding the manner in which [Dura-Loc] and Mr.

> Reid have handled product warranty matters under the Dura-Loc warranty, the parties' May 2006 agreement and June 2007 settlement agreement, and the requirements of applicable law. These concerns continue to increase as additional matters are brought to the attention of Metals Canada and remain unresolved, and as Seller continues to either ignore warranty claims or take positions on those claims that Metals Canada believes are not supported by fact, science or any sound business practices. *See* Exhibit 'V' at MUSA000076.

68. In addition, on or about May 9, 2010, Defendant Metals USA again indicated its sincere and substantial frustration in which Dura-Loc was handling, processing, and responding to warranty claims. As stated by Defendant Metals USA:

> Metals has been forced to incur legal fees as a result of Old Dura-Loc's ongoing failure to honour its warranty and claim obligations pursuant to the Settlement Agreement.
>
> *****
>
> Metals has experienced various losses and damages in connection with Old Dura-Loc's failure to appropriately handle various product warranty matters, including lost sales, investigation costs and ongoing damage to Metals' business reputation.
>
> *****
>
> **The Jamaican Distributor ("Stanmar").** As a direct result of Mr. Reid's and Dura-Loc's failure to properly administer and resolve the warranty claims of the Jamaican distributor Stanmar (11 warranty claims in total), Metals incurred immediate account losses of $374,831.85 ($CDN) when the Stanmar business failed...
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> *****
>
> **Other Lost Sales And Customer Issues.** Mr. Reid's and Dura-Loc's failures to honor the Dura-Loc warranty have greatly impacted Metals' reputation in the marketplace and have caused it to lose a considerable amount of customers and business opportunities. On a without prejudice basis, Metals quantifies its indemnifiable loss in connection with aspect of its Claim in excess of $2M ($CDN), and likely considerably higher.
>
> *****
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> **Ongoing Dura-Loc De-Granulation Issues.** In addition to the lost sales and lost customer issues referenced above, Metals has been also forced to incur actual costs and expenses in connection with remedying ongoing issues involving the de-granulation of Dura-Loc product and the failure of Dura-Loc to address this issue, and will no doubt continue to incur such costs and expenses as Dura-Loc and its principals continue in their failures and breaches. *See* Exhibit 'W' at MUSA004591-4592.

69. Furthermore, on April 26, 2011, as alleged by Defendant Metals USA in a lawsuit brought against Dura-Loc, Allan Reid, and Andrew Spriet:

> [Dura-Loc, Allan Reid, and Andrew Spriet] have breached and continue to breach their contractual obligations to Metals as established in the APA and Settlement Agreement. Further, these breaches have caused and continue to cause damages

to Metals. In particular, and without limitation:

(a) The Defendants have breached and continue to breach their contractual obligations to appropriately handle, process, administer, respond, investigate, resolve and to otherwise remedy various customer complaint and warranty claims involving Old Dura-Loc products. *See* Exhibit 'B' at MUSA000012 at ¶31(a).

70. Since Dura-Loc was purchased, Dura-Loc has utterly failed to honor the Warranty on the Tiles. This, of course, is of no surprise as had Dura-Loc honored warranty claims on the Tiles it would have spent millions and millions of dollars annually which would have all but depleted the funds received by it as a result of its purchase by Defendant Metals USA. The fact that Dura-Loc had approximately $9,000,000 available to pay warranty claims but consciously chose, at every turn, to refuse to pay these claims is further evidence of Dura-Loc's fraudulent transfer to Metals USA in an effort to avoid its obligations under the Warranty.

C. Dura-Loc Files for Bankruptcy in 2012

71. In or about April 2012, Dura-Loc, under the name of its successor-in-interest 604471 Ontario, Inc., filed for bankruptcy in the Province of Ontario, Canada. In its bankruptcy filing, 604471 Ontario, Inc. represented its assets in the amount of $56,265.00 and its liabilities in the amount of approximately $2,000,000.00. *See* Exhibit 'X'.

72. In Dura-Loc's bankruptcy it completed a document called "Statement of Affairs". In its Statement of Affairs, Dura-Loc revealed that in 2008 it received 146 warranty claims; in 2009 it received 170 warranty claims; in 2010 it received 144 warranty claims; and in 2011 it received 224 warranty claims. *Id.*

73. As set forth above, because of the substantial lag between the installation of the Tiles and the warranty claim, on average eight (8) years, it is likely that: (i) most of the 146 warranty claims received in 2008 were from installations completed in 2000 ; (ii) most of the 170 warranty claims received in 2009 were from installations completed in 2001; (iii) most of the 144 warranty claims received in 2010 were from installations completed in 2002; and (iv) most of the 224 warranty claims received in 2011 were from installations completed in 2003.

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VI.

METALS USA'S ASSISTANCE IN DURA-LOC'S PERPETRATION OF FRAUD ON WARRANTY HOLDERS

A. Defendant Metals USA Was Aware Before Acquiring Dura-Loc That Dura-Loc Was Receiving An Increasing Amount Of Warranty Claims Alleging Granule Loss

74. In or about March of 2006, Defendant Metals USA completed its due diligence with respect to Dura-Loc. When conducting its due diligence, Defendant Metals USA reviewed Dura-Loc's operations, financial state, tax liabilities, and legal actions taken against Dura-Loc as of March 2006.

75. As part of its review of Dura-Loc's operations, Defendant Metals USA reviewed the warranty claims that had been made on the Tiles that were in Dura-Loc's possession. In performing its review of Dura-Loc's warranty claims, Defendant Metals USA became aware that an overwhelming number of warranty claims alleged that the Tiles suffered from degranulation. Defendant Metals USA also realized that these warranty claims for degranulation were not being submitted for a number of 5, 7, or 10 years after installation.

76. Defendant Metals USA, in reviewing these warranty claims, further realized the number of claims made on the Tiles in 2005 was nearly 190% higher than the number of average warranty claims made on the Tiles from 2001 through 2004. *See* Exhibit 'Y'.

77. Based on Defendant Metals USA's knowledge of the type of warranty claims being made on the Tiles as well as their substantial increase in 2005, Defendant Metals USA specifically sought to limit its exposure to warranty claims on the Tiles by agreeing to be "responsible for an 'ordinary' amount of warranty activity..." *Id*.

78. Defendant Metals USA's knowledge of the increasing warranty claims, and its desire to avoid financial exposure to these claims, is further evidenced by the fact that its initial due diligence was performed with the intent to make a stock purchase of Dura-Loc, but its due diligence caused its intent to shift to an asset purchase to avoid, among others, Dura-Loc's future liabilities. *See* Exhibit 'L' at MUSA002507.

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B. Defendant Metals USA Was Aware, After Conducting Legal Due Diligence On Dura-Loc, That Dura-Loc Was A Defendant In The *Darby* Action In Which Two (2) Independent Experts Had Issued Reports Opining That The Tiles Were Defective.

79. In addition to conducting financial due diligence on Dura-Loc, Defendant Metals USA also performed legal due diligence. As part of Defendant Metals USA's legal due diligence, Defendant Metals USA, Inc. reviewed each of the seven (7) pending lawsuits which Dura-Loc had identified as being a defendant. *See* Exhibit 'H' at MUSA002792; Exhibit 'L' at MUSA 002510. For each of these seven (7) cases, Defendant Metals USA reviewed the entire case file including the pleadings, discovery, and expert reports when conducting legal due diligence.

80. One of the cases disclosed by Dura-Loc to Defendant Metals USA was the matter entitled *Darby v. Dura-Loc Roofing Systems, Ltd. et al*. In *Darby*, a purchaser of the Tiles in Plano, Texas, Mr. Ted Darby sued Dura-Loc and various other entities alleging that granular coating of his Tiles was coming off prematurely due to a manufacturing defect or materials defect with the Tiles. *See* Exhibit 'M' at MUSA 004059-62 at ¶6. Mr. Darby's roof was installed in June of 1996 and he brought his lawsuit in 2004. *Id*. at ¶4.

81. As part of the *Darby* case Dura-Loc received, both prior to the filing of the action and during the litigation, two (2) independent expert reports to determine the cause of the granule loss on the Tiles. These reports were included in the case files Dura-Loc maintained on the *Darby* action, and were reviewed by Defendant Metals USA during the course of conducting its legal due diligence. The first of these expert reports was written by Joe W. Tomaselli of Joe W. Tomaselli & Associates who opined as follows:

> ... that the relative directional exposure to infrared and ultraviolet light in the intensities experienced in this geographical location explains the granule loss differences exhibited on the various roof slopes of the Darby residence. The degree of granule loss on the south and west roof slopes currently constitutes a safety hazard to a person who would attempt to walk in a vertical direction on either of these slopes. This product quality deficiency is, in our opinion, a clear manufacturing defect. Specifically, the ultraviolet and infrared light resistance of the "clear acrylic" and "acrylic bonder" components of this Dura-Loc product are failing or have failed to perform their intended function. One may offer alternative explanations such as damage caused by storage prior to installation, ambient chemical exposure to pollutants or physical abuse following installation. In each of these circumstances the physical evidence on the roof surface does not support a reason to give credence to any such alternative explanation. *See* Exhibit

'N' at MUSA003756-57.

82. Likewise, and in addition to the report by Mr. Tomaselli, Mr. Darby also had an expert report prepared by Mr. Robert N. Fleishmann, P.E. of Haag Engineering Co. who opined as follows:

> The granules are being lost from normal weathering events with the expansion and contraction of shingles during heating and cooling cycles and even from the impact of rain. It appears the granules had not been applied adequately to withstand normal weather effects. Ridge shingles with the same exposure are not loosing [sic] their granules. In essence, the loss of granule coating is a manufacturing problem and is not hail related.
>
> We found evidence of hail up to 1/16 inch in diameter having fallen at the site. These shingles have a class 4 hail rating and should be able to withstand impact from this size hail. In fact, many rainstorms including raindrops of this size. If hail had caused the loss of granules, there would be circular areas of missing granules where the hailstone impacted. This pattern of granule loss was not observed. There was a general loss of granules, indicating a manufacturing defect associated with a lack of overall adhesion between the granules and the shingle base. *See* Exhibit 'O' at MUSA003762-63.

83. The reports of by Mr. Tomaselli and Mr. Fleishmann were delivered to Dura-Loc on May 19, 2003, over a year before Mr. Darby brought the lawsuit described above, and were maintained in Dura-Loc's case file which was provided to, and reviewed by, Defendant Metals USA in the course of conducting its legal due diligence. As such, prior to the acquisition of Dura-Loc, Defendant Metals USA was aware that there had been not one, but two, expert reports prepared which each, independently, concluded that the Tiles suffered from a defect wherein the granules prematurely separated from the Tiles, i.e., the degranulation defect.

C. Defendant Metals USA Was Aware, After Conducting Legal Due Diligence On Dura-Loc, That Dura-Loc Had Used Colorquartz Granules On The Tiles Despite 3M's Unequivocal Statement That Colorquartz Was Not Appropriate For Use As A Surfacing Material On The Tiles

84. In addition to being aware of the experts' findings in *Darby* as to the defective nature of the Tiles, Defendant Metals USA, as part of its legal due diligence, also reviewed the action entitled *Weiss et al. v. Dura-Loc Roofing Systems, Ltd.* which was filed prior to Defendant Metals USA's purchase of Dura-Loc and was disclosed by Dura-Loc as one (1) of the seven (7) pending cases against it as of May 2006. *See* Exhibit 'H' at MUSA002792; Exhibit 'L' at MUSA 002510.

85. As part of the *Weiss* case, Dura-Loc received copies of documents produced by 3M pursuant to a subpoena sent by plaintiff. These documents were served on Dura-Loc, pursuant to the California Code of Civil Procedure, and were part of its case file on the *Weiss* action. The documents produced by 3M pursuant to the subpoena in *Weiss*, were provided to, and reviewed by, Defendant Metals USA in the course of conducting its legal due diligence. Included in the documents provided by 3M in response to the subpoena, were unequivocal statements by 3M stating that Colorquartz granules were not suitable for the surface coating of the Tiles based on its translucent qualities which readily allowed UV light penetration.

86. Specifically, on January 29, 1993, 3M specifically informed Dura-Loc, through a letter sent to its President Allan Reid entitled "Re: January 28, 1993 telephone conversation related to Colorquartz use on metal roofing material." that:

> ...the primary function of 3M roofing granules is to protect the roofing material from the ultra-violet rays of the sun upon exposure. Base rocks used to produce 3M coloured granules have been selected for their opaque qualities to block uv light, in other words, allowing little or no transmission through the base rock. The 3M Colorquartz product is a quartz base mineral which is not opaque and readily allows light transmission. 3M does not recommend the use of Colorquartz as a surfacing mineral on roofing product. *See* Exhibit 'I' at PLS000009 and PLS000020, and PLS000042-43.

87. Thereafter, 3M issued a "Technical Bulletin" regarding "Ultraviolet Transmission and Colorquartz Aggregate" which was provided by 3M to all customers utilizing its Colorquartz stone, including Dura-Loc, wherein 3M specifically stated as follows:

> Quartz, the base rock used in Colorquartz aggregate, is a naturally occurring mineral made up of more than 99% silicon dioxide. Quartz is recognized as being largely transparent to ultraviolet light, including sunlight in the 290 to 400 nanometer range, and is employed in scientific instruments for that purpose.
>
> *****
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> The ceramic coating is designed to be tough and durable. It is formulated with inorganic pigments that retain color under normal use conditions. However, the colored ceramic coating is not designed to modify the light transmission characteristics of the base quartz particle outside the visible spectrum. Hence, Colorquartz aggregate transmits ultraviolet light much like uncoated quartz.
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> *****
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> Since Colorquartz aggregate transmits ultraviolet light, it is not suitable for applications that require protection of a substrate material from ultraviolet exposure. One such example is asphalt roofing, where an organic binder must be protected from the sun... *See* Exhibit 'I' at PLS000025 and PLS000017.

88. The documents provided by 3M pursuant to the subpoena in *Weiss* were served on Dura-Loc in or about October of 2005, and were maintained in Dura-Loc's case file which was provided to, and reviewed by, Defendant Metals USA in the course of conducting its legal due diligence. As such, prior to the acquisition of Dura-Loc, Defendant Metals USA was aware that Dura-Loc's own materials supplier had explicitly informed it that Colorquartz granules was not appropriate for use as the surface coating for the Tiles. At the time Defendant Metals USA reviewed these documents, it was aware that Dura-Loc was, in fact, using the Colorquartz granules as the surface coating of the Tiles - the very purpose that 3M had repeatedly inculcated against.

D. In 2007, Defendant Metals USA Entered Into a Settlement Agreement With Dura-Loc

89. During negotiations between Dura-Loc on the one hand and Defendant Metals USA on the other with regard to the purchase of Dura-Loc in May of 2006, Dura-Loc made various representations to Defendant Metals USA with respect to the number and type of warranty claims that had been made on the Tiles as well the number of customer complaints. *See* Exhibit 'Q' at MUSA002489; Exhibit 'H' at MUSA002801.

90. In 2007, Defendant Metals USA alleged that the information provided to Defendant Metals USA by Dura-Loc was false, and specifically that:

> [Dura-Loc, Allan Reid, and Andrew Spriet] had significantly misrepresented the extent of customer complaints and warranty claims regarding [Dura-Loc] products in breach of their contractual obligations to Metals pursuant to the APA. *See* Exhibit 'B' at MUSA000007 at ¶13; Exhibit 'R' at 8:01-11:15.

91. In addition to misrepresenting the extent of customer complaint and warranty claims regarding the Tiles, Defendant Metals USA also alleged that Dura-Loc misrepresented the extent of degranulation issues with respect to the Tiles. As alleged by Defendant Metals USA:

> Degranulation is a process whereby the stone coated portion of a metal shingle becomes loose or detaches from the metal substructure. Where degranulation occurs, it has the potential to lessen the expected and warranted lifespan of a metal roof. *See* Exhibit 'B' at MUSA000007 at ¶¶13-14; Exhibit 'R' at 8:01-11:15.

92. Moreover, Dura-Loc, as to those warranty claims it actually disclosed to Metals USA during purchase negotiations, misrepresented the amounts of each warranty claim. Whereas, Dura-Loc, in the APA, represented that the estimated repair costs as being approximately $89,000, months later Metals USA stated that the actual estimated total repair costs for these same claims was approximately $358,050; thus, Dura-Loc, on just those claims it disclosed in the APA, misrepresented the costs to satisfy these claims by $268,450 - or 400%.

93. While Defendant Metals USA was, at all times prior to 2007, aware that the Tiles suffered from the degranulation defect it alleged Dura-Loc failed to disclose prior to the APA, the defect was of little or no concern to Defendant Metals USA based on the fact that its annual liability for warranty claims was capped at a maximum of $161,000 per year, or $4,025,000 ($161,000 x 25 years) over the life of the last Warranty issued by Dura-Loc after the APA was executed in May of 2006. This amount was agreed to by Defendant Metals USA as part of the arms-length negotiations as to the proper purchase price of Dura-Loc and was specifically intended by Defendant Metals USA to insulate itself from any financial liability relating to Dura-Loc's warranty claims.

94. On or about June 1, 2007, Defendant Metals USA and Dura-Loc, Allan Reid, and Andrew Spriet entered into the Settlement Agreement to resolve Defendant Metals USA's allegation as to Dura-Loc's misrepresentations and omissions in the APA. *See* Exhibit 'U' at MUSA000023-37. The Settlement Agreement also altered the parties' future contractual obligations and liabilities regarding the Dura-Loc product, including warranty handling, administration and Warranty Costs, after the date of the Settlement Agreement. *See* Exhibit 'U' at MUSA000023-37 *See* Exhibit 'B' at MUSA000007 at ¶15.

95. Under the terms of the Settlement Agreement, Dura-Loc, Allan Reid, and Andrew Spriet agreed that:

(a) Defendant Metals USA would not be required "…to expend any additional monies whatsoever on Old DL Product Matters," or take any actions to administer handle or respond "to any Old DL Product Matters…" that were ***pending*** as of June 1, 2007 or that may arise in the future. *See* Exhibit 'U' at MUSA000024 at §1; Exhibit 'B' at MUSA000007 at ¶16

(a) (emphasis added);

(b) Dura-Loc would assume "full and sole administrative and financial responsibility for the handling and resolution of all "Old DL Product Matters of any kind or character" from and after June 1, 2007. *See* Exhibit 'U' at MUSA000024 at §1; Exhibit 'B' at MUSA000008 at ¶16 (b);

(c) Dura-Loc would assume responsibility for handling and resolving any outstanding warranty claims and expense regarding Old DL Product Matters from and after June 1, 2007, including all warranty work and related expenses. *See* Exhibit 'U' at MUSA000024 at §2; Exhibit 'B' at MUSA000008 at ¶16 (c);

(d) Dura-Loc would pay Metals Canada the sum of $450,000 (CDN) within seven days of the execution of the Settlement Agreement. *See* Exhibit 'U' at MUSA000025 at §4; Exhibit 'B' at MUSA000008 at ¶16 (d);

(e) Dura-Loc, Allan Reid, and Andrew Spriet agreed to fully and finally release Defendant Metals USA from various obligations in the APA, including Defendant Metals USA's obligations with respect to the administration and sharing of Warranty Costs related to "Old DL Products Matters". *See* Exhibit 'U' at MUSA000025 at §5; Exhibit 'B' at MUSA000008 at ¶16 (e);

(f) Allan Reid and Andrew Spriet each further agreed to jointly and severally guarantee the obligations of Dura-Loc pursuant to the Settlement Agreement. Pursuant to section 6 of the Settlement Agreement, Dura-Loc, Allan Reid, and Andrew Spriet further agreed to indemnify Defendant Metals USA as follows:

> Old Dura-Loc and each of the Principal Shareholders, individually and collectively, jointly and severally, agree to and hereby do indemnify and hold harmless Metals and its Affiliates, as well as all other Purchaser's Indemnified Parties (collectively the "Indemnified Parties"), from and against all actions, causes of action, claims, demands and Legal Proceedings for damages, indemnity, Warranty Costs, Liabilities, costs, expense, interest and loss or injury of any kind and character whatsoever, whether direct or indirect, whether no known or unknown, or whether or not yet alleged or asserted which may be imposed upon, asserted against or suffered or incurred by any of the Indemnified Parties as a direct or indirect result of, or arising out of or in connection with or related in any manner whatever to, any Old DL Product Matters, including, without limitation, claims or demands alleging negligence on the part of Metals or its Affiliates. *See* Exhibit 'U' at MUSA000025 at §6; Exhibit 'B' at MUSA000009 at ¶18.

(g) Defendant Metals USA agreed to release Dura-Loc, Allan Reid, and Andrew Spriet as follows:

> Metals hereby fully releases and discharges [] Dura-Loc and its officers, directors, employees, agents, representatives, shareholders, partners, parent and subsidiary companies and successors and assigns and each of the Principal Shareholders [Allan Reid and Andrew Spriet] and their respective heirs, executors, administrators, successors and assigns from any and all past, present or future actions, causes of action, claims, demands, and Legal Proceedings for Liabilities, damages, indemnity, costs, expenses, interest and loss or injury for any misrepresentations in the Asset Purchase Agreement pertaining to any Old DL Product Matters, or any nondisclosure with respect thereto. Nothing in the foregoing shall be interpreted to constitute a release of any obligations set forth in this Agreement. *See* Exhibit 'U' at MUSA000026 at §9; Exhibit 'B' at MUSA000009 at ¶19.

96. In 2007, a year after Defendant Metals USA and Dura-Loc executed the APA, Defendant Metals USA became aware that Dura-Loc was not honoring its obligations pursuant to the APA; mainly, that Dura-Loc was refusing to honor warranty claims so as to avoid having to pay its portion of the warranty claims pursuant to the cost sharing agreement set forth in the APA in order to avoid reducing the overall profit it received from the sale.

97. Specifically, in 2006, the first year that Defendant Metals USA and Dura-Loc agreed to share warranty liability pursuant to the APA, Defendant Metals USA was aware that there had been seventy-four (74) total warranty claims made on the Tiles. *See* Exhibit 'T' at PLS000068-69. Defendant Metals USA was also aware, as of April 26, 2007 - just more than one year after many of these claims were received and just two months before the Settlement Agreement was executed - the collective status of these seventy-four (74) claims was as follows:

(a) Of the 74 claims made in 2006, 51 or 69% (51/74), remained unpaid as of April 26, 2007. *Id*. at PLS000072-73;

(b) Of the 74 claims made in 2006, 66 were for granule loss, or 89% (66/74), as of April 26, 2007. *Id*. at PLS000070-71;

(c) Of the 66 granule loss claims made in 2006, 45 remained unpaid, or 68% (45/66), as of April 26, 2007. *Id*. at PLS000074-75;

(d) The total amount of unpaid warranty claims made in 2006 was approximately $1,791,184.13 as of April 26, 2007. *Id*. at PLS000076-77;

(e) The total amount of unpaid granule loss warranty claims made in 2006 was $1,417,251.47 as of April 26, 2007. *Id*. at PLS000078-79;

(f) The total amount paid on warranty claims made in 2006 was $96,121.97 as of April 26, 2007. *Id*. at PLS000080;

(g) The total amount paid on granule loss warranty claims made in 2006 was $90,438.96, or 94% of the amounts of all claims paid ($90,438.96/$96,121.97), as of April 26, 2007. *Id*. at PLS000081;

(h) The total amount of paid warranty claims in 2006 and outstanding warranty claims in 2006 was $1,887,306.10 as of April 26, 2007. *Id*. at PLS000082-83; and

(i) The total amount of paid and outstanding warranty claims alleging granule loss made in 2006, was $1,507,690.44 as of April 26, 2007. *Id*. at PLS000084-85.

98. As of April 26, 2007, Defendant Metals USA was aware that there was still $1,791,184.13 in outstanding warranty claims alone for 2006 and that Dura-Loc's conduct in failing to honor these warranty claims was a strong indication, if not direct statement, that it had no intention to pay warranty claims for 2006 or in the future. Specifically, Defendant Metals USA was aware that, after paying its contribution to the 2006 warranty claims pursuant to the APA, Dura-Loc refused to pay any additional warranty claims. *See* Exhibit 'T'.

99. Nevertheless, and being acutely aware that Dura-Loc's failure to honor its obligations under the APA for warranty claims could expose it, and did expose it, to financial and legal liability for warranty claims on the Tiles and would continue to do so increasingly in the future, Defendant Metals USA divested itself of all warranty obligations it had agreed to in the APA in the amount of $4,016,969.5 ($161,000 x 25 years - $8,030.50 (Dura-Loc's 2006 contribution) = $4,016,969.5). Defendant Metals USA did so with full knowledge that Dura-Loc was not honoring warranty claims on the Tiles and had not shown any intention by its conduct or otherwise to pay current warranty claims that would inevitably, and increasingly, arise the future.

100. In addition, Defendant Metals USA was aware that many of the warranty claims made in 2006 were for installations made 5, 7, and 10 years prior to the warranty claim being made. Based on this fact, and based on Defendant Metals USA's knowledge that Dura-Loc's

sales of Tiles increased each year from at least 2000 through 2006, Defendant Metals USA knew that the number of warranty claims made in 2006 would pale in comparison to those in subsequent years based on the substantial increase in Dura-Loc's annual sales from 2000 through 2006. As such, Defendant Metals USA was aware that the number of warranty claims made in 2006 was going to increase on a year-to-year basis in accordance with Dura-Loc's past annual sales, and thus, would require Defendant Metals USA to pay the entire $4,016,969.50 it was obligated to pay under the APA, and could expose Defendant Metal USA to greater and greater liability each subsequent year as a result of Dura-Loc's failure to pay these claims and warranty holder began taking legal action.

101. The net result of the Settlement Agreement was that Defendant Metals USA received approximately $520,000 in cash and divested itself of future warranty obligations in the amount of $4,016,969.50 - an amount that, based on the number of warranty claims from 2006 alone, Defendant Metals USA was aware at the time of the Settlement Agreement it would ultimately pay pursuant to the APA.

E. Upon Discovery Of Dura-Loc's Continuing Failure To Honor Warranty Claims After The Settlement Agreement, Defendant Metals USA Sued Dura-Loc, Allan Reid, and Andrew Spriet Which Was Resolved By The First Amendment To The Settlement Agreement

102. After execution of the Settlement Agreement, Dura-Loc refused to honor its obligations under the APA and the Settlement agreement by failing to respond to, and satisfy, warranty claims as Defendant Metals USA knew it would. Specifically, on or about May 9, 2008, Defendant Metals USA alleged that Dura-Loc was continuing to fail to honor its warranty obligations under the APA and the Settlement Agreement as follows:

> Metals Canada further believes that its business and customer relationships have also been damaged by the ongoing problems with the old Dura-Loc products, and Metals Canada's difficulty selling to customers who have experienced problems with the Dura-Loc product. Specifically, Metals Canada has repeatedly expressed its frustration and concerns regarding the manner in which [Dura-Loc] and Mr. Reid have handled product warranty matters under the Dura-Loc warranty, the parties' May 2006 agreement and June 2007 settlement agreement, and the requirements of applicable law. These concerns continue to increase as additional matters are brought to the attention of Metals Canada and remain unresolved, and as Seller continues to either ignore warranty claims or take positions on those claims that Metals Canada believes are not supported by fact, science or any

sound business practices. *See* Exhibit 'V' at MUSA000076.

103. In addition, on or about May 9, 2010, Defendant Metals USA again indicated its substantial frustration in which Dura-Loc was handling, processing, and responding to warranty claims. As stated by Defendant Metals USA:

> Metals has been forced to incur legal fees as a result of Old Dura-Loc's ongoing failure to honour its warranty and claim obligations pursuant to the Settlement Agreement.
>
> *****
>
> Metals has experienced various losses and damages in connection with Old Dura-Loc's failure to appropriately handle various product warranty matters, including lost sales, investigation costs and ongoing damage to Metals' business reputation.
>
> *****
>
> **The Jamaican Distributor ("Stanmar").** As a direct result of Mr. Reid's and Dura-Loc's failure to properly administer and resolve the warranty claims of the Jamaican distributor Stanmar (11 warranty claims in total), Metals incurred immediate account losses of $374,831.85 ($CDN) when the Stanmar business failed...
>
> *****
>
> **Other Lost Sales And Customer Issues.** Mr. Reid's and Dura-Loc's failures to honor the Dura-Loc warranty have greatly impacted Metals' reputation in the marketplace and have caused it to lose a considerable amount of customers and business opportunities. On a without prejudice basis, Metals quantifies its indemnifiable loss in connection with aspect of its Claim in excess of $2M ($CDN), and likely considerably higher.
>
> *****
>
> **Ongoing Dura-Loc De-Granulation Issues.** In addition to the lost sales and lost customer issues referenced above, Metals has been also forced to incur actual costs and expenses in connection with remedying ongoing issues involving the de-granulation of Dura-Loc product and the failure of Dura-Loc to address this issue, and will no doubt continue to incur such costs and expenses as Dura-Loc and its principals continue in their failures and breaches. *See* Exhibit 'W' at MUSA004591-4592.

104. Ultimately, on or about April 6, 2011 Defendant Metals USA sued Dura-Loc, Allan Reid, and Andrew Spriet in the Ontario Superior Court of Justice. *See* Exhibit 'B' at MUSA000001. In the Statement of Claim, Defendant Metals USA alleged that Dura-Loc had breached, and continued to breach, their contractual obligations to Defendant Metals USA as established under the APA and the Settlement Agreement as follows:

> (a) [Dura-Loc, Allan Reid, and Andrew Spriet] have breached and continue to breach their contractual obligations to appropriately handle, process, administer, respond, investigate, resolve and to otherwise remedy various customer complaint and warranty claims involving Old Duraloc products.

(b) [Dura-Loc, Allan Reid, and Andrew Spriet] have breached and continue to breach their contractual obligations to indemnify and pay Metal's costs and expenses, including legal costs, in connection with various past and ongoing customer complaints and warranty claims involving Old Duraloc products. In particular, among other costs and expenses incurred by Metals, the Defendants have failed to indemnify and pay Metals' legal costs and expenses to date in responding to the Graci Action, and action currently pending before the Ontario Superior Court of Justice involving Old Duraloc product. [Dura-Loc, Allan Reid, and Andrew Spriet] have also failed to indemnify and pay Metals' legal costs and expenses involving similar past and ongoing customer complaints and warranty claims in the United States. *Id*. at MUSA000012-13.

105. In its Statement of Claim, Defendant Metals USA alleged damages based on Dura-Loc's failure to honor and pay warranty claims as follows:

(a) approximately $200,000 (CDN) in legal costs, relating to Metals' need to respond to the Graci Action and other customer complaints and legal claims regarding Old Duraloc products;

(b) approximately $250,000 (CDN) in lost sales and revenue resulting from the loss and continuing loss of key customers and business opportunities due to ongoing customer complaints and warranty claims regarding Old Duraloc products, and [Dura-Loc's, Allan Reid's, and Andrew Spriet's] failure to handle, process, administer, investigate, respond, resolve and to otherwise remedy these customer complaints and warranty claims;

(c) approximately $150,000 (CDN) in internal administration, time, expense and lost productivity that has and continues to be expnaded by Metals employees as a result of [Dura-Loc's, Allan Reid's, and Andrew Spriet's] failure to handle, process, administer, investigate, respond, resolve and to otherwise remedy these customer complaints and warranty claims involving Old Duraloc products;

(d) Significant and ongoing damage to Metals' business reputation and goodwill, which is based on the provision of high quality roofing products. Such loss of reputation and goodwill have caused and continue to cause Metals to lose customers and business opportunities;

(e) approximately $150,000 (CDN) in costs, expenses and lost profits in connection with the remedying of past and existing customer complaints and warranty claims involving degranulation of Old Duraloc product and the failure of Duraloc to appropriately and adequately address and remedy this issue. *Id*. at MUSA000014.

106. On or about May 31, 2011, Defendant Metals USA and Dura-Loc, Allan Reid, and Andrew Spriet entered into the First Amendment to the Settlement Agreement. *See* Exhibit 'Y' at MUSA000039. Pursuant to the First Amendment to the Settlement Agreement, Defendant

Metals USA and Dura-Loc, Allan Reid, and Andrew Spriet agreed, in pertinent part, as follows:

1. Pursuant to the terms of the Settlement Agreement and the Escrow Agreement and in resolution of the Claims and Action against Old Dura-Loc, the Parties agree that:

   (a) Metals is immediately entitled to the entire Escrow Amount, stipulated to be $345,055.75 CDN (plus interest accruing for the month of June 2011), in respect of its Claims, which the parties agree ought to have been released by the Escrow Agent immediately following its receipt of communications from Metals to that effect in May, 2009; and

   (b) Old Dura-Loc shall pay to Metals the sum of $350,000.00 CDN (the "Dura-Loc Payment"), by way of electronic funds transfer, wire transfer, bank draft or certified funds, on or before June 24, 2011.

2. In resolution of the Claims against the Principal Shareholders, the Principal Shareholders agree to pay to Metals the sum of $150,000.00 CDN (the "Settlement Payment"), by way of wire transfer or certified funds, on or before June 24, 2011.

3. Upon receipt of the Settlement Payment, the Dura-Loc Payment and the Escrow Amount by Metals, and subject only to paragraph 5 below and the following sentence, ***the Principal Shareholders shall be fully released and discharged from any and all of their past, present or future indemnity and/or guaranty obligations under the Asset Purchase Agreement and the Settlement Agreement, whether such obligations are now known or unknown, direct or indirect, whether or not yet alleged or asserted, or whether liquidated or unliquidated.***

8. Nothing in the foregoing, however, shall be interpreted to constitute a release of any obligations set forth in this Amendment. Further, notwithstanding anything herein to the contrary, nothing in the foregoing shall be interpreted to constitute a release of Old Dura-Loc's ongoing warranty obligations, and indemnification obligations with respect such warranty obligations for the benefit of Metals, as set forth in the Settlement Agreement, save that the obligation of Old Dura-Loc to indemnify Metals for any legal costs or expenses now or hereafter incurred by Metals in connection with Legal Proceedings related to warranty expenses or claims in respect of Old Dura-Loc product are hereby released. ***For greater certainty, should Metals be made a party to any Legal Proceedings alleging liability on the part of Metals with respect to product manufactured by Old Dura-Loc, Metals shall be responsible to defend, at its own cost and expense, any such Legal Proceedings.*** To the extent that Old Dura-Loc and Metals determines to defend a Legal Proceeding use the same counsel, each shall bear their respective costs, as determined by such counsel, in respect of such Legal Proceeding. ***For greater clarity, Metals confirms that the Principal Shareholders shall have no obligation to or liability in respect of an Old DL Product Matter or any costs, expenses, claims or liabilities of Metals related thereto.*** *Id*. at MUSA000039 and MUSA000041-42 (emphasis added).

107. Despite being fully aware that Dura-Loc was not honoring customer warranty claims, and claiming substantial damages as a result, Defendant Metals USA entered into the First Amendment to the Settlement Agreement with Dura-Loc, Allan Reid, and Andrew Spriet for approximately $982,623 (US).

108. In entering into the First Amendment to the Settlement Agreement, though, Defendant Metals USA expressly released Allan Reid and Andrew Spriet from any and all obligations and liabilities pursuant to the APA and the Settlement Agreement. Defendant Metals USA did so despite direct knowledge that as a result of Dura-Loc's, Allan Reid's, and Andrew Spriet's "failure to handle, process, administer, investigate, respond, resolve and to otherwise remedy [] customer complaints and warranty claims involving Old Duraloc products", it had suffered damages and would ultimately continue to suffer damages based on the fact that, after the APA, Dura-Loc, Allan Reid, and Andrew Spriet had utterly failed "to handle, process, administer, investigate, respond, resolve and to otherwise remedy [] customer complaints and warranty claims involving Old Duraloc products."

109. In releasing Allan Reid and Andrew Spriet from all past and future obligations and liability, and despite knowledge that it had lost, and would continue to lose, money and suffer damages as a result, Defendant Metals USA took a calculated risk to assume sole liability for any claims made against it for matters relating to Dura-Loc's products, and specifically the Tiles, in the future for $982,623. In doing so, Defendant Metals USA surrendered its best, and likely only, manner of recourse for Dura-Loc's, Allan Reid's, and Andrew Spriet's "failure to handle, process, administer, investigate, respond, resolve and to otherwise remedy [] customer complaints and warranty claims involving Old Duraloc products".

F. Defendant Metals USA Paid Inadequate Consideration for Dura-Loc's Assets, As The $9.4 Million Dollar Purchase Price Was Reduced By More Than $1.5 Million Dollars Which Left Insufficient Assets Available To Dura-Loc's Creditors, Specifically The Warranty Holders

110. Defendant Metals USA's consideration paid for the assets of Dura-Loc (the "Purchase Price") was inadequate to satisfy the claims of Dura-Loc's creditors, including the warranty claims resulting from the defective Tiles sold by Dura-Loc prior to the APA.

111. The APA, the Settlement Agreement, and the First Amendment to the Settlement Agreement collectively reflect the purchase price paid by Defendant Metals USA for Dura-Loc as during each transaction affected the amount of money available to Dura-Loc's creditors, specifically the warranty holders. As a result of the Settlement Agreement, and the First Amendment to the Settlement Agreement, the total amount available to Dura-Loc's creditors was approximately $7.9 million ($9,400,000 - $1,500,000). This amount was entirely insufficient for Dura-Loc's creditors to collect on their claims. Moreover, the initial purchase price of $9.4 million alone was inadequate to satisfy the claims of the warranty holders.

112. Specifically, based on the information that was reviewed by Defendant Metals USA when conducting its due diligence, Defendant Metals USA was aware that the $9.4 million purchase price was entirely inadequate as the future warranty claims would, and did, far exceeded $9.4 million.

113. As set forth in the Financial Due Diligence Memo (Exhibit 'Q' at MUSA002489) created by Defendant Metals USA, prior to its acquisition of Dura-Loc, the number of "customer complaints" received by Dura-Loc (i.e., "Warranty Claims") in each year from 2000 through 2005 was as follows:

Year	Warranty Claims
2000	56
2001	40
2002	43
2003	43
2004	37
2005	77

Id. at MUSA002489.

114. As shown in the above table, annual Warranty Claims ranged between 37 and 43 from 2001 to 2004 (average of approximately 41). However, Warranty Claims spiked by more than 100% from 2004 to 2005 (the year prior to the execution of the APA). Defendant Metals USA, at the time of the APA, was aware of the elementary fact that the higher the number of Warranty Claims received by Dura-Loc, the greater the amount of money to pay the warranty claims.

115. To determine the expected total cost of the Warranty Claims subsequent to the APA resulting from the defective Tiles sold by Dura-Loc, Defendant Metals USA should have estimated two (2) factors: (i) the expected average cost per Warranty Claim; and (ii) the expected number of future Warranty Claims.

116. A simple calculation based on the data maintained by Defendant Metals USA after the APA reveals that the average cost per Warranty Claim was approximately $12,165. *See* Exhibit 'J'; Exhibit 'K' at MUSA002446. The data set forth in Exhibit 'J' was also maintained by Dura-Loc prior to the APA and Defendant Metals USA reviewed this data as part of its due diligence.

117. This same data also reveals that there is a lag between the year the Tiles are installed and the Warranty Claims are filed. *Id*. This is due to the fact that the defect does not manifest itself immediately upon installation. Rather, the defect manifests itself after years of exposure to UV rays, i.e., direct sunlight which varies from region to region. Based on the data set forth in Exhibit 'J', which was maintained by Dura-Loc prior to the APA and reviewed by Defendant Metals USA as part of its due diligence, the average lag time between the installation date and the date upon which a Warranty Claim is submitted is approximately eight (8) years. Based on the eight (8) year average lag between the installation date and the date upon which a Warranty Claim is submitted, the following table shows the implied installation year for each Warranty Claim year.

Warranty Claim Year	Implied Installation Year
2000	1992
2001	1993
2002	1994
2003	1995
2004	1996
2005	1997

See Exhibit 'J'.

118. Based on the above table, on average, Warranty Claims for products sold by Dura-Loc after 1997 through the date of the APA were likely yet to have been filed, i.e., Tiles installed in 1998 would, on average, not manifest the defect and thus prompt a Warranty Claim until eight (8) years later, or 2006.

119. The expected number of future Warranty Claims at the time of the APA can be calculated based on the historical Warranty Claims per dollar of revenue in the year of the sale of the Tiles. The following table shows the annual revenue experienced by Dura-Loc from 2000 through 2005.

Year	Revenue	Revenue Growth
2000	$ 4,312,506	N/A
2001	$ 4,884,079	13%
2002	$ 5,558,591	14%
2003	$ 6,060,409	9%
2004	$ 7,747,512	28%
2005	$ 11,009,691	42%
2000-2005 CAGR		**21%**

See Exhibit 'L' at MUSA002515

120. Based on the above table, Dura-Loc's revenue increased between 9% and 42% each year from 2000 through 2005. The compound annual growth rate ("CAGR") was approximately 21% during that period.

121. While, at the time of financial due diligence, Dura-Loc's revenue prior to 2000 was not analyzed, based on the increasing revenue growth trend shown in the table above, it is likely that Dura-Loc's annual revenue was less than $4.3 million in years prior to 2000. In fact, assuming a 21% CAGR, Dura-Loc's revenues from 1997-1999 can be estimated as follows:

Implied Year	Implied Revenue [6]
2000 (Actual Revenue)	$ 4,312,506
1999 (Implied Revenue)	$ 3,564,055
1998 (Implied Revenue)	$ 2,945,500
1997 (Implied Revenue)	$ 2,434,297

122. As shown in table above, based on Dura-Loc's 21% CAGR from 2000 through 2005, the implied revenue in 1997 would approximate $2.4 Million.[7] Consequently, if seventy-

[6] Implied Revenue = Prior Year Revenue / (1+21% CAGR).

[7] 1997 is eight (8) years prior to 2005, which was the last full calendar year prior to the APA.

seven (77) actual Warranty Claims were filed in 2005, and assuming Dura-Loc's revenue in 1997 was $2.4 Million, then for every $31,000 in revenue, one (1) claim was filed ("Revenue per Claim").[8] As an alternative, if one assumes Dura-Loc revenue in 1997 was approximately equal to $4.3 Million level (as it was in 2000), one would expect an average $56,000 in Revenue per Claim.[9]

123. The following table shows the implied number of Warranty Claims in each year following the APA based on a range of $31,000 to $56,000 in Revenue per Claim. For comparison purposes, the actual number of Warranty Claims filed in each year subsequent to the APA through 2011 is shown on the right hand side of the table.

Year of Revenue	Warranty Claim Year [10]	Revenue	**Expected** Warranty Claims Using Revenue / Claim of: $56,000	$31,000	**Actual** Claims Filed [11]
1998	2006	$2,945,500	53	95	68
1999	2007	$3,564,055	64	115	99
2000	2008	$4,312,506	77	139	126
2001	2009	$4,884,079	87	158	170
2002	2010	$5,558,591	99	179	144
2003	2011	$6,060,409	108	196	224
2004	2012	$7,747,512	138	250	TBD
2005	2013	$11,009,691	197	355	TBD
Total		**$46 Million**	**823**	**1,487**	

124. As shown in the above table, the actual Warranty Claims filed in each year subsequent to the APA were within or above the range justified by the previously determined Revenue per Claim ratios. As expected, the actual and expected annual Warranty Claim increases coincide with the actual revenue growth experienced by Dura-Loc during the years

[8] 1997 Revenue in Dollars / 2005 Number of Warranty Claims = Revenue per Claim. $2.4 Million / 77 = $31,168.

[9] 1997 Revenue in Dollars / 2005 Number of Warranty Claims = Revenue per Claim. $4.3 Million / 77 = $55,844.

[10] Assumes eight (8)-year time-lag.

[11] *See* Exhibit 'X'.

leading up to the APA in 2006. In addition, the actual number of Warranty Claims filed in 2012 and 2013 have yet-to-be determined. Nevertheless, a range of the total expected future cost of Warranty Claims can be calculated based on the previously discussed average cost per Warranty Claim of approximately $12,165 as follows:

823 Warranty Claims x $12,165 = **$10.0 Million**

1,487 Warranty Claims x $12,165 = **$18.1 Million**

125. Based on an average Revenue per Claim ranging from $31,000 to $56,000, the expected total Warranty Claim cost would range between $10.0 million and $18.1 million.

126. Although the $10-$18.1 million expected Warranty Claim cost range represents an estimate based on the prior relationship between historical Warranty Claims and revenue, the plain fact remains that, as alleged throughout, the entirety of Dura-Loc's $46 million in revenue between 1998 and the date of the APA resulted from the sale of the defective Tiles. As a result, the entirety of the $46 million worth of defective Tiles remain subject to Warranty Claims.

127. Based on the foregoing, Defendant Metals USA's purchase price of approximately $9.4 Million (of which only $7.9 million was made available to Dura-Loc's creditors after the Settlement Agreement payment and the First Amendment to the Settlement Agreement payments) was inadequate to satisfy the claims of Dura-Loc's creditors, including the expected Warranty Claims resulting from defective products sold by Dura-Loc prior to the APA.

VII.

CLASS ALLEGATIONS

128. This action may properly be maintained as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The Class is sufficiently numerous, since it is estimated to include thousands of homes or structures throughout the United States and the State of California, the joinder of whom in one action is impracticable, and the disposition of whose claims in a class action will provide substantial benefits to the parties and the Court.

129. **Class Definition:** Without prejudice to later revisions, the Classes which Plaintiffs seek to represent are composed of:

/ / /

> The Warranty Class: All individuals and entities that own homes or other structures located in the State of California on which Dura-Loc Roofing Systems Limited's Continental, Shadowline, or Wood Shake stone coated steel roof shingles were installed during the period of time beginning July 1, 1995 through May 12, 2006.
>
> The CLRA Class: All individuals who, in the State of California, purchased Dura-Loc Roofing Systems Limited's Continental, Shadowline, or Wood Shake stone coated steel roof shingles for household use during the period of time beginning July 1, 1995 through May 12, 2006, and who were exposed to any representation by Dura-Loc that the Tiles would remain UV resistant for twenty-five (25) years and/or were free of defects.
>
> The Ownership Class: All individuals and entities that own homes or other structures located in the State of California on which Dura-Loc Roofing Systems Limited's Continental, Shadowline, or Wood Shake stone coated steel roof shingles were installed during the period of time beginning July 1, 1995 through May 12, 2006, and who were exposed to any representation by Dura-Loc that the Tiles would remain UV resistant for twenty-five (25) years and/or were free of defects.[12]

Excluded from the Class are Defendant Metals USA, Dura-Loc and any of their corporate parents, subsidiaries and affiliates, officers and directors, any entity in which Defendant Metals USA or Dura-Loc has a controlling interest, and the legal representatives, successors or assigns of any such excluded persons or entities, and the attorneys for Plaintiffs in this action. Also excluded from the Class are any individuals whose claims in this action have been previously released against either Defendant Metals USA or Dura-Loc.

130. Throughout discovery in this litigation, Plaintiffs may find it appropriate and/or necessary to amend the definition of the Class. Plaintiffs will formally define and designate a class definition when they seek to certify the Class alleged herein.

131. **Ascertainable Class:** The Class is ascertainable in that each member can be identified using information contained in Defendant's records.

132. **Common Questions of Law or Fact Predominate:** There is a well-defined community of interest among the Class. The questions of law and fact common to the Class predominate over questions which may affect individual Class members. These questions of law

[12] Plaintiffs are representatives and members of the Warranty Class, CLRA Class and the Ownership Class. Because the Warranty Class, the California Warranty Class, CLRA Class and the Ownership Class share Class members, all will be referred to as the "Class" unless otherwise noted.

and fact include, but are not limited to, the following:

a. Whether the Tiles are, and were, inherently defective;

b. Whether the Tiles were accompanied with an express written warranty;

c. Whether Dura-Loc breached its express written warranties;

d. Whether Dura-Loc violated California Civil Code Section 1791 *et seq.*;

e. Whether Dura-Loc violated California Commercial Code Section 2313 *et seq.*;

f. Whether Dura-Loc knew, or should have known of the defective nature of the Tiles;

g. Whether Dura-Loc fraudulently concealed from and/or failed to disclose to Plaintiffs and the Class the defective nature of the Tiles;

h. Whether Dura-Loc had a duty to Plaintiffs and the Class to disclose the defective nature of the Tiles;

i. Whether the facts relating to the Tiles that were concealed and/or otherwise not disclosed to Plaintiffs and the Class were material facts;

j. Whether as a result of Dura-Loc's concealment and/or failure to disclose those material facts, to Plaintiffs and the Class members acted to their detriment by purchasing the Tiles or homes or other structures on which the Tiles were installed;

k. Whether Dura-Loc engaged in unfair competition and/or unfair deceptive acts and/or practices in violation of California Civil Code Section 1750 *et seq.*;

l. Whether such acts or practices were illegal, unfair, or fraudulent within the meaning of California Business and Professions Code Section 17200 *et seq.*;

m. Whether Plaintiffs and the Class are entitled to compensatory damages, restitution, and the amounts thereof respectively;

n. Whether Dura-Loc should be ordered to disgorge, for the benefit of Plaintiffs and the Class, all or part of its ill-gotten profits received from the sale of defective Tiles, and/or to make full restitution to Plaintiffs and the Class members;

/ / /

o. Whether Dura-Loc sold its assets to Metals USA for the fraudulent purpose of escaping liability for its liabilities and debts to the Class; and

p. Whether Defendant Metals USA can be held liable for the actions, misrepresentations, and omissions of Dura-Loc as alleged in this action under one of the exceptions to the general rule of successor liability.

133. **Numerosity:** The Class is so numerous that the individual joinder of all members of the Class is impractical under the circumstances of this case. While the exact number of members of the Class is unknown to Plaintiffs at this time, Plaintiffs are informed and believe the Class consists of thousands of members. Individual joinder of members of the Class is also impracticable because the individual Class members are dispersed throughout the United States and the State of California.

134. **Typicality:** Plaintiffs' and the Class's claims arise from and were caused by Dura-Loc's wrongful conduct. Plaintiffs, like all other Class members, were sold the defective Tiles with the Warranty that Dura-Loc was breached by Dura-Loc. Moreover, Plaintiffs and the Class were exposed to the same representations by Dura-Loc which failed to disclose that the Tiles were not UV resistant and contained an inherent defect.

135. Because the Tiles purchased by Plaintiffs contain a defect in their design, Plaintiffs are like all other Class members because Plaintiffs have suffered the same injuries as those suffered by the Class; mainly, the diminution in their property values caused by a defective, unappealing, and substandard roof and the costs to repair and/or replace their defective roof. Since Plaintiffs' claims and the claims of Class members all derive from a common nucleus of operative facts, Plaintiffs are asserting claims that are typical of the claims of the entire Class.

136. **Adequacy:** Plaintiffs will fairly and adequately represent and protect the interests of the Class in that they have no disabling conflicts of interest that would be antagonistic to those of the other members of the Class. Plaintiffs seek no relief that is antagonistic or adverse to the members of the Class and the infringement of the rights and the damages they have suffered are typical of all other Class members. Plaintiffs have retained competent counsel, experienced in

class action litigation.

137. **Superiority:** The nature of this action and the nature of laws available to Plaintiffs and the Class make the use of the class action device a particularly efficient and appropriate procedure to afford relief to Plaintiffs and the Class for the wrongs alleged because:

a. The individual amounts of damages involved, while not insubstantial, are such that individual actions or other individual remedies are impracticable and litigating individual actions would be too costly;

b. If each Class member was required to file an individual lawsuit, Defendant Metals USA would necessarily gain an unconscionable advantage since it would be able to exploit and overwhelm the limited resources of each individual Class member with vastly superior financial and legal resources;

c. The costs of individual suits could unreasonably consume the amounts that would be recovered;

d. Proof of a common defect and factual pattern which Plaintiffs experienced is representative of that experienced by the Class and will establish the right of each member of the Class to recover on the cause of action alleged; and

e. Individual actions would create a risk of inconsistent results and would be unnecessary and duplicative of this litigation.

138. Plaintiffs and Class members have all similarly suffered irreparable harm and damages as a result of Dura-Loc's and Defendant Metals USA's unlawful and wrongful conduct. This action will provide substantial benefits to Plaintiffs, the Class and the public because, absent this action, Plaintiffs and Class members will continue to suffer losses, thereby allowing Dura-Loc's and Defendant Metals USA's violations of law to proceed without remedy, and allowing Dura-Loc's and Defendant Metals USA's to retain proceeds of their ill-gotten gains.

139. **Equitable Tolling:** Dura-Loc fraudulently concealed the defective nature of the Tiles, and the false nature of their representations and material omissions concerning the Tiles, from Plaintiffs and the Class. Thus, any statutes of limitation are equitably tolled because Plaintiffs and the Class did not know, and could not reasonably have known, the true facts

concerning the defects and false statements.

140. The representative Plaintiffs only learned the true facts concerning the damages they have and will suffer upon investigation conducted through counsel of the reasons for the color loss in the Tiles installed in their roofs. The members of the Class were unaware of the reasons for the loss of color, and many are still unaware of the cause of the color loss.

VIII.

FIRST CAUSE OF ACTION
Breach Of Express Warranty Under California Civil Code § 1790 *et* seq.
(On Behalf of the Warranty Class Against Defendant Metals USA)

141. Plaintiffs and the Warranty Class incorporate by reference each and every preceding paragraph of this Third Amended Class Action Complaint as if fully set forth herein.

142. Plaintiffs, on behalf of themselves and all other members of the Warranty Class, seek recovery for Dura-Loc's breach of express warranty under the laws of the State of California.

143. Plaintiffs and members of the Warranty Class are all "buyers" within the meaning of the Song-Beverly Consumer Warranty Act codified in California Civil Code § 1791.

144. The Tiles are a "consumer good" within the meaning of the Song-Beverly Consumer Warranty Act codified in California Civil Code § 1791.

145. Dura-Loc was, at all relevant times herein, a "manufacturer" within the meaning of the Song-Beverly Consumer Warranty Act codified in California Civil Code § 1791.

146. Under the terms of the express written warranty provided by Dura-Loc to members of the Warranty Class, Dura-Loc expressly warranted that the Tiles would remain UV resistant and be free from manufacturing defects for a period of 25 years following proper installation. Specifically, Dura-Loc represented, in writing, that: "[F]or a period of 25 years following proper installation, the surface coating of the Dura-Loc Product shall be UV resistant and will not deteriorate as a result of a manufacturing defect to the extent that the appearance of the roof is substantially affected..." *See* Exhibit 'A'; Exhibit E'; and Exhibit 'F'.

147. The foregoing affirmations and promises created an express warranty as to the fact that the Tiles would remain UV resistant and be free from manufacturing defects for a period

of 25 years following proper installation, were sold without defects, and would to conform to the representations, affirmations, and promises of Dura-Loc. *See* Exhibit 'A'; Exhibit E'; and Exhibit 'F'.

148. Dura-Loc was, and remains, obligated under the terms of the express warranties to repair or replace the defective Tiles sold to Plaintiffs and members of the Warranty Class, and/or make the Tiles conform to the express written warranty under California Civil Code § 1793.2(b) and (d), and California Commercial Code § 2313.

149. Dura-Loc breached its express written warranty to Plaintiffs and members of the Warranty Class, as set forth above, by placing the Tiles into the stream of commerce with knowledge that the Tiles would be purchased and installed on the homes or structures of Plaintiffs and members of the Warranty Class, despite knowing that the Tiles which contained a known and inherent design defect. Specifically, Dura-Loc's use of Colorquartz granules allowed UV rays to penetrate the surface of the Tiles which, causes the bonding material used to bind the surface coating on the Tiles to deteriorate, degrade, and ultimately separate from the Tiles. As a result, the Tiles lose their coating, granular texture, and are left with a discolored appearance. In other words, the granules are literally baked off the metal Tiles upon exposure to the sun, which then subsequently washes off the Tiles through normal exposure to the elements and leaving the bare metal undercoating exposed well before the end of the twenty-five (25) year period as represented by Dura-Loc.

150. Dura-Loc further breached its express written warranties by failing or refusing to repair or replace the Tiles with conforming goods as, in those rare instances in which Dura-Loc actually attempted any repair or replacement, Dura-Loc did so by merely using the same defective Tiles that had failed in the first instance.

151. Notice to Dura-Loc of its breach of the express written warranty by Plaintiffs and members of the Warranty Class is not required under these circumstances, as neither Plaintiffs nor any member of the Warranty Class dealt directly with Dura-Loc; rather, Dura-Loc was a remote manufacturer to whom California law does not require notice in order to plead a cause of action for breach of express warranty.

152. Plaintiffs and the Warranty Class have complied with all requirements under the law, and Dura-Loc failed or refused to honor the terms of the express written warranty. Dura-Loc knew of its warranty obligations to repair or replace the Tiles, and because of the design defect causing granule loss the Tiles did not, and could not, conform to the terms of the express warranties. However, Dura-Loc willfully refused and failed to repair or replace the Tiles. Therefore, Dura-Loc is liable for damages, as well as civil penalties pursuant to California Civil Code § 1794, and Defendant Metals USA is liable for the acts and omissions of Dura-Loc as set forth herein in Paragraphs 141 through 152 as Dura-Loc's successor-in-interest.

WHEREFORE, Plaintiffs and the Warranty Class pray for relief as set forth below.

IX.

SECOND CAUSE OF ACTION
Breach Of Express Warranty Under California Commercial Code Section 2313
(On Behalf of the Warranty Class Against Defendant Metals USA)

153. Plaintiffs and the Warranty Class incorporate by reference each and every preceding paragraph of this Third Amended Class Action Complaint as if fully set forth herein.

154. An express warranty is created by: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise or (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. Cal. Com. Code section 2313(1).

155. To prevail on a breach of express warranty claim, the plaintiff must prove (1) the seller's statements constitute an affirmation of fact or promise or a description of the goods; (2) the statement was part of the basis of the bargain; and (3) the warranty was breached. *Horvath v. LG Elecs. MobileComm U.S.A., Inc.*, 2012 U.S. Dist. LEXIS 19215, at *11 (S.D. Cal. Feb. 13, 2012).

A. Affirmation Of Fact Or Promise Or A Description Of The Goods

156. Dura-Loc specifically represented, and expressly warranted, that the Tiles were and would remain UV resistant and would be free of manufacturing defects that would substantially affect the appearance of the Tiles for a period of 25 years following proper

installation as follows: "[F]or a period of 25 years following proper installation, the surface coating of the Dura-Loc Product shall be UV resistant and will not deteriorate as a result of a manufacturing defect to the extent that the appearance of the roof is substantially affected..." *See* Exhibit 'A'; Exhibit E'; and Exhibit 'F'.

B. The Statement Was Part Of The Basis For The Bargain

157. Dura-Loc represented to Plaintiffs and the Warranty Class that the Tiles would be UV resistant and that the Tiles would not deteriorate to the extent that the appearance of the roof was substantially affected for a period of twenty-five (25) years.

158. These representations - that the Tiles would be UV resistant and that the Tiles would not deteriorate to the extent that the appearance of the roof was substantially affected for a period of twenty-five (25) years - were part of the basis of the bargain upon which Plaintiffs and the Warranty Class members purchased the Tiles.

C. The Warranty Was Breached

159. The Tiles did not conform to these representations and warranties by Dura-Loc and in fact contained an inherent defect. Dura-Loc's use of Colorquartz granules allowed UV rays to penetrate the surface of the Tiles which, causes the bonding material used to bind the surface coating on the Tiles to deteriorate, degrade, and ultimately separate from the Tiles. As a result, the Tiles lose their coating, granular texture, and are left with a discolored appearance. In other words, the granules are literally baked off the metal Tiles upon exposure to the sun, which then subsequently washes off the Tiles through normal exposure to the elements and leaving the bare metal undercoating exposed well before the end of the twenty-five (25) year period as represented by Dura-Loc.

160. Dura-Loc's actions, as complained of herein, constitute a breach of express warranty in violation of California Commercial Code section 2313.

161. Plaintiffs and the Warranty Class have been damaged as a direct and proximate result of the breach of Dura-Loc's failure to honor its express warranty in that Plaintiffs and Warranty Class members would not have purchased or paid as much for the Tiles had they known of the defective nature of the Tiles. Moreover, Plaintiffs' and Warranty Class members'

homes are less valuable than if they were not constructed with the defective Tiles.

162. Defendant Metals USA is liable for the acts and omissions of Dura-Loc as set forth herein in Paragraphs 153 through 161 as Dura-Loc's successor-in-interest.

WHEREFORE, Plaintiffs and the California Warranty Class pray for relief as set forth below.

X.

THIRD CAUSE OF ACTION
Violations of California Civil Code Section 1750 *et seqi*
(On Behalf of the Warranty Class Against Defendant Metals USA)

163. Plaintiffs and the CLRA Class incorporate by reference each and every preceding paragraph of this Third Amended Class Action Complaint as if fully set forth herein.

164. California Civil Code section 1770(a) provides that it is unlawful to use unfair methods of competition and unfair or deceptive acts or practices in a transaction intended to result or which results in the sale or lease of goods or services to any consumer.

165. California Civil Code section 1770(a) prohibits, among other things, one to "[r]epresent[] that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have," to "[r]epresent[] that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another," and to "advertis[e] goods with intent not to sell them as advertised." *See* Cal. Civ. Code section 1770(a)(5); (7); (9).

166. Dura-Loc violated California Civil Code sections 1770(a)(5), (7) and (9) when it failed to disclose that the Tiles suffered from a defect which would cause the exterior surface granules and the color exterior to deteriorate, degrade, and ultimately separate from the Tiles and were, in fact, not UV resistant.

167. The foregoing facts were not disclosed to either Plaintiffs or any member of the CLRA Class and are material as a reasonable consumer would deem an inherent defect which would cause the exterior surface granules and the color exterior to deteriorate, degrade, and ultimately separate from the Tiles important in making a decision with respect to whether to

purchase the Tiles.

168. Dura-Loc's deceptive practices, as alleged above, were specifically designed to, and did, induce Plaintiffs and the CLRA Class to purchase the Tiles. Dura-Loc engaged in common scheme to deliberately omit from all publicly available information and from information provided to Plaintiffs and the CLRA Class that the Tiles suffered from an inherent defect.

169. Dura-Loc was under a duty to Plaintiffs and the CLRA Class to disclose the aforementioned facts because:

a. Dura-Loc's omissions regarding an inherent defect that renders the Tiles non-UV resistant and that would result in the Tiles losing their granules and color were directly contrary to Dura-Loc's representations made in its advertising materials, warranty, and website, which states, *inter alia*, that the Tiles "shall be UV resistant and will not deteriorate as a result of a manufacturing defect to the extent that the appearance of the roof is substantially affect" and "Permanent colour, texture..."

b. Since at least January of 1993, Dura-Loc has had exclusive knowledge of an inherent defect that renders the Tiles non-UV resistant and that would result in the Tiles losing their granules and color when 3M Company informed Dura-Loc that "3M Colorquartz product is a quartz base mineral which is not opaque and readily allows light transmission. 3M does not recommend the use of Colorquartz as a surfacing mineral on roofing product."

c. Dura-Loc actively concealed an inherent defect that renders the Tiles non-UV resistant and that would result in the Tiles losing their granules and color by failing to disclose the defect in any of its advertising and marketing materials.

170. Plaintiffs and the CLRA Class reasonably and justifiably relied on Dura-Loc's representations, and were ignorant to those omissions of the aforementioned material facts. Plaintiffs and the CLRA Class would not have purchased their Dura-Loc roofing shingles were it not for the material omissions by Dura-Loc.

171. As a direct and proximate result of Dura-Loc's violations of the CLRA as alleged herein, Plaintiffs and the CLRA Class have been injured by, including but not limited to, the

following:

a. The infringement of their legal rights as a result of being subjected to the common course of conduct alleged herein;

b. Plaintiffs and the CLRA Class were induced to purchase the Tiles from Dura-Loc, which they would not have done so had they been fully informed of Dura-Loc's acts, omissions, misrepresentations, practices and nondisclosures as alleged in this Class Action Complaint, in violation of *inter alia*, the CLRA.

172. Plaintiffs seek an order awarding restitution or disgorgement of Defendant Ontario's revenues and profits from the sale of the Tiles.

173. Prior to filing the initial Class Action Complaint, each of the named Plaintiffs timely served a notice of violation of the CLRA by certified mail, return receipt requested, to Defendant Metals USA. Plaintiffs have therefore complied with the 30-day notice period required by California Civil Code section 1782(a). *See* Exhibits 'Z'-'AA'.[13]

174. Because Defendant Metals USA refused to provide appropriate relief for violations of the CLRA in response to Plaintiffs' CLRA notices, Plaintiffs and the CLRA Class are entitled to recover actual damages, punitive damages, attorneys' fees and costs, and any other relief the Court deems proper.

175. Defendant Metals USA is liable for the acts and omissions of Dura-Loc as set forth herein in Paragraphs 163 through 174 as Dura-Loc's successor-in-interest.

WHEREFORE, Plaintiffs and the CLRA Class pray for relief as set forth below.

XI.

FOURTH CAUSE OF ACTION
Violations of California Business & Professions Code Section 17200
(On Behalf of the Ownership Class Against Defendant Metals USA)

176. Plaintiffs and the Ownership Class incorporate by reference each and every preceding paragraph of this Third Amended Class Action Complaint as if fully set forth herein.

177. Plaintiffs have standing to bring this action under the UCL because they have suffered injury in fact as a result of Dura-Loc's conduct and have lost money through their

[13] Attached hereto as Exhibit 'AB' is a venue declaration by Plaintiff Wilson pursuant to Civil Code § 1780(d).

purchase of the Tiles which they would not have done were it not for the material omissions by Dura-Loc.

178. Dura-Loc's marketing, advertising, warranting and sales of the Tiles and constitute unfair competition in violation of the UCL. Dura-Loc has engaged in conduct that is unlawful, unfair, or fraudulent through a pattern of concealment of material facts that misleads and deceives the public with respect to an inherent defect in the Tiles.

179. The omissions and nondisclosures of Dura-Loc, as alleged herein, constitute unfair, unlawful, and/or fraudulent business practices within the meaning of California Business and Professions Code section 17200 *et seq*., including, but in no way limited to, violations of California Civil Code section 1750 *et seq.*

180. Plaintiffs and the Ownership Class are entitled to full restitution and/or disgorgement of Defendant's revenues and profits resulting from the sales of the Tiles.

181. Defendant Metals USA is liable for the acts and omissions of Dura-Loc as set forth herein in Paragraphs 172 through 176 as Dura-Loc's successor-in-interest.

WHEREFORE, Plaintiffs and the Ownership Class pray for relief as set forth below.

XII.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all present and former similarly situated Class members, and on behalf of the general public, request the following relief:

A. That an order certifying the Classes defined herein be entered designating Plaintiffs as representatives of said Classes and appointing Plaintiffs' attorneys as Class Counsel;

B. For actual damages in an amount according to proof;

C. For compensatory damages in an amount according to proof;

D. For other equitable relief;

E. For attorneys' fees as provided by law;

F. For prejudgment interest as provided by law;

G. For costs of suit; and

H. For such other and further relief as this Court deems just and equitable.

Dated: June 29, 2015

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