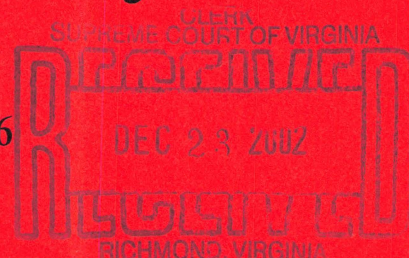


265Va 518

In The
Supreme Court of Virginia

RECORD NO. 021976



PULTE HOME CORPORATION,

Appellant,

v.

PAREX, INC.,

Appellee.

APPENDIX

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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

TIM L. PECKINPAUGH
PAMELA S. MCKINNEY-PECKINPAUGH

Plaintiffs,

v.

LAW NO. 184719

PULTE HOME CORPORATION,

and

CSS, L.L.C., a/k/a CORONADO
STUCCO & STONE,

and

CORONADO CORPORATION
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and

PAREX, INC.

Defendants.

AMENDED MOTION FOR JUDGMENT

The Plaintiffs, Tim L. Peckinpaugh and Pamela S. McKinney-Peckinpaugh, by undersigned counsel, file this Motion for Judgment against the Defendants, Pulte Home Corporation, CSS, L.L.C., a/k/a Coronado Stucco & Stone, Coronado Corporation and Parex, Inc., jointly and severally, stating as follows:

PARTIES

1. The Plaintiffs, Tim L. Peckinpaugh and Pamela S. McKinney-Peckinpaugh, are citizens and residents of Oakton, Virginia.

2. Plaintiffs are informed and believe that Defendant Pulte Home Corporation (hereinafter "Pulte") is a corporation organized and existing under the laws of Michigan. Pulte holds itself out as a licensed general contractor in the Commonwealth of Virginia, and is in the business of, among other things, constructing residential houses on real property. Pulte maintains a place of business in Fairfax, Virginia.

3. Plaintiffs are informed and believe that Defendant CSS, L.L.C., a/k/a Coronado Stucco & Stone is a Virginia limited liability company with its principal place of business in Vienna, Virginia, and is engaged in the business of exterior finish applications on residential houses and other buildings.

4. Plaintiffs are informed and believe that Coronado Corporation is the predecessor in interest of Coronado, and that Coronado Corporation may have engaged in the business of exterior finish applications on residential houses and other buildings, but that all obligations and liabilities of Coronado Corporation have been assumed by Defendant CSS, L.L.C. a/k/a Coronado Stucco & Stone. Defendants CSS, L.L.C., a/k/a Coronado Stucco & Stone, and Coronado Corporation are hereinafter collectively referred to as "Coronado."

5. Plaintiffs are informed and believe that Parex, Inc., a/k/a Parex Systems, Inc., a/k/a Parex EIFS (hereinafter "Parex") is a corporation organized and existing under the laws of the State of Georgia, with its principal place of business located in Redan, Georgia and is engaged in the design and manufacture of exterior insulation and finish systems ("EIFS"), also

commonly referred to as "synthetic stucco," for residential houses and other buildings.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

6. This case arises out of the defects in the construction, materials, design and supervision of Plaintiffs' home located at 3206 Wheatland Farms Drive, Oakton, Virginia.

7. On or about February 3, 1998, the Plaintiffs entered into a Sales Contract (hereinafter the "Contract") with Gerald A. Boutcher (hereinafter "Mr. Boutcher") for the purchase of a home built by defendant Pulte and subcontractors under Pulte's direction and control. Said Contract included transfer of the one-year builder warranty by Pulte for the remainder of the term.

8. At the time of the sale of the house, Plaintiffs believed that said residence was:

- (a) Constructed in a workmanlike manner, free from structural defects, and constructed with skill and care in a manner so as to meet the requisite standard of workmanlike quality and industry standards; and
- (b) Constructed in a manner that was in compliance with all relevant building codes and regulations and the plans and specifications, including manufacturer's specifications and architectural/drafter's plans and specifications.

9. The exterior walls of the Plaintiffs' home are clad with an Exterior Insulation and Finish System ("EIFS"), or synthetic stucco. The EIFS applied and otherwise utilized on the exterior walls was manufactured by Parex.

10. Plaintiffs are informed and believe that the synthetic stucco on the house was applied and installed by Coronado. Plaintiffs are further informed and believe that Coronado was a subcontractor of Pulte and that Coronado held itself out and warranted itself as a Parex Approved Applicator. As the home builder and general contractor, Pulte had the responsibility to coordinate the work of the subcontractors and properly integrate all of the building components,

including but not limited to the windows with the exterior cladding system, and to ensure that all work was performed pursuant to the applicable building codes.

11. Prior to closing on the sale, Pulte represented to Plaintiffs that Pulte had constructed the house in accordance with the plans and specifications, that Pulte and its subcontractors had complied with all laws and regulations concerning the construction of the work, and that Pulte had supervised all subcontractors and would remedy any problem that arose in the construction of the house pursuant to the warranty. Furthermore, Pulte had also represented to Plaintiffs that the EIFS was an adequate and protective exterior which would provide years of maintenance free service to the project and was otherwise proper and fit for the purpose of Plaintiffs' needs, and that the house would otherwise be free from structural defects and was constructed with the care and skill necessary to meet the standard of workmanlike quality and in a proper and workmanlike manner. After entering into the sale, but prior to closing, Plaintiffs had an inspection performed on the house which revealed that the EIFS had not been applied properly on the front of the house. Pursuant to the warranty that transferred from Mr. Boucher to Plaintiffs, Pulte represented to the Plaintiffs that Pulte would remove and reclad the areas where the EIFS had been improperly applied, in particular next to the garage. Pulte stated that once the EIFS was reinstalled correctly, there would be no further moisture intrusion problems and that the EIFS would "last forever."

12. Defendant Parex, or its agents and representatives, held itself out to the public, and to Plaintiffs, that it had developed a synthetic stucco that was suitable for use on houses like the Plaintiffs' home and would be properly applied by applicators who were trained and certified by Parex representatives.

13. Plaintiffs are informed and believe that Parex failed to properly train and supervise its alleged "Parex Approved Applicators" and specifically the subcontractor on this house, and failed to properly train and implement training for others on the house whose work was integral to the proper functioning of Parex EIFS, such that the EIFS on Plaintiffs' house was improperly applied. Despite this failure to properly train and supervise, Parex, upon information and belief, has sought to blame any defects on the failure of the contractor and the particular applicator subcontractor. Notwithstanding this claim, whether the "application" was done in accordance with the manufacturer's instructions does not detract from the fact that Parex knowingly or recklessly distributed a product which is inherently defective. Parex also failed to adequately inform Plaintiffs of the risks of the failure of the EIFS and the reason for the failure of the EIFS. Further, upon information and belief, it was foreseeable that water intrusion would occur in these systems, including, but not limited to, moisture intrusion entering into the wall assembly through inappropriate application of EIFS, and that Parex knew that water intrusion could and would occur in these systems and failed to disclose this fact to Plaintiffs.

14. The house was substantially completed in 1997. Plaintiffs moved into and occupied the house on or about March 27, 1998. In August, 1998, Coronado reinstalled the EIFS on the front of the house.

15. On or about July 7, 1999, a moisture intrusion inspection was performed on Plaintiffs' house. The moisture report indicated elevated moisture readings and improper application of all of the EIFS, even the EIFS that had been reinstalled in August 1998. As a result of this report and reports in the media, Plaintiffs became concerned that their house was, and is, experiencing severe moisture intrusion problems.

16. Plaintiffs have informed Pulte of their concerns that defects and problems with the synthetic stucco, flashings and sealants, combined with inadequate and improper installation and application of the system by Coronado and other subcontractors under the control and direction of Pulte, were causing their house to experience severe and serious moisture intrusion related problems in numerous areas.

17. Plaintiffs are also informed and believe that Pulte is currently aware that the EIFS installed on their house is not a sufficiently durable and watertight cladding.

18. Plaintiffs are also informed and believe that the defendants had a duty under Uniform Statewide Building Code §106.4, to obtain approval from the appropriate building code officials for the use of alternative materials such as EIFS. Defendants had a duty to ensure that the EIFS material was at least equivalent to those prescribed by the code, in quality, strength, effectiveness, durability and safety. Defendants failed to comply with this code section in that the EIFS used on the Plaintiffs' home is ineffective, failing to meet the purpose for which it was intended.

19. Despite the foregoing notice and knowledge, defendants have failed to perform the necessary remedial activities to correct the defects in Plaintiffs' house. Upon information and belief, the defects in Plaintiffs' house include, but are not limited to:

- (a) Missing or inadequate sealant at penetrations and junctures of dissimilar materials;
- (b) Lack of proper sealant between window tracks and framing;
- (c) Lack of proper roofing "kickouts" or inadequate kickouts;
- (d) Failure to follow industry standards;
- (e) Cracks in the EIFS;

- (f) Exposed EIFS mesh, where base and finish coats have not been applied;
- (g) EIFS improperly applied to horizontal surfaces;
- (h) Lack of proper expansion joints;
- (i) In other respects which will be more fully revealed following demolition and removal of the synthetic stucco; and
- (j) Defective and leaking windows.

20. Due to defendants' conduct, as described herein, Plaintiffs have suffered substantial property damage to their home, and will continue to suffer damages unless relief is granted. The damages include, among other things, the excessive moisture levels within the walls of the new home and probable exterior and interior wood rot, the necessary and reasonable costs of repair and the diminishment in value of the home as a result of the many structural defects and other deficiencies in Plaintiffs' home. These defects, problems, and damages were caused by deficiencies in materials and workmanship provided by defendants.

21. Defendants' actions will require Plaintiffs to entirely remove the synthetic stucco, install a new exterior siding, and repair the damaged property, including but not limited to the doors and windows, made visible after removal of the EIFS. Plaintiffs' damages are reasonably believed to be an amount in excess of \$100,000, plus costs, interest and attorneys fees as allowed by law. Plaintiffs further reserve the right to amend their damages as they obtain more complete information regarding the total amount necessary to re-clad and perform any necessary additional repairs following removal of the EIFS.

22. This action is timely filed by Plaintiffs, and all conditions precedent to bringing this action have occurred, been met, or have been waived.

COUNT ONE
(Negligence *Per Se* – Pulte)

23. Plaintiffs incorporate herein by reference paragraphs 1 through 22, above.

24. Pulte owed a duty to Plaintiffs to construct Plaintiffs' house with due care, and in accordance with the Virginia Uniform Statewide Building Code (hereinafter the "USBC") and industry standards, and with the care and skill necessary to meet the standard of workmanlike quality.

25. Pulte breached the aforementioned duty and was negligent in its construction of the house. Pulte's specific acts of negligence include, but are not limited to, the fact that it:

- (a) Failed to use proper workmanship in accordance with USBC §115.1, which has resulted in numerous construction defects;
- (b) Failed to install the EIFS, sealants and flashings in accordance with USBC §1403.3, §1404.7 and §1405.1, *et seq.*, pertaining to the requirements for constructing exterior wall coverings so as to prevent the deleterious intrusion of water through condensation and leakage;
- (c) Failed to adequately test the EIFS to determine character, quality and limitations of use, in accordance with USBC §1701.2;
- (d) Failed to adequately repair known leaks that resulted in wood deterioration from water infiltration in areas of the house;
- (e) Failed to select an appropriate external siding system that would adequately and properly keep the house waterproof;
- (f) Failed to properly supervise employees, agents, and subcontractors to assure that all work proceeded in accordance with, and in conformity with, manufacturer's specifications, industry standards, and applicable building codes;
- (g) Failed to detect errors and failures in workmanship and quality of materials;
- (h) Accepted and approved defective and/or nonconforming materials and/or labor;

- (i) Provided deficient workmanship and/or defective materials without proper inspection to assure that the work was correct and in conformity with customary industry standards and in accordance with the purchase contract with Plaintiffs and the manufacturer's instructions and specifications;
 - (j) Failed to adequately construct the waterproofing system on the exterior of Plaintiffs' house which would not allow water to infiltrate the interior of the structure;
 - (k) Failed to use due care in securing competent subcontractors;
 - (l) Failed to guard against the negligent acts of subcontractors;
 - (m) Failed to correct defective conditions;
 - (n) Failed to report the failure of installation to comply with manufacturer and other specifications; and
 - (o) Committed other acts of negligence and breaches of the applicable building code which may be revealed through discovery.
26. The USBC and industry standards referenced above were enacted for public safety.

27. Plaintiff belongs to that class of persons for whose benefit the referenced the USBC and industry standards were enacted.

28. It was reasonably foreseeable that the aforementioned acts of negligence would damage Plaintiffs.

29. As a direct and proximate result of Pulte's negligence, Plaintiffs have suffered damages in the amount of \$500,000.00, or according to proof at trial, plus interest.

COUNT TWO
(Breach of Express Warranty – Pulte)

30. Plaintiffs incorporate herein by reference paragraphs 1 through 29, above.

31. Pulte provided an express warranty, that among other things, the work would be

performed in a good and workmanlike manner, using quality materials, in accordance with its plans and specifications, and that Pulte would repair or replace any defective materials and/or workmanship which became known or apparent during the warranty period.

32. As set forth herein, the house contained numerous latent defects of which Plaintiffs had little knowledge at the time of purchase, such that the work is not of good quality, not free from faults and defects, not in conformance with the plans and specifications, and not in accordance with good building practices. The latent problems and defects, largely unknown to Plaintiffs, occurred and manifested within the applicable warranty period.

33. By reason of the defects and defective construction activities as described herein, and the additional defects that Plaintiffs are informed and believe will be discovered upon further destructive testing, Pulte has breached its express warranties to Plaintiffs.

34. Plaintiffs have notified Pulte of the defective condition of the house and the breaches of express warranties, but Pulte has failed to perform the necessary remedial activities to correct these defects.

35. By reason of Pulte's failure to repair or replace the aforementioned defects, Pulte has breached its continuing duty to repair under the express warranty. Plaintiffs have met all conditions precedent to recovery under the warranty.

36. By reason of Pulte's breach of its express warranty, Plaintiffs have suffered damages in the amount of \$500,000.00, or according to proof at trial, plus interest.

COUNT THREE
(Breach of Implied Warranties – Pulte)

37. Plaintiffs incorporate herein by reference paragraphs 1 through 36, above.

38. By operation of law, Pulte impliedly warranted that the house would be habitable

and of good workmanship.

39. Further, Pulte impliedly warranted to Plaintiffs that the house was free from substantial defects and was constructed in a workmanlike manner in accordance with the standard of workmanlike quality prevailing at the time and place of construction.

40. Pulte breached this warranty in that the work was not of a workmanlike quality prevailing at the time of construction and failed to satisfy the applicable standards of habitability and contained numerous latent defects.

41. By reason of Pulte's breach of its implied warranties, Plaintiffs have suffered damages in the amount of \$500,000.00, or according to proof at trial, and will continue to suffer damages unless relief is granted.

COUNT FOUR
(Negligence *Per Se* – Coronado)

42. Plaintiffs incorporate herein by reference paragraphs 1 through 22, above.

43. Defendant Coronado owed a duty to Plaintiffs to construct their house with due care, and in accordance with the USBC and industry standards, to properly apply the synthetic stucco system on Plaintiffs' house to avoid injury to their person or property.

44. Plaintiffs are informed and believe that Coronado breached the aforementioned duty and was negligent in its construction of the EIFS and its work on Plaintiffs' house in that Coronado:

- (a) Failed to use proper workmanship in accordance with USBC §115.1, which has resulted in numerous construction defects;
- (b) Failed to install the EIFS, sealants and flashings in accordance with USBC §1403.3, §1404.7 and §1405.1, *et seq.*, pertaining to the requirements for constructing exterior wall coverings so as to prevent the deleterious intrusion of water through condensation and leakage;

- (c) Failed to adequately test the EIFS to determine character, quality and limitations of use, in accordance with USBC §1701.2;
- (d) Failed to select an appropriate external siding system that would adequately and properly keep the house waterproof;
- (e) Failed to properly supervise employees and agents to assure that all work proceeded in accordance with, and in conformity with, manufacturer's specifications, industry standards, and applicable building codes;
- (f) Failed to detect errors and failures in workmanship and quality of materials;
- (g) Provided deficient workmanship and/or defective materials without proper inspection to assure that the work was correct and in conformity with customary industry standards and in accordance with the purchase contract with Plaintiffs and the manufacturer's instructions and specifications;
- (h) Failed to adequately construct the waterproofing system on the exterior of Plaintiffs' house which would not allow water to infiltrate the interior of the structure;
- (i) Failed to correct defective conditions;
- (j) Failed to report the failure of installation to comply with manufacturer and other specifications; and
- (k) Committed other acts of negligence and breaches of the applicable building code which may be revealed through discovery.

45. The USBC and industry standards referenced above were enacted for public safety.

46. Plaintiff belongs to that class of persons for whose benefit the referenced the USBC and industry standards were enacted.

47. As a direct, foreseeable, and proximate result of Coronado's negligence, Plaintiffs have suffered damages in the amount of \$500,000.00, or according to proof at trial, plus interest.

COUNT FIVE
(Negligence *Per Se* – Parex)

48. Plaintiffs incorporate herein by reference paragraphs 1 through 22, above.

49. Parex had a duty to design and manufacture its EIFS product in accordance with the USBC and industry standards, and with the care and skill necessary to meet the standard of workmanlike quality.

50. Parex breached its duty in the particulars previously described. Specifically, Plaintiffs are informed and believe and therefore allege that Parex:

- (a) Failed to adequately test and develop in accordance with USBC § 1701.1, *et seq.*, its EIFS before marketing and selling the product to be used in the construction of the house in this case;
- (b) Failed to adequately design and manufacture, in accordance with USBC §1404.7 and §1405.1, *et seq.*, a weather resistant material, with the result that moisture became trapped within the exterior walls of the house in this case, thereby causing accelerated rotting and decay of the EIFS, the metal and gypsum sheathing to which it was attached, and other structural components of the Plaintiffs' home;
- (c) Failed to consider construction realities prior to marketing and distributing its EIFS;
- (d) Failed to warn of the dangers of any moisture intrusion on the EIFS or the structures to which the EIFS was attached;
- (e) Failed to properly train, instruct and educate the EIFS applicator and others in the construction trade as to how to apply and install the EIFS and other components of the wall such as windows and flashing to prevent moisture from intruding behind the EIFS and becoming trapped;
- (f) Failed to address the repeated actions of its certified applicators, who repeatedly chose to ignore EIFS application instructions written by Parex;
- (g) Failed to properly design instructions of EIFS application, sealant application, flashings and other details upon which the performance of the Parex product is dependent;

- (h) Failed to warn of extreme maintenance needs of the EIFS;
- (i) Unreasonably designed and administered the applicator certification program;
- (j) Unreasonably failed to insure that EIFS applicators, contractors and others were aware of any revisions to the manufacturer's instructions for the proper application of EIFS;
- (k) Unreasonably failed to consider the impact of the climate on the viability and performance of its EIFS in Northern Virginia;
- (l) Unreasonably failed to consider or warn of the results of the interaction of the EIFS with other components of the house, including, but not limited to, windows, decks, doors, flashing and roof overhangs;
- (m) Failed to take other actions or provide warnings to prevent the damage to the house;
- (n) Continued to market its barrier EIFS as a viable and suitable exterior system for structures such as Plaintiffs' house, even after Parex knew of its inherent flaw; and
- (o) Committed other acts of negligence and breaches of the applicable building code which may be revealed through discovery.

51. The USBC and industry standards referenced above were enacted for public safety.

52. Plaintiff belongs to that class of persons for whose benefit the referenced the USBC and industry standards were enacted.

53. As a direct, foreseeable, and proximate result of Parex's negligence, Plaintiffs have suffered damages in the amount of \$500,000.00, or according to proof at trial, plus interest.

COUNT SIX

(Fraud – Pulte, Coronado, and Parex)

54. Plaintiffs incorporate herein by reference paragraphs 1 through 53, above.

55. In or about March 1998, prior to closing, Plaintiffs were in contact with representatives of Pulte in order to discuss the exterior cladding material on the front of the house that needed replacement. Attending that meeting were Bob Fisher and Bill Fisher of Pulte, and two representatives of Coronado, among others.

56. The Coronado representatives stated that EIFS is better than real stucco or brick if properly applied .

57. Both Pulte representatives stated that any problems with the EIFS cladding on Plaintiffs' home was due to improper application, and not with the product itself. Mr. Fisher also said that once the EIFS was replaced, Plaintiffs would not have any further problems with the EIFS "unless you drive a car or a lawnmower through the side of the house."

58. The foregoing statements by Pulte and Coronado, referenced in paragraphs 60 and 61, above, were false. Despite replacement of the stucco in August 1998, Plaintiffs' home continues to experience moisture intrusion as a result of defects with the EIFS as confirmed by the inspection performed in July 1999.

59. In addition to the foregoing false statements made by Pulte and Coronado, Plaintiffs are informed and believe and therefore allege that Parex made also numerous direct and indirect representations to consumers, including potential home buyers such as the Plaintiffs, regarding the durability and quality of its synthetic stucco, EIFS, which were materially false and misleading.

60. Parex's misrepresentations include, on information and belief, that its system was moisture resistant, low maintenance or maintenance free, cost effective, and was an effective exterior cladding suitable for use on residential structures, that adequate testing had been

performed and those other representations that are set forth herein.

61. Parex knew or should have known that its EIFS was defective and would trap moisture that would cause wood to rot and decay, and would promote mold growth in and insect infestation of wood and insulation, water damage to gypsum sheathing and metal, resulting in risks to the health of the occupants of the home, and was otherwise not as the system as represented by Parex and was not disclosed to potential purchasers of its product. These failures to disclose were material omissions of fact.

62. Plaintiffs are informed and believe and on that basis allege that in addition to the foregoing misrepresentations and omissions, Parex also did the following:

- (a) Provide false and inaccurate information to the consuming public, including Plaintiffs, regarding the durability characteristics of barrier EIFS clad structures.
- (b) Provide false and inaccurate information to the consuming public, including Plaintiffs, regarding homeowner maintenance. Provide false and inaccurate information to the consuming public, including Plaintiffs, about the suitability of barrier EIFS for use in the construction of residential structures such as the subject home.
- (c) Provide false and inaccurate information to the consuming public, including Plaintiffs, regarding the adequacy of Parex's testing of barrier EIFS.
- (d) Provide false and inaccurate information to the consuming public, including Plaintiffs, regarding the governmental approvals of Parex's barrier EIFS.
- (e) Provide false and inaccurate information to the consuming public, including Plaintiffs, regarding the history of water intrusion problems with barrier EIFS clad structures.
- (f) Provide false and inaccurate information to the consuming public, including Plaintiffs, regarding how the EIFS industry's had or would respond to water intrusion damage on barrier EIFS clad structures.

- (g) Provide false and inaccurate information to the consuming public, including Plaintiffs, regarding the need to incorporate means to drain or weep away water that would foreseeably intrude (from sources such as caulk joints, flashings or windows) into barrier EIFS clad structures.
- (h) Provide false and inaccurate information to the consuming public, including Plaintiffs, regarding barrier EIFS being a cost effective wall cladding for residential structures.
- (i) Provide false and inaccurate information to the consuming public, including Plaintiffs, regarding barrier EIFS ability to protect structures from water damage.
- (j) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that barrier EIFS clad structures will trap water which intrudes from sources such as caulk joints, flashings, penetrations or windows.
- (k) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that water trapped in barrier EIFS clad structures will result in water damage to the underlying substrate and other damages.
- (l) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that barrier EIFS clad structures are dependent upon maintaining a face sealed barrier.
- (m) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, the difficulty of maintaining a face sealed barrier.
- (n) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, the degree of maintenance of sealants in order to maintain a face sealed barrier.
- (o) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that barrier EIFS clad structures require a greater degree of maintenance than structures clad with traditional claddings.
- (p) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that there existed an alternative design for EIFS that provided a drainage plane to weep or drain away intruding water and neutralize forces.
- (q) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, the nature and extent of the water damage to barrier EIFS clad structures.

- (r) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, of the known likelihood of water intrusion behind the barrier EIFS from various sources.
- (s) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that Parex had not performed moisture intrusion tests that dealt with water intrusion from windows.
- (t) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that Parex had not performed moisture intrusion tests that dealt with water intrusion from caulk joints.
- (u) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that Parex had not performed moisture intrusion tests that dealt with water intrusion from junctures of EIFS and dissimilar materials.
- (v) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that Parex had not performed moisture intrusion tests that dealt with water intrusion from flashings.
- (w) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that Parex had not performed moisture intrusion tests that dealt with water intrusion from penetrations, such as water spigots, vents and hoses.
- (x) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, the documented problems with barrier EIFS clad structures.
- (y) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, the sources of water penetration that will result in water damage in barrier EIFS structures.
- (z) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that a structure clad with barrier EIFS is incompatible with the normal weather conditions in Northern Virginia.
- (aa) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that Parex had implemented no direct method of monitoring application methods.
- (bb) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that Parex had no requirement that trained or certified applicators apply its product.

- (cc) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that Parex had no means of assuring that contractors and subcontractors would receive their application instructions.
- (dd) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, the need for expansion joints, flashings, sealant, and other items which are integral to the functioning of an barrier EIFS clad structure.
- (ee) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that the application instructions and details provided by Parex were insufficient to insure proper application.
- (ff) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that those who would likely be installing expansion joints, flashings, sealant, and other items which are integral to the functioning of a barrier EIFS clad structure would not be trained by Parex and would not be required to have received a copy of the instructions provided by Parex.
- (gg) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that installation of barrier EIFS along with the polyethylene vapor barrier would lead to failure of the system.
- (hh) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, that barrier EIFS had no means of dealing with foreseeable water intrusion and that such foreseeable water intrusion would cause rot and decay.
- (ii) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, the degree of difficulty of applying barrier EIFS.
- (jj) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, the degree of difficulty of applying adequate caulk joints in barrier EIFS clad structures.
- (kk) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, the degree of difficulty of applying adequate flashings in barrier EIFS clad structures.
- (ll) Conceal or fail to accurately disclose to the consuming public, including Plaintiffs, the standard of windows that can be installed in barrier EIFS clad structures in order for a face sealed barrier to be established and maintained.

63. Parex was under a duty to disclose this information to Plaintiffs because, among other reasons, Parex was in a superior position to know the true facts and the hidden defects of Parex's EIFS and its known repercussions to consumers, and because the defect was latent and it would not immediately appear.

64. Parex's foregoing misrepresentations and omissions regarding the durability, quality and characteristics of its EIFS product and the application and training of applicators were made with the intent to induce consumers, including the Plaintiffs, to act thereon in selecting a home clad with Parex's EIFS product.

65. Pulte, Coronado, and Parex intentionally, or with reckless abandon and disregard for the truth, concealed and misrepresented the foregoing material facts and intended Plaintiffs to rely on them in their selection of Parex's EIFS product as the exterior cladding for their home. Defendant's actions were done in willful and wanton disregard of Plaintiffs' rights.

66. Plaintiffs reasonably and justifiably relied on Defendants' misrepresentations and omissions of the foregoing material facts to Plaintiffs' detriment.

67. As a direct result of Defendants' foregoing fraud, Plaintiffs have suffered damages in the amount of \$500,000.00, or according to proof at trial, plus interest and punitive damages.

COUNT SEVEN
(Constructive Fraud – Pulte, Coronado, and Parex)

68. Plaintiffs incorporate herein by reference paragraphs 1 through 64, above.

69. Defendants innocently or negligently concealed and misrepresented the foregoing material facts and intended Plaintiffs to rely on them in their purchase of their home that was clad with Parex's EIFS product.

70. Plaintiffs reasonably and justifiably relied on Defendants' misrepresentations and

omissions of the foregoing material facts to Plaintiffs' detriment.

71. As a direct result of Defendants' constructive fraud, Plaintiffs have suffered damages in the amount of \$500,000.00, or according to proof at trial, plus interest.

COUNT EIGHT

(Violation of Virginia Consumer Protection Act – Pulte, Coronado & Parex)

72. Plaintiffs incorporate herein by reference paragraphs 1 through 71, above.

73. The aforementioned acts by the Defendants Pulte, Coronado, and Parex constitute prohibited practices by suppliers within the meaning of the Virginia Consumer Protection Act, Virginia Code § 59.1-200. Under the Act, Defendants are all Suppliers as defined by Virginia Code §59.1-198 in that Pulte and Coronado acted as a distributor and Parex acted as a manufacturer of the EIFS that was to be resold in a consumer transaction, namely to the Plaintiffs herein.

74. As set forth in paragraphs 54 through 67, above, the Defendants, collectively and individually, violated the Virginia Consumer Protection Act by: (a) misrepresenting their goods and services, specifically the EIFS product and construction of Plaintiffs' home, as having certain quantities, characteristics, ingredients, uses and/or benefits; (b) advertising or offering for sale goods which were defective, without clearly and unequivocally indicating in the advertisements or offer of sale that the goods were defective; (c) misrepresenting that the "stucco" was a quality product; (d) misrepresenting that defendants' services were of a particular quality or standard; (e) advertising goods or services with intent not to sell them as advertised, namely, as a first class building material; (f) offering for sale defective goods; and (g) using deception, fraud, false pretense, false promise and/or misrepresentation in connection with a consumer transaction. The foregoing misrepresentations include that the EIFS would "last forever" if properly installed and

that the EIFS was better than "real stucco" or brick in terms of durability and maintenance.

75. The foregoing violations of the Virginia Consumer Protection Act, Virginia Code § 59.1-200, *et. seq.*, were willful, and consequently support treble damages.

76. Pursuant to Virginia Code § 59.1-204(B), Plaintiffs are also entitled to an award of reasonable attorneys' fees and court costs.

77. As a direct and proximate result of Defendants' misconduct and violation of the Virginia Consumer Protection Act, Plaintiffs have suffered actual damages in the amount of \$500,000.00, or according to proof at trial, plus interest, attorney's fees, and treble damages.

JURY DEMAND

Plaintiffs demand trial by jury on all counts.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on June 15, 2000, a copy of the foregoing Motion for Judgment was mailed, postage prepaid, to the office of:

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David Hilton Wise

FILED
00 JUN 15 PM 3:07
CLERK OF COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

TIMOTHY L. PECKINPAUGH, et al,)	
)	
Plaintiffs,)	
)	
v.	)	At Law No. 184719
)	
PULTE HOME CORPORATION, et al,)	
)	
Defendants.)	

**DEFENDANT PULTE HOME CORPORATION'S
CROSS-CLAIM AGAINST DEFENDANTS CSS, L.L.C. AND PAREX, INC.**

COMES NOW Defendant/Cross-Claim Plaintiff Pulte Home Corporation ("PHC" or "Cross-Claim Plaintiff"), by and through counsel, and asserts this Cross-Claim against Defendants CSS, L.L.C. ("CSS") and Parex, Inc. ("Parex") (collectively, "Cross-Claim Defendants"). In support thereof, Cross-Claim Plaintiff states as follows:

1. This Cross-Claim is properly before this Court pursuant to Rule 3:9 of the *Rules of the Supreme Court of Virginia* in that PHC's claims against CSS and Parex grow out of matter pled in the Motion for Judgment filed by Plaintiffs.
2. This Court may exercise jurisdiction over this suit pursuant to Virginia Code § 17.1-513.
3. Cross-Claim Plaintiff PHC is a Michigan corporation, authorized to do business in the Commonwealth of Virginia as a builder of residential homes.

4. CSS is a Virginia limited liability company that is or was engaged in the business of applying synthetic stucco cladding (sometimes referred to as "EIFS", or "Exterior Insulation and Finish System") to buildings.

5. Parex is a Georgia corporation that is or was engaged in the business of designing and manufacturing synthetic stucco cladding (sometimes referred to as "EIFS", or "Exterior Insulation and Finish System") for use on residential homes and other buildings.

6. At all times relevant to the allegations herein, PHC, CSS and Parex were conducting business in the Commonwealth of Virginia.

7. Pursuant to a subcontract agreement dated September 6, 1995 (the "Subcontract", attached hereto as Exhibit A), PHC engaged Coronado Corporation ("Coronado") to apply synthetic stucco manufactured by Parex, Inc. ("Parex") at homes in the development known as Wheatland Estates, including the home of the Plaintiffs in this action.

8. CSS is the successor-in-interest of Coronado, and assumed Coronado's liabilities, in that:

- a. CSS expressly or impliedly agreed to assume Coronado's liabilities;
- b. the circumstances surrounding CSS' succession demonstrate a *de facto* merger of CSS and Coronado;
- c. CSS is merely a continuation of Coronado; and/or
- d. the transaction whereby CSS succeeded Coronado was fraudulent in fact.

9. That CSS is a mere continuation of Coronado, or is otherwise charged by law to have assumed Coronado's liability, is further demonstrated in that:

- a. Both CSS and Coronado were engaged in the business of, *inter alia*, applying synthetic stucco to residential homes;
- b. Coronado ceased its business operations and/or became insolvent at the same approximate time that CSS came into being;

- c. CSS began work under the Subcontract at the same approximate point that Coronado ceased work;
- d. Both CSS and Coronado conduct business under the name "Coronado", the employee uniforms and insignia of both companies bear the name "Coronado", and CSS distributed materials under Coronado's name;
- e. CSS uses the same equipment that Coronado used, including the same trucks, which also bear the name "Coronado";
- f. The employees of Coronado became the employees of CSS without any interruption in employment and without formal or informal job interviews, and many of the employees were unaware that they had changed employers;
- g. CSS and Coronado shared the same offices, address and phone number, and Bernard Franks was PHC's "contact person" for both;
- h. There is a common identity of the officers, directors and shareholders of CSS and Coronado, and CSS' president, Benjamin Franks, is the son of the president, secretary and treasurer of Coronado, Bernard Franks;
- i. Coronado transferred or sold all or part of its assets to CSS for less than adequate consideration, and with an intent to enable Coronado to avoid tax indebtedness and other liabilities that Coronado had accrued, and to enable its principal to continue his business without having to honor such liabilities;
- j. CSS is, in fact, dominated and controlled by Bernard Franks, such that the economic ownership and actual control of the two companies was and is essentially the same; and
- k. Coronado's transfer or sale of all or part of its assets to CSS was not an arm's-length transaction, but rather was a product of the close relationship between the two companies.

10. After partially performing its obligations under the Subcontract and without PHC's consent, Coronado delegated to CSS its duty to perform part or all of the remaining synthetic stucco application under the Subcontract, which duty was assumed by CSS, such that CSS and Coronado jointly shared the obligation to fully perform under the Subcontract.

11. Either CSS, Coronado, or both CSS and Coronado actually applied the synthetic stucco manufactured by Parex to Plaintiffs' home pursuant to the Subcontract.

12. Plaintiffs have filed a Motion for Judgment, hereby incorporated by reference, alleging that Plaintiffs entered into a contract to purchase a house built by PHC. Plaintiffs further state that the house was clad with Parex synthetic stucco.

13. Plaintiffs seek recovery based, in part, on the alleged damage that the stucco exterior has caused their home. Specifically, Plaintiffs complain that the Parex stucco on their home has permitted unusually high moisture concentrations and that as a result the property has experienced and continues to experience damage including, but not limited to, major structural defects. The damages claimed by Plaintiffs flow from the allegedly defective nature of the Parex stucco and from the allegedly improper manner in which the Parex stucco was applied.

14. PHC denies the allegations against it and will assert affirmative defenses.

COUNT ONE

(Contractual Indemnification) (CSS)

15. PHC repeats and reiterates each and every allegation as more fully set forth in paragraphs 1 through 14.

16. PHC is the named Contractor on the Subcontract, and Coronado is the named Subcontractor on the Subcontract responsible for the application of synthetic stucco at the homes in Wheatland Estates. CSS, by virtue of its succession of Coronado and assumption of Coronado's liabilities and/or by virtue of its assumption of Coronado's performance duties, is also deemed a Subcontractor obligated under the terms of the Subcontract.

17. Pursuant to this Subcontract, CSS, as a Subcontractor, agreed "[t]o the fullest extent permitted by law . . . to save, indemnify, and keep harmless the Contractor and its agents and employees against all liability, claims, judgments, or demands for damages to persons or property arising out of, resulting from, or otherwise in connection with performance of the work under this Agreement, unless such claims or losses are caused solely by the negligence of the Contractor. Subcontractor will defend any and all claims or suits which may be brought or threatened against the Contractor in connection therewith and will pay on behalf of the Contractor any expenses which the Contractor incurs by reason of such claims (including, but not limited to, court costs and reasonable attorneys fees incurred in defending or investigating such claims or actions)."

18. The damage alleged in Plaintiffs' Motion for Judgment is of the nature and type contemplated by the aforementioned indemnification obligations set forth in the Subcontract, and is not alleged to have been caused solely by the negligence of PHC.

19. Under the Subcontract, CSS is required to defend, indemnify and hold harmless PHC for the claims raised in Plaintiffs' Motion for Judgment.

WHEREFORE, PHC demands payment from CSS for any damages that PHC may be required to pay Plaintiffs and for any other loss that PHC consequently may incur, together with costs, pre- and post-judgment interest, attorneys' fees, and such other relief as the Court deems just and proper.

COUNT TWO

(Declaratory Relief) (CSS)

20. PHC repeats and reiterates each and every allegation as more fully set forth in paragraphs 1 through 14 and paragraphs 16 through 19.

21. Under the Subcontract and as set forth in paragraph 17, CSS is under an affirmative duty to “*defend any and all claims or suits which may be brought or threatened against [PHC] in connection [with the performance of the work under the Subcontract]*”

22. Although the allegations set forth in Plaintiffs’ Motion for Judgment are of the nature and type contemplated by CSS’ defense obligations as set forth in the Subcontract, and although CSS was provided with notice of same, CSS has refused to provide a defense of PHC, and has refused to pay any of PHC’s attorneys’ fees and costs incurred in connection with its defense of the Motion for Judgment.

23. Based on the aforementioned antagonistic assertion and denial of right, an actual controversy exists within the meaning of § 8.01-184 of the Virginia Code with respect to CSS’ duty to defend PHC under the Subcontract.

WHEREFORE, PHC requests a declaration that CSS is obligated to defend PHC in connection with Plaintiffs’ Motion for Judgment, which obligation includes payment of PHC’s past and future costs and attorneys’ fees incurred in defending said Motion for Judgment and in securing this declaratory relief, together with such other relief as the Court deems just and proper.

COUNT THREE

(Breach of Contract) (CSS)

24. PHC repeats and reiterates each and every allegation as more fully set forth in paragraphs 1 through 14.

25. Pursuant to the Subcontract, CSS, as a Subcontractor, agreed, *inter alia*, to:

- a. Ensure that all work performed under the Subcontract is performed in a workmanship like manner and meets or exceeds all pertinent governing codes and requirements;

- b. Maintain a competent supervisor at the job site and not employ or utilize any unfit person or person not skilled in the work to be performed;
- c. Provide a complete list to PHC of all sub-subcontractors, suppliers and materialmen (along with Certificates of Insurance for each) to be used on any part of the project;
- d. Procure and maintain insurance coverage, and ensure that suppliers procure and maintain insurance coverage, which meets or exceeds the minimum specifications set forth in the Subcontract;
- e. Notify PHC of any defective work performed by others;
- f. Walk, inspect and correct all defects upon completion of each operation;
- g. Guarantee, in the case of any work sublet to a third-party, that such third-party would indemnify PHC, and that a signed indemnification agreement and proof of insurance from the third-party would be obtained; and
- h. Require that each and every supplier indemnify both PHC and the Subcontractor from all losses arising from their materials and their delivery thereof.

26. In the event that CSS entered into any other contract with PHC – whether such contract be express or implied, written or oral – CSS would be bound by the express and implied terms of that contract, including an express or implied obligation to perform and complete the contract in a good and workmanlike manner, and to use properly skilled workmen and adequate material, tools, and equipment.

27. PHC is entitled to recover from CSS for the breach of one or more of the terms of the Subcontract or other contracts (including, but not limited to, the terms set forth above), which breach is or would be the factual and proximate cause of all or part of any loss incurred by PHC arising out of or relating to Plaintiffs' Motion for Judgment.

WHEREFORE, PHC demands payment from CSS for any damages that PHC may be required to pay Plaintiffs and for any other loss that PHC consequently may

incur, together with consequential damages, costs, interest, attorneys' fees, and such other relief as the Court deems just and proper.

COUNT FOUR

(Breach of Contract) (Parex)

28. PHC repeats and reiterates each and every allegation as more fully set forth in paragraphs 1 through 14.

29. To the extent that any sales contract, indemnification agreement, or other contract was entered into by Parex with Coronado, CSS, or any other subcontractor or supplier as respects the synthetic stucco cladding Plaintiffs' house, PHC is an intended beneficiary under any such contract(s).

30. PHC is entitled to recover from Parex as an intended third-party beneficiary for the breach of said contract(s), which is or would be the factual and proximate cause of all or part of any loss incurred by PHC arising out of or relating to Plaintiffs' Motion for Judgment.

WHEREFORE, PHC demands payment from Parex for any damages that PHC may be required to pay Plaintiffs and for any other loss that PHC consequently may incur, together with consequential damages, costs, interest, attorneys' fees, and such other relief as the Court deems just and proper.

COUNT FIVE

(Breach of Express Warranties) (CSS)

31. PHC repeats and reiterates each and every allegation as more fully set forth in paragraphs 1 through 14.

32. CSS, in advising PHC and in performing work on Plaintiffs' house, provided oral and written express warranties that their work would be done in a compe-

tent and professional manner using ordinary and usual care, and provided other express warranties by way of affirmations of fact, promises, descriptions, and/or use of samples and/or models regarding the appearance, durability, and/or water-resistance of the Parex synthetic stucco.

33. CSS' Subcontract with PHC contains specific express warranties, including warranties that *"all work and/or materials provided hereunder meet or exceed all applicable Federal, State, and Local laws, building codes and agency regulations and that said work and/or materials are intended for use in a residential structure and meet all VA/FHA compliance regulations"*, and that *"all materials and workmanship are not defective and are of an acceptable nature."*

34. In the event PHC is found liable to Plaintiffs or otherwise incurs any loss whatsoever as a result of Plaintiffs' allegations, PHC is entitled to recover from CSS for the breach of the express warranties insofar as CSS' breach would be the factual and proximate cause of all or part of PHC's loss.

WHEREFORE, PHC demands payment from CSS for any damages that PHC may be required to pay Plaintiffs and for any other loss that PHC consequently may incur, together with consequential damages, costs, pre- and post-judgment interest, attorneys' fees, and such other relief as the Court deems just and proper:

COUNT SIX
(Breach of Express Warranties)
(Parex)

35. PHC repeats and reiterates each and every allegation as more fully set forth in paragraphs 1 through 14.

36. To the extent, if any, that PHC or its agents approved the use by Coronado, CSS or any other subcontractor of Parex synthetic stucco on Plaintiffs' house, that approval was based upon the express oral or written warranties of Parex

by way of affirmations of fact, promises, descriptions, and/or use of samples and/or models regarding the appearance, durability, and/or water-resistance of that good.

37. To the extent that any written warranty was provided by Parex to Coronado, CSS, or to any other subcontractor or supplier as respects the Parex synthetic stucco allegedly applied to Plaintiffs' house, PHC is entitled to recover as a direct and/or intended beneficiary under such warranty.

38. In the event PHC is found liable to Plaintiffs or otherwise incurs any loss whatsoever as a result of Plaintiffs' allegations, PHC is entitled to recover from Parex for the breach of said express warranties insofar as Parex's breach would be the factual and proximate cause of all or part of PHC's loss.

WHEREFORE, PHC demands payment from Parex for any damages that PHC may be required to pay Plaintiffs and for any other loss that PHC consequently may incur, together with consequential damages, costs, pre- and post-judgment interest, attorneys' fees, and such other relief as the Court deems just and proper.

COUNT SEVEN

(Breach of Implied Warranties) (CSS)

39. PHC repeats and reiterates each and every allegation as more fully set forth in paragraphs 1 through 14.

40. CSS, in performing work on Plaintiffs' house under the Subcontract, impliedly warranted that its work would be done in a competent and professional manner using ordinary and usual care.

41. CSS, in contracting to sell the Parex synthetic stucco at issue in this suit to PHC, impliedly warranted that the Parex synthetic stucco sold to PHC was merchantable in all respects as set forth in Section 8.2-314 of the Virginia Code.

42. CSS, in contracting to sell the Parex synthetic stucco at issue in this suit to PHC, impliedly warranted that the Parex synthetic stucco sold to PHC was fit for the particular purpose of cladding Plaintiffs' home, in that CSS was aware or should have been aware of the purpose for which the synthetic stucco was required, and that PHC was relying on CSS' skill and/or judgment in selecting and/or furnishing the Parex synthetic stucco.

43. In the event PHC is found liable to Plaintiffs or otherwise incurs any loss whatsoever as a result of Plaintiffs' allegations, PHC is entitled to recover from CSS for the breach of said implied warranties insofar as CSS' breach would be the factual and proximate cause of all or part of PHC's loss.

WHEREFORE, PHC demands payment from CSS for any damages that PHC may be required to pay Plaintiffs and for any other loss that PHC consequently may incur, including direct damages under Section 8.2-714(2) of the Virginia Code, together with consequential damages to the extent available by law, costs, pre- and post-judgment interest, attorneys' fees, and such other relief as the Court deems just and proper.

COUNT EIGHT

(Breach of Implied Warranties) (Parex)

44. PHC repeats and reiterates each and every allegation as more fully set forth in paragraphs 1 through 14.

45. Parex, in contracting to sell the Parex synthetic stucco at issue in this suit to PHC, Coronado, CSS, and/or another subcontractor or supplier, impliedly warranted that the Parex synthetic stucco ultimately sold to PHC was merchantable in all respects set forth in Section 8.2-314 of the Virginia Code.

46. Parex, in contracting to sell the Parex synthetic stucco at issue in this suit, impliedly warranted that the Parex synthetic stucco ultimately sold to PHC was fit for the particular purpose of cladding Plaintiffs' home, in that Parex was aware or should have been aware of the purpose for which the synthetic stucco was required, and that PHC, Coronado, CSS and/or another subcontractor or supplier was relying on Parex's skill and/or judgment in selecting and/or furnishing the Parex synthetic stucco.

47. In the event PHC is found liable to Plaintiffs or otherwise incurs any loss whatsoever as a result of Plaintiffs' allegations, PHC is entitled to recover from Parex for the breach of said implied warranties insofar as Parex's breach would be the factual and proximate cause of all or part of PHC's loss.

WHEREFORE, PHC demands payment from Parex for any damages that PHC may be required to pay Plaintiffs and for any other loss that PHC consequently may incur, including direct damages under Section 8.2-714(2) of the Virginia Code, together with consequential damages to the extent available by law, costs, pre- and post-judgment interest, attorneys' fees, and such other relief as the Court deems just and proper.

COUNT NINE
(Indemnification)
(CSS & Parex)

48. PHC repeats and reiterates each and every allegation as more fully set forth in paragraphs 1 through 14.

49. Although PHC expressly denies any and all liability to Plaintiffs, in the event that a judgment against PHC is obtained by Plaintiffs, then CSS and Parex are under an implied contractual duty at law to indemnify PHC because PHC's liability would be derivative, constructive, passive and/or secondary, while the acts and omis-

sions of CSS and Parex would be the active, direct and primary cause of Plaintiffs' damages.

WHEREFORE, PHC demands payment from CSS and Parex for any damages that PHC may be required to pay Plaintiffs and for any other loss that PHC consequently may incur, together with costs, pre- and post-judgment interest, attorneys' fees, and such other relief as the Court deems just and proper.

COUNT TEN

**(Contribution)
(CSS & Parex)**

50. PHC repeats and reiterates each and every allegation as more fully set forth in paragraphs 1 through 14.

51. Although PHC expressly denies any and all liability to Plaintiffs, in the event that a judgment against PHC is obtained by Plaintiffs, then CSS and Parex are under a statutory and/or common law duty to contribute toward PHC's discharge of that obligation in view of Plaintiffs' presently or previously existing cause of action to recover from CSS and Parex for the same indivisible injury.

WHEREFORE, PHC demands contribution from CSS and Parex toward any damages that PHC may be required to pay Plaintiffs, together with costs, interest, attorneys' fees, and such other relief as the Court deems just and proper, to the extent permitted by common law and/or by Section 8.01-34 of the Virginia Code.

JURY DEMAND

Cross-Claim Plaintiff Pulte Home Corporation demands a jury trial on all counts.

Respectfully submitted,

PULTE HOME CORPORATION

By: 

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Telecopier: 703/522-1124

Dated: June 14, 2000

* Retainage shall not be held. L. then 30 days past skill payment u. WORK IS OUTSTANDING.

During the time in which Subcontractor's work is still under a warranty period, then the Contractor shall have an immediate right to an amount based on the above stated percentage as a result of Subcontractor's inability to perform warranty work. Once it is determined that Subcontractor owes the Contractor money for failure to perform warranty work, pursuant to the preceding agreement or Subcontractor's failure to perform warranty work voluntarily upon Contractor's request, Subcontractor shall not be entitled to receive any further payment under this, or any other Agreement between the parties, until such time as the Contractor has received the same owed by the Subcontractor pursuant to this or any other provision of this agreement. Contractor shall have the right to a credit, added to the amount owed, and such credit shall be against any balance owed the Subcontractor from the Contractor pursuant to this or any other Agreement between the parties, but if the same due the Contractor exceed such unpaid balance, then the Subcontractor shall pay the difference to the Contractor.

Warranty work shall be performed in conformance with the guidelines set forth in the General Conditions, attached hereto and incorporated herein by this reference. To the full extent permitted by law, Subcontractor hereby agrees to serve, indemnify, and keep harmless the Contractor and its agents and employees against all liability, claims, judgments, or demands for damages to persons or property arising out of, resulting from, or otherwise in connection with performance of the work under this Agreement, unless such claims or losses are caused solely by the negligence of the Contractor. Subcontractor will defend any and all claims or suits which may be brought or threatened against the Contractor in connection herewith and will pay on behalf of the Contractor any expenses which the Contractor incurs by reason of such claims (including, but not limited to, court costs and reasonable attorneys fees incurred in defending or investigating such claims or suits). Such payments on behalf of the Contractor shall be in addition to any and all other legal remedies available to the Contractor and shall not be considered the Contractor's exclusive remedy.

In order to ensure fulfillment of the foregoing obligations, Subcontractor agrees to carry the following insurance coverage continuously during the life of this Agreement with insurance companies acceptable to the Contractor.

Contractor General Liability Coverage. Commercial General Liability Insurance on a Claims Occurrence Form containing a per occurrence combined single limit as designated in the attached addendum providing against bodily injury, property damage (Broad Form) and personal injury claims arising from the operations of (1) premises-operations; (2) products and completed operations including materials damaged, furnished and/or installed in any way by Subcontractor; (3) independent contractors; (4) contractual liability risk covering the Subcontractor's obligations set forth in this Agreement; and (5) property damage resulting from explosion, collapse, or underpinning (i.e., a, b, c) exposures. Such coverage shall contain (1) a verifiability of contract (contract liability) provision so that the Contractor will be treated as if a separate policy were in effect without reducing the policy limits of liability; (2) Product Liability Insurance covering materials damaged, furnished, and/or installed in any way by the Subcontractor; and (3) Completed Operations Insurance for two (2) years after the completion of the Work.

Automobile Liability Coverage. Automobile Liability Coverage containing a \$300,000 (\$300,000) per occurrence combined single limit of liability covering against bodily injury and/or property damage arising out of the operation, maintenance or use of any auto including, owned, non-owned, hired, and employee auto use.

Workers' Compensation and Employer's Liability Coverage. Workers' Compensation Insurance providing statutory benefits as required by applicable state or federal law such that (a) the Contractor will have no liability to Subcontractor's employees and agents; and (b) Subcontractor will comply with Workers' Compensation obligations imposed by state law. Employer's Liability Coverage with limits of not less than \$100,000 each accident; \$100,000 each employee; and \$500,000 aggregate policy limit for death.

Additionally, each Subcontractor will obtain and maintain Workers' Compensation coverage, regardless of whether and Subcontractor is required to do so under applicable municipal, state, and Federal law. The Subcontractor shall add the Contractor as an Additional Insured on the above liability policy. Each policy shall provide for a waiver of subrogation and contain an endorsement specifying that the insurance provided by the Subcontractor shall be considered primary, and uninsured of the Contractor shall be considered excess, so that they be admissible to claims arising out of this Agreement. The Subcontractor shall evidence that such insurance is in force by furnishing the Contractor with a Certificate of Insurance, or if requested by the Contractor, a certified copy of the above policies. Such certificates of insurance from companies having some form of coverage without thirty (30) days prior written notice to the Contractor.

If the Subcontractor should submit any of the Work to a third party, Subcontractor guarantees that such third party shall indemnify the Contractor and carry insurance as set forth herein prior to performing such third party to commence as work. Subcontractor shall obtain a signed agreement from such third party indemnifying the Contractor and providing the Contractor with evidence of insurance to set forth above. In addition, the Subcontractor shall require as its purchase order that such supplier indemnify the Subcontractor and the Contractor from all losses arising from their materials and their delivery thereof.

Any attempt by the Subcontractor to cancel or modify such insurance coverage, or any failure by the Subcontractor to maintain such coverage, shall be a default hereunder and, upon such default, the Contractor will have the right to immediately terminate this agreement and/or exercise any of its rights at law or in equity. In addition to any other remedies, the Contractor may, at its discretion, withhold payment of any sums due hereunder until Subcontractor provides the proof of the insurance coverage described herein.

The amounts and types of insurance set forth herein are minimums required by the Contractor and shall not be substituted for an independent determination by the Subcontractor of the amounts and types of insurance which the Subcontractor shall deem to be reasonably necessary to protect itself and the Work.

Thirty (30) days prior to the expiration of the required insurance coverage, Subcontractor will provide Contractor with a new certificate of insurance showing the amounts of said insurance coverage for a period not less than six (6) months. Should the Subcontractor not produce said new certificate of insurance within fifteen (15) days of expiration of the previous certificate of insurance, then Contractor will cause all payments to Subcontractor for work performed pursuant to this Agreement and such time as the new certificate of insurance is provided to Contractor, subject, however, to the provision of the immediately preceding sentence. Should Subcontractor not provide a new certificate of insurance for (30) days prior to the date of expiration of the previous certificate of insurance then this Agreement will be terminated, the Subcontractor will cease performing all work pursuant to this Agreement, and Subcontractor waives its rights to any and all monies that may be due and owing to Subcontractor from Contractor for work previously performed pursuant to this Agreement, and Subcontractor agrees to release to any and all monies that may be due and owing to Subcontractor from Contractor for work previously performed pursuant to this Agreement, or for any other claims relating to this Agreement. It is understood that TIME IS OF THE ESSENCE regarding the deadlines set forth in this paragraph and Contractor will not allow any deviation from the deadlines set forth herein.

G. The Subcontractor shall comply with all occupational safety and health standards promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 and all other applicable laws, ordinances, rules, regulations, and orders of any public authority having jurisdiction for the safety of persons or property or to prevent them from damage, injury or loss.

To the full extent permitted by law, the Subcontractor hereby agrees to indemnify and keep harmless the Contractor from and against any and all claims, demands, judgments, liability, expenses, penalties and amounts of whatsoever kind, character or description that may arise out of or result from violation of said act or regulations in connection with, incident to, resulting from or arising out of the Subcontractor's said work. Subcontractor further agrees that any amounts which have or may become due to Subcontractor under this Agreement, may be retained by Contractor and applied toward any indemnification which is due the Contractor pursuant to the terms of Section II or which become due the Contractor from the Subcontractor for any matter of which the Contractor has notice, whether or not there is litigation, at the time such sum would otherwise become due the Subcontractor under this Agreement. It is further understood and agreed that this provision is not in lieu of and shall not in any way impair or modify the Contractor's rights to be indemnified and held harmless by the Subcontractor under any other agreement, any statute, or the common law, and all such rights shall be cumulative.

H. The Subcontractor shall be responsible for obtaining, maintaining and supervising all safety precautions and programs in connection with the work. The Subcontractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:

1. all employees on the work and any and all other persons who may be affected thereby
2. all the work and all materials and equipment to be incorporated therein, whether in storage on or off the site, under the care, custody or control of the Subcontractor or any of his subcontractors, and
3. other property of the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

The Subcontractor shall erect and maintain, as required by working conditions and progress of the work, all reasonable safeguards including posting danger signs and other warnings against hazards, prewarning safety regulations and enforcing orders and rules of adjacent workers. Subcontractor will pay all fees assessed because of safety violations.

I. Subcontractor shall comply fully with all applicable Federal, State, or local regulations relating to the employment of persons. Subcontractor agrees, in connection with the performance of work under this Agreement, not to discriminate against any employee or applicant for employment because of race, creed, color, sex, or national origin. The foregoing provisions shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or advancement; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

Subcontractor further agrees to post, in places available to employees and applicants for employment, notices required by law setting forth the provisions of this nondiscrimination clause and to state in its advertisements or advertisements for employment, placed by or on behalf of Subcontractor, that all qualified applicants will receive equal consideration for employment without regard to race, creed, color, sex or national origin.

VI. CONDUCT OF SUBCONTRACTOR

A. The Subcontractor agrees to give his personal attention to the work and shall at all times maintain a competent supervisor at the job site who will have full authority to act on any and all matters pertaining to the work to be performed under this Agreement and whose name will be binding upon the Subcontractor to the fullest extent. Should the Contractor determine that the Subcontractor's supervisor is not satisfactory for any reason whatsoever, then, and in that event, the Contractor has the unequivocal right to direct Subcontractor, in writing, to replace such supervisor within forty-eight (48) hours of receipt of the notice.

B. Subcontractor shall enforce strict discipline and good order among its employees and shall not employ any such person or anyone not skilled in the work assigned to him or any person determined by the Contractor, in the Contractor's sole discretion, to be unsuitable for working on the project, and Subcontractor shall, immediately upon notice from Contractor, remove any such person from the project. Subcontractor assumes full responsibility for his sub-subcontractors working on the site and Subcontractor agrees that all sub-subcontractors working for him will abide by the terms of this Agreement.

C. No alcoholic beverages or illegal drugs of any kind are to be consumed by Subcontractor's employees and/or agents while on the job site. Subcontractor agrees to enforce and strictly enforce a regulation to this effect and to inform employees and/or agents that such a regulation will be strictly enforced. Any employee and/or agent found to have violated said regulation is to be replaced immediately.

D. Contractor consents as licensee to such a manner as to comply with all the laws, statutes and regulations, and all municipal, governing the jurisdiction in which the project is located and Subcontractor consents that a compliance with said laws, statutes and regulations and that should Contractor become aware of Subcontractor's failure to so comply with applicable laws, statutes or regulations then Contractor, at its sole discretion, may immediately terminate Subcontractor. Subcontractor further acknowledges its obligation to inform Contractor's President or Vice-President of Persons of any situation they become aware of in which anyone connected with this project fails to comply with the laws, statutes or regulations of the jurisdiction. Should Contractor become aware of a situation in which anyone connected with this project, be they Subcontractor or individual in Contractor's employ, violates a law, statute or regulation, and/or criminal, and further determines that Subcontractor was aware of the violation and failed to inform Contractor, as required by the paragraph, then Contractor may, in its sole discretion, immediately terminate Subcontractor.

VII. SUBCONTRACTOR'S DEFAULTS

A. Should the Subcontractor refuse or neglect to supply a sufficient number of properly skilled workmen, or a sufficient quantity of materials of proper quality, or fail to make prompt payment to his subcontractors for materials or labor, or fail, in any respect, to prosecute the work covered by this Agreement, with promptness and diligence, or fail in the performance of any of the provisions of this Agreement, or intentionally disregard laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, the Contractor may, at its option, immediately provide any such labor and materials and deduct the costs thereof from any money then due or to become due to the Subcontractor under this Agreement, or any other agreement between the parties; and/or in addition, the Contractor may, at its option, immediately terminate the employment of the Subcontractor for the work, and shall have the right to enter upon the premises and take possession, for the purpose of completing the work included under this Agreement, of all drawings, materials, tools and appliances therein, and may employ any other person or persons to finish the work and provide the materials therefor, and in case Contractor must act in conformance with this provision Subcontractor shall not be entitled to receive any further payment under this or any other Agreement between the parties until the work shall be wholly finished; at which time, if the unpaid balance of the amount to be paid under this Agreement, exceeds the expenses incurred by the Contractor in finishing the work, such excess shall be paid by the contractor to the Subcontractor; but if such expense shall exceed such unpaid balance, the Contractor has the right to deduct such excess expense from any monies owed the Subcontractor from the Contractor pursuant to any other agreement between the parties, and if there still remains an unpaid balance then the Subcontractor shall pay the difference to the Contractor.

In the event that the Contractor does perform any work or services or enter into further or additional subcontracted agreements because of any default of the Subcontractor, the Contractor shall be entitled to charge the Subcontractor the cost thereof plus fifteen (15%) percent, representing the Contractor's overhead expense, and Subcontractor, hereby agrees to pay same. In the event it becomes necessary for the Contractor to obtain any Subcontractor from the Subcontractor by legal action, the Subcontractor agrees to reimburse Contractor for all of its legal and court expense in connection with such action, including attorney's fees at fifty (50%) percent of the amount in controversy.

B. The Subcontractor agrees that should the Contractor become aware of the situation where the Subcontractor is delinquent in making payments to any of Subcontractor's suppliers, laborers or subcontractors, the contractor will have the authority to enter checks made out directly to the affected supplier, laborer or subcontractor and such time as the delinquency is resolved and the Contractor obtains full payment from the affected supplier, laborer or subcontractor with respect to any affected payment. This is in addition to, and not in lieu of, Contractor's right to terminate Subcontractor for failure to provide full payment. It is expressly understood that this provision does not deprive the subcontractor of sole liability to pay its supplier, laborers or subcontractors and that should the Contractor must deduct payment to this provision, the Contractor in no way assumes any direct liability towards Subcontractor's supplier, laborers or subcontractors.

Subcontractor agrees to pay any payments from Contractor owed Contractor and its subcontractors in accordance with this paragraph, until Contractor has obtained fully satisfied full payment from all of Subcontractor's suppliers, subcontractors and laborers on this project.

C. In the event the Contractor assigns any legal expense based on any act or omission by the Subcontractor which can result in a monetary loss being filed by a subcontractor, subcontractor, or laborer of the Subcontractor, and actual expenses shall constitute an offset to any monies owed the Subcontractor by the Contractor regardless of whether said monies are owed based on work performed under this Agreement or any other agreement for work to be performed between the Contractor and Subcontractor. If the balance owed the Subcontractor from the Contractor is less than the amount constituting an offset under this paragraph then the Subcontractor shall pay the difference.

D. Should the Subcontractor at any time, either prior to starting any work or after partial completion thereof, be adjudged bankrupt, adjudicated a bankrupt, make a general assignment for the benefit of his creditors, or if a receiver is appointed on account of his insolvency, then Contractor has the exclusive right to immediately terminate this Agreement and Subcontractor waives any right to any monies owed hereunder, or otherwise to any payment between the parties, as an asset of Subcontractor to the extent Subcontractor is, or will be, indebted to Contractor and/or any suppliers, laborers, subcontractors and/or sub-subcontractors.

E. In the event Subcontractor initiates this Agreement, or this Agreement is terminated for any reason other than that set forth in VII, Contractor shall have the right to any of any payments to the Subcontractor shall such time as Contractor can reasonably ascertain the damages resulting from and breach at which time Contractor is authorized to deduct said damages from any monies owed Subcontractor.

VIII. TERMINATION NOT FOR DEFAULT

A. Nothing contained herein shall constitute a guarantee to Subcontractor that they will perform all the work contemplated by this Agreement. Contractor expressly reserves the right to employ other subcontractors to perform the same or similar work contemplated under this Agreement, K, in the Contractor's sole discretion, and additional subcontractors are necessary to comply with the progress schedule of Contractor. Subcontractor shall have no claim against Contractor should Contractor employ additional subcontractors. This Paragraph is in addition to the other remedies provided Contractor in the event Subcontractor fails to perform work in accordance with Contractor's schedule and/or supply sufficient laborers.

B. Notwithstanding any other provision of this Agreement, it is agreed by and between the Parties hereto that the duration and amount of work to be performed hereunder is unspecified and that Contractor may terminate this Agreement for any reason or for no reason, in which event Subcontractor shall be fully paid for all work satisfactorily completed less the appropriate retainage and less any backcharges and/or credits pursuant to this Agreement and/or the laws of the Commonwealth of Virginia. Subcontractor specifically agrees that it will make no claim nor shall Contractor be liable for damages of any nature including but not limited to loss of profits, cost of materials ordered but not used, interest, consequential or incidental damages. Contractor may purchase specialty Subcontract material from Subcontractor at the price Subcontractor paid for the same material, to the extent the same is feasible, in Contractor's sole discretion.

IX. GENERAL PROVISIONS

A. To the extent permitted by applicable law, Subcontractor hereby waives its right to claim any and all liens against the real property for which work is being performed upon pursuant to this Agreement including, but not limited to, any necessary lienholder's Lien.

B. The Contractor shall have the right to require the Subcontractor to furnish bonds covering the faithful performance of this Agreement and the payment of all obligations arising hereunder in such form and amounts as the Contractor may prescribe, and with such sureties as may be agreeable to the parties. If such bonds are stipulated in the bidding requirements, the premiums shall be paid by Subcontractor; if required subsequent to the submission of proposals or bids, the cost shall be reimbursed by the Contractor.

C. All requisitions, proposals and agreements prior to the date of this Agreement are merged herein and superseded hereby, there being no agreement or understanding other than those written or specified herein. This Agreement shall be binding upon and enforce to the benefit of the respective heirs, executors, administrators, successors and assigns of the parties hereto.

D. A waiver by the Contractor of any breach or violation by the Subcontractor of any provision hereof shall not constitute a waiver of any further or additional breach of such provision or of any other provision.

E. Should any part, term or provision of this Agreement be by a court decided to be unenforceable or in conflict with any applicable law of the State where made, the validity of the remaining portions or provisions shall not be affected thereby.

IN WITNESS WHEREOF the Parties execute this Agreement this 6 day of SEPTEMBER, 19 95.


CONTRACTOR:

PULTE HOME CORPORATION OF VIRGINIA
10600 Arrowhead Drive, Suite 225
Fairfax, Virginia 22030

BY: 
Ben Kinnish, Purchasing Manager

SUBCONTRACTOR:

COLONADO CORP.

BY:  PLS
Bernard Fank

**Schedule A to Standard Form
Subcontract Agreement**

INVOICING INFORMATION:	Date: _____	Invoice Number: _____	Lot/Block: _____	Subtotal: _____	Tax: _____	Total: _____
Please attach itemized preprinted invoice along with Schedule A. ONE Lot per Schedule A.						

This Schedule A is an integral part of that certain Standard Form Subcontract Agreement ("Agreement") between Pulte Home Corporation, Contractor, and **COR000 Coronado Corporation**, Subcontractor, date **9/6/95** for the project known as **8484 Wheatland Estates**

The prices set forth in the Schedule A are agreed upon commencing **9/6/95** until **9/6/96**

These prices will be binding on the parties during the above period. This time period does not constitute a guarantee by Contractor that the Agreement will remain in effect during the entire period.

The following items are set forth for emphasis:

- 1) All invoices must be submitted within thirty (30) days of work completion. As an expressed condition precedent to payment, all invoices must be submitted to Contractor no later than ninety (90) days after the work referenced therein was performed or the invoices will not be paid and the Subcontractor waives said payment.
- 2) Proposed increases in the prices contained herein for any work after the expiration date of this Schedule A must be submitted to Contractor, in writing, no later than ninety (90) days prior to the above expiration date, for review, acceptance and/or rejection. Failure to properly notify Contractor of proposed increase grants Contractor, at its sole option to renew this Schedule for an identical time period. The above dates represent minimum pricing commitments only. Contracts that are past the above 'expiration' date are still in full force and effect. New contracts will be issued only if pricing and/or specifications change after the above 'expiration' date.
- 3) Signing this Schedule A constitutes an acceptance and acknowledgment to be bound by the terms and conditions of the Agreement and its terms and conditions are incorporated herein by this reference.
- 4) Each subcontractor will be responsible for complying with all Federal and State safety laws when in the employment of Pulte Home Corporation. Each subcontractor will familiarize himself with OSHA and MSDS guidelines (available at the construction office) and will comply with any requests made by Pulte Home Corporation regarding said guidelines.

Pricing for (#1275) Dryvit is as follows:

	Bridgeport 2	Hampton 2	Wendworth
0000 Base House			\$7,850
102 Elevation #2		\$6,878	(\$7,850)
103 Elevation #3	\$9,591		(\$603)
104 Elevation #4		\$6,559	(\$1,038)
105 Elevation #5			(\$7,850)
106 Elevation #6		\$5,275	(\$7,850)
107 Elevation #7			
108 Elevation #8	\$6,514		
109 Elevation #9	\$1,982		
275 Add Stucco To Sides Of Home - Walk Out	\$6,390	\$10,080	\$10,410
276 Add Stucco To Sides Of Home	\$7,429	\$11,355	\$10,969
283 Garage - Side Entry Add Stucco/Stone	\$469	\$431	\$450
287 Sunroom - Add Stucco/Stone	\$850	\$850	\$850

Above pricing includes all taxes, labor, materials and equipment necessary to complete work according to plans and specifications.

CONTRACTOR:
PULTE HOME CORPORATION OF VIRGINIA
By: [Signature]

SUBCONTRACTOR:
CORONADO CORPORATION
By: [Signature] **BEHAROT/RES.**

PULTE HOME CORPORATION OF VIRGINIA
SPECIFICATIONS AND QUALITY REQUIREMENTS
FOR
GENERAL SPECIFICATIONS
ALL SUB-CONTRACTORS, SUPPLIERS AND STAFF

1. **SCHEDULING**

The schedule is part of each subcontractor's and supplier's contract.

A. Pulte expects each subcontractor to arrange to have the necessary manpower available to meet the schedule and to make up weather delay days.

B. It is each subcontractor's obligation to check each job to see that the necessary materials to perform the work are on the job site. Subcontractors shall assume full responsibility for all materials, whether supplied by Pulte Home Corporation or subcontractor until they are installed. Do not install damaged material. Upon entering the job/home, all damage and/or vandalism must be brought to a Pulte Representative's attention before commencing work or assume responsibility for all damage.

C. Each subcontractor must staff all Pulte job sites with a qualified representative to coordinate priorities resulting from delay in the schedule, providing lists of damaged materials supplied by Pulte Homes prior to starting work, and to schedule work regarding repair and rework. Scheduling the completion of the Project Care Manager and Customer Orientation lists, within the time specified, shall also be the responsibility of the subcontractors qualified representative.

D. Forty-eight (48) hour notice to verify supplier deliveries.

2. **CLEAN UP**

A. When containers shall be provided for the use of all subcontractors in a designated area. All debris shall be compacted before putting it into containers.

B. Each subcontractor must clean up all of his debris prior to leaving the unit each day.

C. The interior and exterior of all units shall be kept clean at all times in order to allow each trade to do their work efficiently. All subcontractors shall maintain a neat and clean construction environment.

D. Each subcontractor is to leave the job site and lot in a clean and orderly manner at all times.

E. Each subcontractor's qualified representative is to notify Pulte Homes of any existing violations regarding clean up before commencing work or shall risk being held accountable for someone else's refuse.

F. Each subcontractor shall be responsible for disposing of hazardous waste in the proper manner.

3. **INSPECTION**

A. It is the responsibility of each subcontractor to properly inspect his own work for quality and completeness and to notify Pulte Homes that the work is ready for inspection. The subcontractor shall write the work with a Pulte Representative. Pulte Homes shall be notified again upon completion of all construction deficiencies before submitting invoices for payment.

B. All work is to be performed in a workmanship like manner in accordance with Pulte Homes' specifications and quality requirements.

C. All trades shall respect one another's material and workmanship.

D. Each subcontractor's qualified representative shall be present at scheduled inspections by owner and/or municipal officials for their respective trades.

E. It is the subcontractors responsibility to schedule all necessary inspections relative to his own work unless stated otherwise within the subcontractors specifications and perform any tests needed to receive approval. All tests performed by the subcontractor at the request of Pulte Homes or requests made by inspection shall be at the expense of the subcontractor. All re-inspection fees shall be paid by the subcontractor.

4. **WARRANTY WORK**

A. All subcontractors and suppliers shall warrant all material and workmanship effective from the date of settlement.

B. All subcontractors and suppliers shall respond to all warranty requests within 34 hours and complete the work per Pulte warranty schedule.

C. Every subcontractor shall have his qualified representative pick up all warranty orders and/or necessary information for completion of warranty work at least twice daily.

D. If a customer is not at home, subcontractor shall leave a "we stopped by, no one was here" ticket. A copy shall be turned into the Project Care Manager. Sufficient tickets shall be in subcontractors possession at all times.

E. Each trade shall supply a professional representative who looks and acts like a qualified tradesman who can clearly communicate with both Pulte Representatives and Homeowners. All tradesmen are instructed not to offer personal opinions and suggestions which in any way relate to the warranty work being performed. No subcontractor shall comment on other subcontractors or suppliers work to any homeowner.

F. All warranty requests must be signed by the person who completes the work and a copy must be turned in to the warranty department.

G. All warranty work completed in an occupied home must have (2) signatures to show work was completed: the person who did the work and the Homeowner.

H. Subcontractors and suppliers shall provide Pulte Warranty staff with any necessary materials to complete warranty work per warranty staff schedule at no cost to Pulte Homes.

I. Subcontractor shall provide Pulte Warranty staff with emergency phone numbers per the guidelines for emergency service of the warranty department.

BUILDING LOCK UP

A. It is the obligation of each trade to lock the building when the completion of their job functions each day. This shall include all exterior doors, patio doors, windows and venting and the lights. Also each trade is to ensure thermostats be set @ 55 degrees in winter months and thermostats turned off in summer months.

- B. Once doors and windows have been installed, it is the responsibility of each subcontractor to close them during inclement weather in an effort to minimize damage to the house.

6. GENERAL JOB PROCEDURE

- A. It is the obligation of each trade to protect the material or work of all other trades preceding him.
- B. Each subcontractor must have a qualified representative on the job who is responsible for the work done by employees of that subcontractor.
- C. All subcontractors are to provide heat, electrical power and water if not available, or designated by a Pulte Representative.
- D. Each subcontractor shall be responsible for complying with all Federal and State safety laws when in the employment of Pulte Home Corporation. Each subcontractor shall familiar himself with OSHA and MSDS guidelines (available at the construction office) and shall comply with any requests made by Pulte Homes regarding said guidelines.
- E. All work shall comply with applicable building codes and must meet FHA/VA, and regulations.
- F. Subcontractors materials shall be stored in the subcontractors trailer only. Under no circumstances shall flammable material be stored in any unit under construction.
- G. The subcontractors storage area shall be kept clean, neat and orderly at all times.
- H. Each subcontractor shall perform all water pumping necessary to complete his work as scheduled.
- I. All construction shall be per models and per Pulte prints. Any changes must be approved in writing by a Pulte Project Manager or be on a new set of prints.
- J. All subcontractors shall receive, unload, and inspect all products pertinent to their trades, whether supplied by subcontractor or Pulte Home Corporation.
- K. Before starting each job, it is the subcontractors responsibility to check his schedule to ensure that the correct material and color selections are being used, and that all the options for that unit are installed.
- L. Each subcontractor and supplier shall furnish a qualified representative for weekly Subcontractor and Supplier meetings.
- M. It is the responsibility of each subcontractor's qualified representative to police the area for food wrappers and containers left by employees of the subcontractors. Under no circumstances is lunch to be eaten in the units.
- N. No alcohol or non-prescription drugs are allowed on any Pulte job site. Anyone found in violation is subject to immediate termination.
- O. All parking is to be restricted to one side of the street or designated area. No parking or driving on graded lots or driveways shall be permitted.
- P. Tub liners and fireplace covers carry the same responsibility for each subcontractor as clean up. The subcontractor must notify Pulte Homes when one is missing or risk being held accountable for replacement before submitting for pay.
- Q. All invoices must be submitted within 30 days of work completion to be honored. Invoices submitted 90 days after completion of work shall not be paid. Invoices shall only be accepted for work that is 100% complete and inspected.
- R. No toll phone calls shall be allowed.
- S. Construction site speed limit is 15 m.p.h.
- T. No stereo equipment is to be played on the job site.
- U. Any violation or non-conformance to the above regulations may result in additional cost and/or termination of subcontractor/supplier.

7. ADDITIONAL NOTES AND COMMENTS

- A. Subcontractors and suppliers agree to supply all labor, equipment, materials, necessary permits, and obtain necessary inspections required to complete work, unless otherwise noted on Schedule A of his contract.
- B. These specifications and quality requirements are part and party of your contract and are in force at all times while working for Pulte Homes Corporation.
- C. It is the responsibility of the owner and representatives of all subcontractors and suppliers to make sure that everyone working on a Pulte job site has a copy of these specifications and requirements.
- D. Lost working days shall be made up by the subcontractor to meet the schedule, at no cost to Pulte Homes.
- E. No Friday afternoon material deliveries shall be allowed unless Saturday work has been authorized.
- F. After carpet installation, all shoes must be removed outside the entry and left outside.

Signatures:

Pulte Representative:

Ben Kinnish, Purchasing Mgr

Date:

9/6/95

Subcontractor Rep:

Bernard Franks, PHS

Date:

9/6/95

April, 1995

CONTRACTOR AND SUPPLIER INSURANCE REQUIREMENTS

It is the policy of the Company to only use insured contractors and suppliers. In order, to comply with this policy, each Division must clearly state the Company's insurance requirements in all agreements with contractors and suppliers, must monitor Contractor and Supplier compliance and pursue any and all remedies if compliance is not achieved. The Division Vice President of Construction (or equivalent) is responsible for implementing this policy.

All contractor and supplier agreements must be expressed in writing.

Contractor Insurance Requirements

Mandatory Insurance Clause

The attached "Standard Contractor Insurance Clause" must be included in all new contractor agreements effective on or after July 1, 1995. All existing contractor agreements must be amended to contain the specified language by January 1, 1996.

An original copy of the entire contractor agreement, along with the contractor's certificate of insurance, must be maintained with the Division's financial records to substantiate the contractor's indemnity obligation to the Company. To facilitate compliance, the Division should ask its contractors to use the enclosed certificate of insurance form which incorporates all of the requirements contained in the Standard Contractor Insurance Clause. The Insurance Clause specifically enables the Company to withhold payment from contractors failing to provide proof of the coverages specified

Insurance Coverages Required

Workers' Compensation - Workers' compensation insurance with statutory limits must be maintained by all contractors who are required by state law to carry such insurance. However, it is strongly recommended that all contractors, regardless of size, carry workers' compensation insurance whether or not they are required to by state law. If a Division chooses to allow contractors on a site who do not carry workers' compensation insurance, the Division will responsible for any liability the company faces up to the full company deductible (\$500,000 for workers' compensation and \$1,000,000 for general liability).

General Liability - Contractors must maintain general liability coverage as shown in the accompanying schedule. Those contractors that are shown must carry the indicated limits. While it is strongly recommended that all other contractors carry at least \$500,000 in limits, lower limits may be maintained. All contractors must, unless mutually waived by the Division and the Company's Director of Risk Management, carry some general liability insurance.

Auto Liability - Auto liability insurance must be carried by all contractors with limits equal to or greater than those required by state law. Certificates are not required for auto liability insurance. The company will rely on the representation made in the contract that the contractor is carrying the appropriate

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Page 2 of 6

Contractor and Supplier Insurance Requirements Policy

April, 1995

coverage. However, if the Division becomes aware of a vehicle or driver on our site which is not covered by auto liability insurance, the car and or driver must not be permitted to return to our site until satisfactory evidence of coverage is obtained.

Certificates of Insurance.

Certificates of insurance evidencing the coverages required by this policy must be obtained for each Contractor before Contractor begins work at any Pulte site and current certificates must be maintained throughout the duration of the work. Certificates will be audited by Pulte's internal audit staff according to the standards set forth in this policy.

Records Retention

Because Pulte can be sued many years after an incident occurs, contracts and insurance certificates for each contractor must be maintained for ten years after completion of the work. Failure to locate contracts or certificates in the event of a claim will expose the Company to a much greater degree of risk. In such cases, the Division will be held responsible for legal fees and damages up to the full Company deductibles.

Supplier Insurance Requirements

Mandatory Insurance Clause

The attached "Standard Supplier Insurance Clause" must be included in all material/supply contracts executed effective on or after July 1, 1995. All existing contracts must contain the specified language by January 1, 1996.

Insurance Coverages Required

General liability insurance with limits of \$1,000,000 must be maintained by all suppliers. If materials are being off-loaded at the site by the Supplier, workers' compensation insurance with statutory limits must also be maintained.

Certificates of Insurance and Record Retention

Requirements with regard to certificates and record retention are as outlined above for Contractors.

STANDARD CONTRACTOR AGREEMENT INSURANCE CLAUSE

Contractor hereby agrees to save, indemnify, and keep harmless Pulte and its agents and employees against all liability, claims, judgments, or demands for damages to persons or property arising out of, resulting from, or otherwise in connection with performance of the work under this Agreement ("Claims") unless such Claims are caused solely by the negligence of Pulte. Contractor will defend any and all claims or suits which may be brought or threatened against Pulte and will pay on behalf of Pulte any expenses which Pulte incurs by reason of such Claims including, but not limited to, court costs and reasonable attorney fees incurred in defending or investigating such Claims. Such payments on behalf of Pulte shall be in addition to any and all other legal remedies available to Pulte and shall not be considered Pulte's exclusive remedy.

Contractor represents that it does carry and will continue to carry, with insurance companies acceptable to Pulte, the following insurance coverages continuously during the life of this Agreement (and in the case of products and completed operations coverage, for two years after the expiration of this Agreement):

Commercial General Liability Coverage

Commercial General Liability Insurance on an Occurrence Form containing a per occurrence limit of at least \$ <see chart attached> protecting against bodily injury, property damage and personal injury claims arising from the exposures of (1) premises-operations (with an aggregate limit at least equal to the per occurrence limit); (2) products and completed operations including materials designed, furnished and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the per occurrence limit); (3) independent subcontractors; (4) contractual liability risk covering the indemnity obligations set forth in this Agreement; and, (5) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures.

Automobile Liability Coverage

Automobile Liability Coverage insuring against bodily injury and/or property damage arising out of the operation, maintenance or use of any auto including, owned, non-owned, hired and employee autos, with limits at least equal to the minimum required by the state in which the work covered by this Agreement is performed.

Workers' Compensation and Employers Liability Coverage

Workers' Compensation Insurance providing statutory benefits imposed by applicable state or federal law such that (a) Pulte will have no liability to Contractor or Contractor's employees and agents; and (b) Contractor will satisfy all Workers' Compensation obligations imposed by state law. If Contractor has any employees who are subject to the rights and obligations of the Longshoremen and Harbor Workers Act, then the Workers' Compensation insurance must be broadened to provide such coverage.

Page 4 of 6

Contractor and Supplier Insurance Requirements Policy

April, 1995

In addition, Contractor agrees to carry Employer's Liability Coverage with limits of not less than:

\$100,000	Each Accident
\$500,000	Aggregate policy Limit for Disease
\$100,000	Each Employee

The Contractor shall add Pulte as an Additional Insured on the above general liability policy or policies to the full extent of the actual limits of Contractor's coverages even if such actual limits exceed the minimum limits required by this Agreement. Each policy shall specifically state that the insurance provided by the Contractor shall be considered primary, and insurance of Pulte shall be considered excess for purposes of responding to Claims arising out of the work performed by Contractor.

Contractor shall evidence that such insurance is in force by furnishing Pulte with a Certificate of Insurance, or if requested by Pulte, certified copies of the policies. The Certificate shall accompany and become a part of this Agreement. Each Certificate of Insurance shall (1) contain an unqualified statement that the policy shall not be subject to cancellation, nonrenewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Pulte; (2) show Pulte as Additional Insured where applicable; (3) shall indicate that the Contractor's coverage is primary and Pulte's insurance is excess for any claims arising out of work performed by Contractor on behalf of Pulte; and (4) indicate that coverage applies in the state where operations are being performed.

If the Contractor should sublet any Work to a third party, Contractor guarantees that such third party shall indemnify Pulte and carry insurance as set forth in this Agreement prior to permitting such third party to commence its work. Contractor shall obtain a signed agreement from such third party indemnifying Pulte and providing Pulte with evidence of insurance as set forth above. In addition, Contractor shall require in its purchase orders that each supplier indemnify Contractor and Pulte from all losses arising from any materials or suppliers included in such work.

Any attempt by the Contractor to cancel or modify such insurance coverage, or any failure by the Contractor to maintain such coverage, shall be a default under this Agreement and, upon such default, Pulte will have the right to terminate this Agreement and/or exercise any of its rights at law or at equity. In addition to any other remedies, Pulte may, at its discretion, withhold payment of any sums due under this Agreement until Contractor provides adequate proof of insurance.

The amounts and types of insurance set forth above are minimums required by Pulte and shall not substitute for an independent determination by Contractor of the amounts and types of insurance which Contractor shall determine to be reasonably necessary to protect itself and its work.

Page 5 of 6

*Contractor and Supplier Insurance Requirements Policy
April, 1995*

Required Minimum Liability Limits by Trade

GENERAL LIABILITY

<u>Required</u>	<u>Minimum Limit</u>
Electrical	\$1,000,000
Excavating/Grading/Dirt Moving	1,000,000
Fireplace Installation	1,000,000
Foundation Installation (including trench footings and concrete)	1,000,000
Hozing/Air Conditioning	1,000,000
Insulation	1,000,000
Plumbing	1,000,000
Propane Heat	1,000,000
Brick Labor	1,000,000
Dumpsters	1,000,000
Energy Package	1,000,000
Painting	1,000,000
Roofing	1,000,000
Shockrock Hanging and Finishing	1,000,000
Structural Steel	1,000,000
Sump Line	1,000,000
Trusses	1,000,000
Windows	1,000,000
Aluminum Siding Installation	\$500,000
Cabinets, Interior Doors and Trim	500,000
Gutter and Downspout Installation	500,000
Mirrors, Shower Doors and Glazing	500,000
Rough Carpentry	500,000
Sod Installation	500,000
Sprinkler System Installation	500,000
Trim Carpentry	500,000
Wrought Iron	500,000
Basement Spray Coating	\$300,000
Brick Clean and Caulk	300,000
Carpet Installation	300,000
Ceramic Tile	300,000
Concrete - Flat Work Only	300,000
Fill Sand	300,000
Furniture Tops	300,000
Hardware	300,000
Interior Cleaning	300,000
Marble Tops and Tubs	300,000
Shower Hanging	300,000
Snow Removal	300,000
Street Cleaning	300,000
Trash	300,000
Tub Repair	300,000
Vinyl	300,000
Wood Flooring	300,000

PROFESSIONAL LIABILITY

Required (in addition to GL, WC and auto)

Soils Engineers/ Testing Firms	\$4,000,000
Environmental Engineers	\$1,000,000

Recommended (in addition to GL, WC and auto)

Surveyors/Engineers	\$1,000,000
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7/4/95

STANDARD SUPPLIER AGREEMENT INSURANCE CLAUSE


Seller hereby agrees to save, indemnify, and keep harmless the Buyer and its agents and employees against all liability, claims, judgments, or demands for damages to persons or property arising out of its performance under this Agreement "Claims", unless such Claims are caused solely by the negligence of the Buyer. Seller will defend any and all Claims which may be brought or threatened against the Buyer and will pay on behalf of the Buyer any expenses which the Buyer incurs by reason of such Claims (including, but not limited to, court costs and reasonable attorneys fees incurred in defending or investigating such Claims). Such payments on behalf of the Buyer shall be in addition to any and all other legal remedies available to the Buyer and shall not be considered the Buyer's exclusive remedy.

In order to ensure fulfillment of the foregoing obligation, Seller agrees to carry Commercial General Liability Insurance on an Occurrence Form containing a per occurrence combined single limit of liability of not less than \$1,000,000 protecting against bodily injury, property damage and/or personal injury claims arising from the exposures of (1) product liability; and (2) contractual liability risk covering the indemnity obligations set forth in this Agreement.

The Seller shall add the Buyer as an Additional Insured on the above liability policy(ies). Each policy shall provide for a waiver of subrogation and contain an endorsement specifying that the insurance provided by the Seller shall be considered primary, and insurance of the Buyer shall be considered excess, for claims arising out of this Agreement. The Seller shall evidence that such insurance is in force by furnishing the Buyer with a Certificate of Insurance, or if requested by the Buyer, certified copies of the policies. The Certificate of insurance shall accompany and become part of this Agreement. Each Certificate of Insurance shall (1) contain an unqualified statement to the effect that the policy shall not be subject to cancellation, nonrenewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to the Buyer; (2) show Buyer as Additional Insured; and shall indicate that the insurance provided by the Seller is primary, and the insurance of the Buyer is excess for claims arising out of Claims arising from the performance of this Agreement.

Any attempt by the Seller to cancel or modify such insurance coverage, or any failure by the Seller to maintain such coverage, shall be a default under this Agreement and, upon such default, the Buyer will have the right to terminate this Agreement and/or exercise any of its rights at law or at equity. In addition to any other remedies, the Buyer may, at its discretion, withhold payment of any sums due under this Agreement until Seller provides adequate proof of insurance.

The amounts and types of insurance set forth above are minimums required by the Buyer and shall not substitute for an independent determination by the Seller of the amounts and types of insurance which the Seller shall determine to be reasonably necessary to protect itself and its products.

 9/4/95

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 2000, a copy of the Defendant Pulte Home Corporation's Cross-Claim Against Defendant CSS, L.L.C. and Parex, Inc. was served, via Federal Express, overnight delivery on:

David H. Wise, Esq.
Kavita S. Knowles, Esq.
FULLERTON & WISE
4021 University Drive, Suite 204
Fairfax, VA 22030
Counsel for Plaintiffs

Daniel K. Bryson, Esq.
LEWIS & ROBERTS, P.L.L.C.
1305 Navaho Drive, Suite 400
Raleigh, NC 27609
Counsel for Plaintiffs

Timothy R. Hughes, Esq.
RUSSELL & RUSSELL
150 South Washington Street
Suite 101
Falls Church, VA 22046
Counsel for Parex, Inc.

and served by hand on:

Christopher E. Hassell, Esq.
James A. Allen, Esq.
GILBERG & KIERNAN
1250 Eye Street, N.W., 6th Floor
Washington, D.C. 20005
Counsel for CSS, L.L.C.



Brian A. Coleman

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED
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TIM L. PECKINPAUGH, et al.,

Plaintiffs,

v.

Law No. 184719

PAREX, INC., et al.,

Defendants.

DEFENDANT PAREX, INC.'s
MOTION CRAVING OYER IN RESPONSE TO DEFENDANT/CROSS-PLAINTIFF
PULTE HOME CORPORATION'S CROSS-CLAIM

COMES NOW Defendant, Parex, Inc. ("Parex"), by and through counsel, and appears and submits the following Motion Craving Oyer In Response to Defendant/Cross-Plaintiff Pulte Home Corporation's Cross-Claim, and states as follows:

1. Defendant/Cross-Plaintiff filed a Cross-Claim alleging that Parex and other named parties are liable for breach of contract, breach of express warranty, breach of implied warranty, indemnification and contribution.
2. Count IV of Defendant/Cross-Plaintiff's Cross-Claim contains allegations that Plaintiff is the intended beneficiary of contracts entered into by and between Parex, Corondo, CSS and any other subcontractor concerning the synthetic stucco cladding used in the construction of the Plaintiff's house. See, Cross-Claim at ¶¶ 29-30. Parex believes that several issues underlying this claim may be resolved upon review of any contract or express agreement forming the basis of Count IV of Defendant/Cross-Plaintiff's Cross-Claim.
3. Count VI of Defendant/Cross-Plaintiff's Cross-Claim alleges that Parex provided oral and written express warranties to Defendant/Cross-Plaintiff, Coronado, CSS or some other

contractor concerning the use and application of synthetic stucco cladding on Plaintiff's home.

See, Cross-Claim at ¶¶ 36-37.

4. Accordingly, Parex craves oyer of any alleged contract or agreement and any alleged express warranty forming the basis of Counts IV and VI of Defendant/Cross-Plaintiff's Cross-Claim.

5. Good cause is shown for entry of an Order granting Parex's Motion Craving Oyer In Response to Defendant/Cross-Plaintiff's Cross-Claim, requiring the Defendant/Cross-Plaintiff to produce a copy of any alleged contract or agreement and any alleged express warranty referenced in the Cross-Claim, attaching the same to a pleading filed with the Court and thereby making such documents part of the record.

WHEREFORE, Defendant, Parex, Inc., respectfully requests that the Court enter an Order granting its Motion Craving Oyer In Response to Defendant/Cross-Plaintiff's Cross-Claim, requiring Defendant/Cross-Plaintiff to present a copy of any alleged contract or agreement and any alleged express warranty referenced in the Cross-Claim, attaching the same to a pleading filed with the Court and thereby making the same a part of the record in this matter, and such other relief as the Court deems proper.

Respectfully submitted,
RUSSELL & RUSSELL, P.C.

By: Timothy R. Hughes/EAR
Timothy R. Hughes, VSB No. 33398
150 S. Washington Street
Suite 101
Falls Church, VA 22046
(703) 241-1976
Counsel for Defendant,
Parex, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Parex, Inc.'s Motion Craving Oyer In Response to Defendant/Cross-Plaintiff Pulte Home Corporation's Cross-Claim was served, on this 24th day of June, 2000 to the parties set forth below.

Via First Class Mail

David Hilton Wise
THE WISE LAW FIRM, P.C.
4021 University Drive, Suite 204
Fairfax, VA 22030
Counsel for Plaintiffs

Via First Class Mail

Daniel K. Bryson
LEWIS & ROBERTS, P.L.L.C.
1305 Navaho Dr., Suite 400
Raleigh, NC 27609
Of-Counsel for Plaintiffs

Via First Class Mail

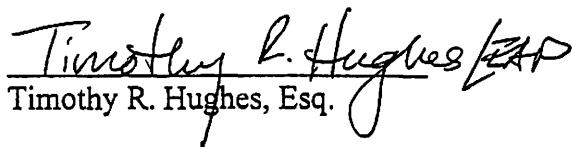
Michael McManus
DRINKER BIDDLE & REATH, LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
Counsel for Pulte Home Corp.

Via First Class Mail

Jordan Samuel
2009 N. 14th Street, Suite 510
Arlington, VA 22201
Counsel for Defendant Pulte Home Corp.

Via First Class Mail

Christopher E. Hassell
James Allen
GILBERG & KIERNAN
1250 I Street, N.W., 6th Floor
Washington, D.C. 20005
*Counsel for Defendant CSS L.L.C. a/k/a/
Coronado Stucco & Stone*


Timothy R. Hughes, Esq.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TIM L. PECKINPAUGH, et al.,

Plaintiffs,

v.

PAREX, INC., et al.,

Defendants.

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Law No. 184719

DEFENDANT PAREX, INC.'s
DEMURRER TO DEFENDANT/CROSS-PLAINTIFF PULTE HOME
CORPORATION'S CROSS-CLAIM

COMES NOW Defendant, Parex, Inc. ("Parex"), by and through counsel, and appears and submits the following Demurrer to Defendant/Cross-Plaintiff Pulte Home Corporation's ("PHC's") Cross-Claim, and states as follows:

1. Defendant/Cross-Plaintiff PHC filed a Cross-Claim asserting five distinct causes of action against Parex: 1) breach of contract (Count IV); 2) breach of express warranty (Count VI); 3) breach of implied warranty (Count VIII); 4) indemnification (Count IX); and 5) contribution (Count X).

2. Defendant/Cross-Plaintiff's Cross-Claim is based upon allegations that Parex and other named defendants are obligated to defend, indemnify, contribute and pay damages to PHC in the event that PHC is held liable for the alleged defective construction of Plaintiff's home.

See, Cross-Claim at ¶¶ 12-13, 30, 38, 47, 49, 51. Specifically, Defendant/Cross-Plaintiff PHC alleges that Parex, as the manufacturer of the stucco cladding used on Plaintiff's home, has both implied and express warranty and contractual obligations to Defendant/Cross-Plaintiff PHC.

See, Cross-Claim at ¶¶ 12-13, 30, 38, 47, 49, 51.

3. Defendant/Cross-Plaintiff PHC's claim for breach of third-party-beneficiary contract in Count IV should be dismissed. Defendant/Cross-Plaintiff fails to affirmatively allege the existence of any contract between Parex and any other subcontractor or supplier, or any provisions of the same indicating Parex's intent to name PHC as a third-party beneficiary of the agreement. Parex has craved oyer of this alleged contract or agreement and strongly believes that Defendant/Cross-Plaintiff cannot confirm the existence of any such document. Indeed, Defendant/Cross-Plaintiff PHC fails to allege any basis for finding that PHC is an intended third-party beneficiary of any agreement made by Parex concerning the use of synthetic stucco on Plaintiff's home.

4. Defendant/Cross-Plaintiff PHC's claim for breach of express warranty in Count VI should be dismissed. Defendant/Cross-Plaintiff PHC fails to properly allege that PHC received any express warranty from Parex or even had any direct communications with Parex concerning the use of Parex's product or a warranty for the same. Moreover, Defendant/Cross-Plaintiff PHC cannot avail itself of any warranty remedies against Parex, because Defendant/Cross-Plaintiff is not in privity of contract with Parex and provides no legal or factual basis for finding that PHC is an intended third-party beneficiary of any such warranty. Finally, U.C.C. warranties do not apply to ordinary building components that are used in construction and affixed to realty, and Defendant/Cross-Plaintiff PHC fails to allege any notice of the alleged product defect to Parex prior to filing suit as required by Va. Code Ann. § 8.2-714 and § 8.2-607(3)(a).

5. Defendant/Cross-Plaintiff PHC's claim for breach of implied warranty in Count VIII should also be dismissed. Defendant/Cross-Plaintiff has failed to allege any basis for

finding an implied warranty in this case. Defendant/Cross-Plaintiff lacks privity of contract with Parex and thus all consequential and even direct damage claims should be barred. Moreover, U.C.C. implied warranties do not apply to ordinary building components that are used in construction and affixed to realty, and Defendant/Cross-Plaintiff again fails to allege any notice of the alleged product defect to Defendant prior to filing suit as required by Va. Code Ann. § 8.2-714 and § 8.2-607(3)(a).

6. Defendant/Cross-Plaintiff PHC's claim for indemnification in Count IX is also without merit. Defendant/Cross-Plaintiff PHC fails to allege any contractual agreement between Parex and PHC concerning indemnification of PHC. Defendant/Cross-Plaintiff also fails to allege, as part of its "active/passive" theory of indemnification, that PHC is without fault and is only being held vicariously liable for the negligence of Parex. Moreover, a claim for implied indemnification will not lie in circumstances where the Cross-Plaintiff is held liable to the Plaintiff as a result of his own negligence or misconduct.

7. Defendant/Cross-Plaintiff PHC's claim for contribution in Count X is equally deficient. Under Virginia law, a claim for contribution may be asserted against a party who is a joint wrongdoer. Defendant/Cross-Plaintiff and Parex cannot be found to be joint wrongdoers on Plaintiff's underlying claims, as Plaintiff's claims seek recovery of purely economic loss. Since claims for economic loss sound in contract rather than tort, and Parex is not in privity of contract with the Plaintiff, Parex cannot be found liable on Plaintiff's claims absent privity of contract. Thus, PHC's claims for contribution must be dismissed.

WHEREFORE, Defendant, Parex, Inc., respectfully requests that the Court enter an Order sustaining its Demurrer, dismissing with prejudice Defendant/Cross-Plaintiff's claims for

breach of the third-party beneficiary contract, breach of express warranty, breach of implied warranty, indemnification and contribution, and such other relief as the Court deems proper.

Respectfully submitted,
RUSSELL & RUSSELL, P.C.

By: Timothy R. Hughes/EAD
Timothy R. Hughes, VSB No. 33398
150 S. Washington Street
Suite 101
Falls Church, VA 22046
(703) 241-1976
Counsel for Defendant,
Parex, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Demurrer to Defendant/Cross-Plaintiff Pulte Home Corporation's Cross-Claim was served, on this 29th day of June, 2000 to the parties set forth below.

Via First Class Mail

David Hilton Wise
THE WISE LAW FIRM, P.C.
4021 University Drive, Suite 204
Fairfax, VA 22030
Counsel for Plaintiffs

Via First Class Mail

Daniel K. Bryson
LEWIS & ROBERTS, P.L.L.C.
1305 Navaho Dr., Suite 400
Raleigh, NC 27609
Of-Counsel for Plaintiffs

Via First Class Mail

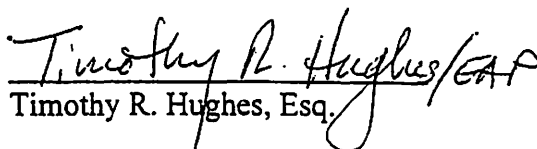
Michael McManus
DRINKER BIDDLE & REATH, LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
Counsel for Pulte Home Corp.

Via First Class Mail

Jordan Samuel
2009 N. 14th Street, Suite 510
Arlington, VA 22201
Counsel for Defendant Pulte Home Corp.

Via First Class Mail

Christopher E. Hassell
James Allen
GILBERG & KIERNAN
1250 I Street, N.W., 6th Floor
Washington, D.C. 20005
*Counsel for Defendant CSS L.L.C. a/k/a/
Coronado Stucco & Stone*


Timothy R. Hughes, Esq.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TIM L. PECKINPAUGH, et al.,

Plaintiffs,

v.

PAREX, INC., et al.,

Defendants.

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Law No. 184719

DEFENDANT PAREX, INC.'s
SPECIAL PLEA OF THE STATUTE OF LIMITATIONS TO DEFENDANT/CROSS-PLAINTIFF PULTE HOME CORPORATION'S CROSS-CLAIM

COMES NOW Defendant, Parex, Inc. ("Parex"), by and through counsel, and appears and submits the following Special Plea of the Statute of Limitations to Defendant/Cross-Plaintiff Pulte Home Corporation's ("PHC's") Cross-Claim, and states as follows:

1. Defendant/Cross-Plaintiff PHC filed a Cross-Claim asserting five distinct causes of action against Parex: 1) breach of contract (Count IV); 2) breach of express warranty (Count VI); 3) breach of implied warranty (Count VIII); 4) indemnification (Count IX); and 5) contribution (Count X).

2. Defendant/Cross-Plaintiff's Cross-Claim is based upon allegations that Parex and other named defendants are obligated to defend, indemnify, contribute and pay damages to PHC in the event that PHC is held liable for the alleged defective construction of Plaintiff's home.

See, Cross-Claim at ¶¶ 12-13, 30, 38, 47, 49, 51. Specifically, Defendant/Cross-Plaintiff PHC alleges that Parex, as the manufacturer of the stucco cladding used on Plaintiff's home, has both implied and express warranty and contractual obligations to Defendant/Cross-Plaintiff PHC.

See, Cross-Claim at ¶¶ 12-13, 30, 38, 47, 49, 51.

3. Count VI and VIII of Defendant/ Cross-Plaintiff PHC's Cross-Claim, breach of express warranty and breach of implied warranty, are barred by the applicable statute of limitations. See, Va. Code § 8.2-725.¹

WHEREFORE, Defendant, Parex, Inc., respectfully requests that the Court enter an Order sustaining its Special Plea of the Statute of Limitations to Defendant/Cross-Plaintiff PHC's Cross-Claim, dismissing with prejudice Defendant/Cross-Plaintiffs' claims for breach of express warranty and breach of implied warranty, (Counts VI and VIII), and such other relief as the Court deems proper.

Respectfully submitted,
RUSSELL & RUSSELL, P.C.

By: Timothy R. Hughes / EAT
Timothy R. Hughes, VSB No. 33398
150 S. Washington Street
Suite 101
Falls Church, VA 22046
(703) 241-1976
Counsel for Defendant,
Parex, Inc.

¹ Parex reserves the right to assert additional special pleas of the statute of limitations for the remaining Counts of Defendant/Cross-Plaintiff PHC's Cross-Claim until after Parex has had the opportunity to investigate these claims further through discovery. Parex anticipates additional such arguments after discovery.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Parex, Inc.'s Special Plea of the Statute of Limitations to Defendant/Cross-Plaintiff Pulte Home Corporation's Cross-Claim was served, on this 21st day of June, 2000 to the parties set forth below.

Via First Class Mail

David Hilton Wise
THE WISE LAW FIRM, P.C.
4021 University Drive, Suite 204
Fairfax, VA 22030
Counsel for Plaintiffs

Via First Class Mail

Daniel K. Bryson
LEWIS & ROBERTS, P.L.L.C.
1305 Navaho Dr., Suite 400
Raleigh, NC 27609
Of-Counsel for Plaintiffs

Via First Class Mail

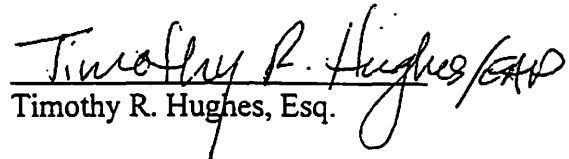
Michael McManus
DRINKER BIDDLE & REATH, LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
Counsel for Pulte Home Corp.

Via First Class Mail

Jordan Samuel
2009 N. 14th Street, Suite 510
Arlington, VA 22201
Counsel for Defendant Pulte Home Corp.

Via First Class Mail

Christopher E. Hassell
James Allen
GILBERG & KIERNAN
1250 I Street, N.W., 6th Floor
Washington, D.C. 20005
*Counsel for Defendant CSS L.L.C. a/k/a/
Coronado Stucco & Stone*


Timothy R. Hughes, Esq.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TIM L. PECKINPAUGH, et al.,

Plaintiffs,

v.

PAREX, INC., et al.,

Defendants.

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Law No. 184719

DEFENDANT PAREX, INC.'s
PLEA IN BAR TO DEFENDANT/CROSS-PLAINTIFF PULTE HOME
CORPORATION'S CROSS-CLAIM

COMES NOW Defendant, Parex, Inc. ("Parex"), by and through counsel, and appears and submits the following Plea in Bar to Defendant/Cross-Plaintiff Pulte Home Corporation's ("PHC's") Cross-Claim, and states as follows:

1. Defendant/Cross-Plaintiff PHC filed a Cross-Claim asserting five distinct causes of action against Parex: 1) breach of contract (Count IV); 2) breach of express warranty (Count VI); 3) breach of implied warranty (Count VIII); 4) indemnification (Count IX); and 5) contribution (Count X).

2. Defendant/Cross-Plaintiff's Cross-Claim is based upon allegations that Parex and other named defendants are obligated to defend, indemnify, contribute and pay damages to PHC in the event that PHC is held liable for the alleged defective construction of Plaintiff's home.

See, Cross-Claim at ¶¶ 12-13, 30, 38, 47, 49, 51. Specifically, Defendant/Cross-Plaintiff PHC alleges that Parex, as the manufacturer of the stucco cladding used on Plaintiff's home, has both implied and express warranty and contractual obligations to Defendant/Cross-Plaintiff PHC.

See, Cross-Claim at ¶¶ 12-13, 30, 38, 47, 49, 51.

3. Count IV of Defendant/Cross-Plaintiff PHC's Cross-Claim, breach of third-party beneficiary contract, should be dismissed. Parex believes that the express terms of any alleged contract or agreement between Parex and any subcontractor or supplier, clearly demonstrate that Defendant/Cross-Plaintiff PHC was not an intended third-party beneficiary of any such contract or agreement. Parex has cravedoyer of this contract or agreement.

WHEREFORE, Defendant, Parex, Inc., respectfully requests that the Court enter an Order sustaining its Plea in Bar to Defendant/Cross-Plaintiff PHC's Cross-Claim, dismissing with prejudice Defendant/Cross-Plaintiffs' claim for breach of third-party beneficiary contract, (Counts IV), and such other relief as the Court deems proper.

Respectfully submitted,
RUSSELL & RUSSELL, P.C.

By: Timothy R. Hughes/EA
Timothy R. Hughes, VSB No. 33398
150 S. Washington Street
Suite 101
Falls Church, VA 22046
(703) 241-1976
Counsel for Defendant,
Parex, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Parex, Inc.'s Plea in Bar to Defendant/Cross-Plaintiff Pulte Home Corporation's Cross-Claim was served, on this 24th day of June, 2000 to the parties set forth below.

Via First Class Mail

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Counsel for Plaintiffs

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Daniel K. Bryson
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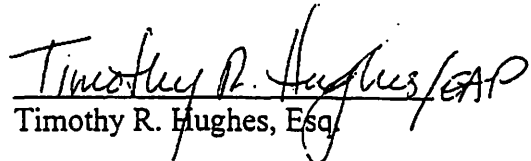
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Counsel for Pulte Home Corp.

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*Counsel for Defendant CSS L.L.C. a/k/a/
Coronado Stucco & Stone*


Timothy R. Hughes, Esq.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TIM L. PECKINPAUGH, et al.,

Plaintiffs,

v.

PAREX, INC., et al.,

Defendants.

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Law No. 184719

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JUDITH A. CLARK
CLERK, CIRCUIT COURT
FAIRFAX, VA

DEFENDANT PAREX, INC.'s
DEMURRER TO PLAINTIFFS' AMENDED MOTION FOR JUDGMENT

COMES NOW Defendant, Parex, Inc. ("Parex"), by and through counsel, and appears and submits the following Demurrer to Plaintiffs' Amended Motion for Judgment, and states as follows:

1. Plaintiffs filed an Amended Motion for Judgment asserting four causes of action against Parex: 1) negligence per se (Count V); 2) fraud (Count VI); 3) constructive fraud (Count VII); 4) and violation of the Virginia Consumer Protection Act, Va. Code Ann. § 59.1-200A (Count VIII).

2. Plaintiffs' Amended Motion for Judgment arises out of the alleged defective construction of Plaintiffs' home, located at 3206 Wheatland Farms Drive, Oakton, Virginia ("the House"). See, Amended Motion for Judgment at ¶ 6. Specifically, Plaintiffs claim damages resulting from use of stucco cladding on their home and assert that Parex was the manufacturer of the stucco product that caused the alleged damage to the House. See, Amended Motion for Judgment at ¶¶ 9, 11, 15, and 20.

3. Plaintiffs' claim for negligence per se in Count V should be dismissed. Plaintiffs

fail to properly allege that Parex violated any legal duty owed to the Plaintiffs pursuant to the Virginia Uniform State Building Code (“VUSBC”). First, Plaintiffs are not the original owners of the home and fail to allege any agency relationship between Plaintiffs and the original owner, Mr. Boutcher, which would permit a claim against Parex by Plaintiffs rather than Mr. Boutcher. See, Amended Motion for Judgment at ¶ 7. Second, the VUSBC applies to “construction, alteration, repair, addition and removal of all structures,” and not the manufacture of building materials.¹ See, VUSBC § 102.1. Third, Plaintiffs’ reliance on USBC § 1701.1 et seq. as a basis for a negligence per se claim is misplaced, because any duties arising under VUSBC § 1701.1 et seq. run to the building permit applicant or “owner” of the property, and not the manufacturer of building materials. See, VUSBC §§ 1705.1.1, 107.3. Fourth, the VUSBC does not require special testing and approval of Parex’s synthetic stucco product prior to its sale or use as a building material, because synthetic stucco is an “approved” exterior covering. See, VUSBC §§ 1405.1, 1404.7 and 106.4. Fifth, Plaintiffs fail to provide any basis for finding that Parex’s actual synthetic stucco product is not weather-resistant as required by VUSBC § 1403.3. Indeed, Plaintiffs’ Amended Motion for Judgment admits that water penetration damage to their home occurred as the result of improper installation of sealants and flashing to the home, not through the stucco’s lack of weather resistance. See, Amended Motion for Judgment at ¶¶ 16, 25(b), (f), (g), (j), and (n).

4. Plaintiffs’ claims for actual fraud and constructive fraud in Counts VI and VII are also lacking. Plaintiffs fail to allege their claims with specificity. Plaintiffs fail to allege that Plaintiffs saw any alleged advertising materials from Parex or that Plaintiffs relied upon the

¹ Indeed, the VUSBC is merely an administrative regulatory code, and does not provide a standard of care

alleged advertising materials in choosing the stucco cladding for their home. Indeed, Plaintiffs fail to allege any direct or indirect communications whatsoever between Parex and the Plaintiffs, alleging only that the builder, Pulte Home Corporation (“Pulte”), made certain representations to Plaintiffs concerning the stucco cladding used on their home.² See, Amended Motion for Judgment at ¶¶ 55-57. Moreover, as set forth above with regard to Plaintiffs’ negligence per se claim, Plaintiffs fail to allege that any agency relationship existed between the Plaintiffs and the original owner, Mr. Boutcher, which would permit Plaintiffs to assume any of Mr. Boutcher rights concerning the house. Further, Parex had no duty of disclosure to Plaintiffs, because Parex is a manufacturer that is not in direct communications or privity with Plaintiffs. As such, Plaintiff’s claims lack both misrepresentation and reliance. Finally, under Virginia law, a claim for constructive fraud is essentially an action for negligent misrepresentation, which requires Plaintiffs to demonstrate Parex owed them a duty of care. Such duty is lacking absent privity of contract.

5. Plaintiffs’ claim for violation of Virginia’s Consumer Protection Act should be dismissed. Under Virginia law, the Virginia Consumer Protection Act does not apply to consumer purchases of realty or to commercial transactions between a builder and a remote manufacture of component parts of a house. Moreover, as with the other misrepresentation-based claims, Plaintiffs fail to plead the circumstances underlying the Consumer Protection Act claim with the requisite specificity. Plaintiffs further fail to allege that Plaintiffs saw any alleged advertising materials from Parex or that Plaintiffs relied upon the same in choosing the stucco

appropriate for a negligence per se claim under Virginia law.

² Plaintiffs also fail to allege any agency relationship between Pulte and Parex, and thus any representations made by Pulte cannot be imputed to Parex.

cladding for their home. Indeed, Plaintiffs fail to allege that they communicated with Parex, directly or indirectly, concerning the performance of Parex's product, or that any agency relationship existed between Mr. Boutcher and Plaintiffs which would permit Plaintiffs to assume any of Mr. Boutcher rights concerning the house. See, Amended Motion for Judgment at ¶¶ 7, 55-58. As such, Plaintiff's claims lack both misrepresentation and reliance.

WHEREFORE, Defendant, Parex, Inc., respectfully requests that the Court enter an Order sustaining its Demurrer to Plaintiffs' Amended Motion for Judgment, dismissing with prejudice Plaintiffs' claims for negligence per se, actual and constructive fraud, and violation of the Virginia Consumer Protection Act, and such other relief as the Court deems proper.

Respectfully submitted,
RUSSELL & RUSSELL, P.C.

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Counsel for Defendant,
Parex, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Demurrer to Plaintiffs'

Amended Motion for Judgment was served, on this 7th day of July, 2000 to the parties set forth below.

Via First Class Mail

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Of-Counsel for Plaintiffs

Via First Class Mail

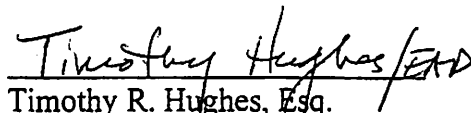
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*Counsel for Defendant CSS L.L.C. a/k/a/
Coronado Stucco & Stone*


Timothy R. Hughes, Esq.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TIM L. PECKINPAUGH, et al.,

Plaintiffs,

v.

PAREX, INC., et al.,

Defendants.

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Law No. 184719

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JULIE L. FLETCHER
CLERK, CIRCUIT COURT
FAIRFAX, VA

DEFENDANT PAREX, INC.'s
SPECIAL PLEA OF THE STATUTE OF LIMITATIONS
TO PLAINTIFFS' AMENDED MOTION FOR JUDGMENT

COMES NOW Defendant, Parex, Inc. ("Parex"), by and through counsel, and appears and submits the following Special Plea of the Statute of Limitations to Plaintiffs' Amended Motion for Judgment, and states as follows:

1. Plaintiffs filed an Amended Motion for Judgment asserting four causes of action against Parex: 1) negligence per se (Count V); 2) fraud (Count VI); 3) constructive fraud (Count VII); 4) and violation of the Virginia Consumer Protection Act, Va. Code Ann. § 59.1-200A (Count VIII).

2. Plaintiffs' Amended Motion for Judgment arises out of the alleged defective construction of Plaintiffs' home, located at 3206 Wheatland Farms Drive, Oakton, Virginia ("the House"). See, Amended Motion for Judgment at ¶ 6. Specifically, Plaintiffs claim damages resulting from use of stucco cladding on their home and assert that Parex was the manufacturer of the stucco product that caused the alleged damage to the House. See, Amended Motion for Judgment at ¶¶ 9, 11, 15, and 20.

3. Count V of Plaintiffs' Amended Motion for Judgment, negligence per se, is

barred by the applicable statute of limitations. See, Va. Code Ann. 8.01-243.

4. Count VIII of Plaintiffs' Amended Motion for Judgment, violation of the Virginia Consumer Protection Act, Va. Code Ann. § 59.1-200A, is barred by the applicable statute of limitations as provided by Va. Code Ann. § 59.1-204.1.¹

WHEREFORE, Defendant, Parex, Inc., respectfully requests that the Court enter an Order sustaining its Special Plea of the Statute of Limitations to Plaintiffs' Amended Motion for Judgment, dismissing with prejudice Plaintiffs' claims for negligence per se (Count V), violation of the Virginia Consumer Protection Act, Va. Code Ann. § 59.1-200A (Count VIII), and such other relief as the Court deems proper.

Respectfully submitted,
RUSSELL & RUSSELL, P.C.

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Elizabeth A. Dore, VSB No. 44001
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(703) 241-1976
Counsel for Defendant,
Parex, Inc.

¹ Parex reserves the right to assert additional special pleas of the statute of limitations for Plaintiffs' remaining counts until after Parex has had the opportunity to investigate these claims further through discovery. Parex anticipates additional such arguments after discovery.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Parex, Inc.'s Special Plea of the Statute of Limitations to Plaintiffs' Amended Motion for Judgment was served, on this 7th day of July, 2000 to the parties set forth below.

Via First Class Mail

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Of-Counsel for Plaintiffs

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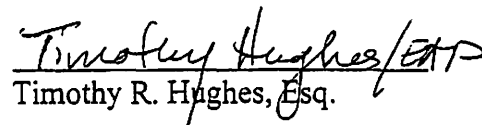
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Counsel for Pulte Home Corp.

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Counsel for Defendant Pulte Home Corp.

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*Counsel for Defendant CSS L.L.C. a/k/a/
Coronado Stucco & Stone*


Timothy R. Hughes, Esq.

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

FILED
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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

TIMOTHY L. PECKINPAUGH, *et al.*,

Plaintiffs,

v.

PULTE HOME CORPORATION, *et al.*,

Defendants.

Law No. 183665

184719

**DEFENDANT PULTE HOME CORPORATION'S DEMURRER
TO PLAINTIFFS' AMENDED MOTION FOR JUDGMENT**

COMES NOW Defendant Pulte Home Corporation ("PHC"), by and through counsel, and demurs to each count of Plaintiffs' Amended Motion for Judgment. In support thereof, PHC states as follows:

1. Plaintiffs filed an Amended Motion for Judgment asserting six causes of action against PHC: Negligence *Per Se* (Count One), Breach of Express Warranty (Count Two), Breach of Implied Warranties (Count Three), Actual Fraud (Count Six), Constructive Fraud (Count Seven) and Violation of the Virginia Consumer Protection Act ("VCPA") (Count Eight).

2. Plaintiffs' Amended Motion for Judgment arises out of the allegedly defective construction of Plaintiffs' home. Specifically, Plaintiffs claim damages resulting from the use of stucco cladding manufactured by co-defendant Parex, Inc. ("Parex") on their home, and assert that PHC sold and, through its subcontractors and co-defendants CSS, L.L.C. ("CSS") and Coronado Corporation ("Coronado"), installed the stucco product.

3. In a Motion Craving Oyer that is also part of this pleading in response, PHC has requested that several documents referenced and relied upon in the Amended Motion for Judgment be made a part of these pleadings; to wit, the purchase agreement between PHC and the original purchasers (the "Contract"), the limited warranty issued by PHC to Plaintiffs (the "Pulte Protection Plan", or the "PPP Warranty"), the one-year builder warranty and the documents purportedly relied upon by Plaintiffs in support of their counts alleging Actual Fraud, Constructive Fraud, and violation of the VCPA. Portions of this Demurrer are predicated upon those documents expressly relied upon by Plaintiffs being made a part of these pleadings, whether by virtue of the Motion Craving Oyer, by virtue of Plaintiffs' express reference to same in their Amended Motion for Judgment, or, in the case of the PPP Warranty, by virtue of Plaintiffs' admission of the genuineness of that document pursuant to the new matter plead herein under to Rule 3:12.

4. Count One of Plaintiffs' Amended Motion for Judgment fails to state a claim for Negligence *Per Se*. This claim has been specifically and properly waived in the Contract and PPP Warranty, is barred by the economic loss rule, is unavailable in that PHC owed Plaintiffs no underlying common law duty, and constitutes an improper attempt to convert a contract claim into a tort claim. Additionally, no code provision is referenced for most of PHC's alleged "violations," which is required in that mere private rules and precatory standards cannot support a negligence *per se* claim. Finally, the code provisions actually mentioned do not say what Plaintiffs claim, and cannot form the basis of a negligence *per se* claim in any event in that they are merely general prescriptions that do not enhance a common law duty of care, and are not designed to prevent the type of harm allegedly suffered by Plaintiffs.

5. Count Two of Plaintiffs' Amended Motion for Judgment fails to state a claim for Breach of Express Warranty. A review of the plain terms of the PPP Warranty reveals that its conditions precedent have not been met, and further reveal that the provisions relied upon have expired and are otherwise inapplicable to the damage alleged.

6. Count Three of Plaintiffs' Amended Motion for Judgment fails to state a claim for Breach of Implied Warranties. The only potentially available implied warranties are those set forth in Va. Code Ann. § 55-70.1, which have been validly waived in the Contract and PPP Warranty.

7. Count Six of Plaintiffs' Amended Motion for Judgment fails to state a claim for Actual Fraud. Plaintiffs have failed to allege all elements of this claim with the requisite particularity. Further, many or all of PHC's alleged statements are, on their face, true, non-misleading, and/or mere statements of opinion and/or puffery that cannot form the basis of a fraud count. This claim has also been specifically and properly waived in the Contract and PPP Warranty, and is further barred as an improper effort to convert a contract claim into a tort claim. Finally, because Plaintiffs did not purchase the subject home from PHC, there can be no duty, intent to deceive, reliance or proximate cause as a matter of law.

8. Count Seven of Plaintiffs' Amended Motion for Judgment fails to state a claim for Constructive Fraud. Plaintiffs have failed to allege all elements of this claim with the requisite particularity. Further, many or all of PHC's alleged statements are, on their face, true, non-misleading, and/or mere statements of opinion and/or puffery that cannot form the basis of a fraud count. This claim has also been specifically and properly waived in the Contract and PPP Warranty, is barred by the economic loss rule, and is further barred as an improper effort to convert a contract claim into a tort

claim. Finally, because Plaintiffs did not purchase the subject home from PHC, there can be no duty, intent to deceive, reliance or proximate cause as a matter of law.

9. Count Eight of Plaintiffs' Amended Motion for Judgment fails to state a claim for violation of the VCPA. Plaintiffs have failed to allege all elements of this claim with the requisite particularity, especially with regard to Plaintiffs' failure to distinguish between PHC, Parex, Coronado and CSS, and specifically as pertains to Plaintiffs' reliance on PHC's allegedly misleading statements and the causal connection to Plaintiffs' purported damages. Finally, because Plaintiffs did not purchase the subject home from PHC, there can be no cause of action under the VCPA as a matter of law.

10. Finally, PHC demurs to the *ad damnum* clauses of the Amended Motion for Judgment. PHC's liability, if any, is limited to the terms of the PPP Warranty, which in turn limits PHC's liability to repair or replacement. Further, Plaintiffs have failed to adequately plead facts sufficient to merit an award of punitive damages.

WHEREFORE, your Defendant, Pulte Home Corporation, asks this Honorable Court to enter an Order sustaining its Demurrer, dismissing each and every count brought against it with prejudice, and such other relief as the Court deems just and proper.

**DEFENDANT PULTE HOME CORPORATION'S PLEAS
IN BAR TO PLAINTIFFS' MOTION FOR JUDGMENT**

COMES NOW Defendant Pulte Home Corporation ("PHC"), by and through counsel, and asserts these pleas in bar to each count of Plaintiffs' Amended Motion for Judgment. In support thereof, PHC states as follows:

1. Plaintiffs filed an Amended Motion for Judgment asserting six causes of action against PHC: Negligence *Per Se* (Count One), Breach of Express Warranty (Count Two), Breach of Implied Warranties (Count Three), Actual Fraud (Count Six),

Constructive Fraud (Count Seven) and Violation of the Virginia Consumer Protection Act ("VCPA") (Count Eight).

2. Plaintiffs' Amended Motion for Judgment arises out of the allegedly defective construction of Plaintiffs' home. Specifically, Plaintiffs claim damages resulting from the use of stucco cladding manufactured by co-defendant Parex, Inc. ("Parex") on their home, and assert that PHC sold and, through its subcontractors and co-defendants CSS, L.L.C. ("CSS") and Coronado Corporation ("Coronado"), installed the stucco product.

3. Count One of Plaintiffs' Amended Motion for Judgment, alleging Negligence *Per Se*, is barred by the applicable two-year statute of limitations.

4. Count Two of Plaintiffs' Amended Motion for Judgment, alleging Breach of Express Warranty, is barred by the fact that Plaintiffs failed to satisfy all mandatory conditions precedent to recovery under the PPP Warranty attached as Exhibit A. Further, any claim based upon the alleged remaining portion of a one-year builder warranty are barred for failure to make a claim within one year from conveyance of title.

5. Count Three of Plaintiffs' Amended Motion for Judgment, alleging Breach of Implied Warranties, is barred by the fact that Plaintiffs failed to provide notice of breach within one year of the date of transfer of record title or Plaintiffs' taking possession, whichever occurred first. Count Three is additionally barred by the applicable two-year statute of limitations.

6. Count Six of Plaintiffs' Amended Motion for Judgment, alleging Actual Fraud, is barred by the applicable two-year statute of limitations. Count Six is additionally barred by the fact that Plaintiffs made an independent inquiry and inspection concerning the EIFS synthetic stucco prior to purchase of the home. Finally, Count

Six is barred by the fact that any statements made by PHC to Plaintiffs occurred subsequent to the Plaintiffs' purchase of the home.

7. Count Seven of Plaintiffs' Amended Motion for Judgment, alleging Constructive Fraud, is barred by the applicable two-year statute of limitations. Count Seven is additionally barred by the fact that Plaintiffs made an independent inquiry and inspection concerning the EIFS synthetic stucco prior to purchase of the home. Finally, Count Seven is barred by the fact that any statements made by PHC to Plaintiffs occurred subsequent to the Plaintiffs' purchase of the home.

8. Count Eight of Plaintiffs' Amended Motion for Judgment, alleging violation of the VCPA, is barred by the applicable two-year statute of limitations.

WHEREFORE, your Defendant, Pulte Home Corporation, asks this Honorable Court to enter an Order sustaining its Pleas in Bar, dismissing each and every claim brought against it with prejudice, and such other relief as the Court deems just proper.

DEFENDANT PULTE HOME CORPORATION'S MOTION CRAVING OYER

✓ COMES NOW Defendant Pulte Home Corporation ("PHC"), by and through its counsel, and in support of its Motion Craving Oyer states as follows:

1. Plaintiffs filed an Amended Motion for Judgment asserting six causes of action against PHC: Negligence *Per Se* (Count One), Breach of Express Warranty (Count Two), Breach of Implied Warranties (Count Three), Actual Fraud (Count Six), Constructive Fraud (Count Seven), Violation of the Virginia Consumer Protection Act ("VCPA") (Count Eight).

2. Plaintiffs' Amended Motion for Judgment arises out of the allegedly defective construction of Plaintiffs' home. Specifically, Plaintiffs claim damages result-

ing from the use of stucco cladding manufactured by co-defendant Parex, Inc. ("Parex") on their home, and assert that PHC sold and, through its subcontractors and co-defendants CSS, L.L.C. ("CSS") and Coronado Corporation ("Coronado"), installed the stucco product.

3. In Count Two of Plaintiffs' Amended Motion for Judgment, Plaintiffs allege that PHC provided them with an express written warranty, and that the terms of this express written warranty serve as the basis of a Breach of Express Warranty claim. However, Plaintiffs do not attach any written warranty to their Amended Motion for Judgment.

4. Plaintiffs allege that the original purchasers of the home entered into a contractual purchase agreement with PHC, and rely on the representations made by PHC in connection with that sales contract. However, Plaintiffs do not attach any contract to their Amended Motion for Judgment.

5. In Counts Six, Seven and Eight of Plaintiffs' Amended Motion for Judgment, Plaintiffs allege that they reviewed certain documents allegedly containing false or misleading information, and that they relied on said documents to their detriment. Plaintiffs further alleged that the terms of these documents serve as the partial or entire basis of their claims for Actual Fraud, Constructive Fraud, and violation of the VCPA. However, Plaintiffs do not attach any of the aforesaid documents to their Amended Motion for Judgment.

6. As a result of Plaintiffs' reliance on the written warranty, the sales contract, and the allegedly false or misleading documents to support their claims as set forth above, PHC is entitled to review and rely upon these same documents in its defense of these claims, as set forth in the accompanying Demurrer and Pleas in Bar.

7. PHC believes that several issues underlying these claims and the allegations in Plaintiffs' Amended Motion for Judgment may be resolved upon review of the aforementioned documents. PHC further believes that the contents of these documents will enable the Court to resolve these claims by dispositive motion and/or pleading, as set forth in the accompanying Demurrer and Pleas in Bar.

8. Accordingly, good cause having been shown, PHC craves oyer of the written warranty, sales contract, the alleged false and/or misleading documents published by PHC, as set forth in Plaintiffs' Amended Motion for Judgment.

WHEREFORE, your Defendant, Pulte Home Corporation, respectfully requests that the Court enter an Order granting its Motion Craving Oyer; requiring Plaintiffs to present copies of the written warranty, sales contract, the alleged false and/or misleading documents published by PHC, as set forth in Plaintiffs' Amended Motion for Judgment, and to attach such documents to a pleading filed with the Court and making same a part of the record herein; and such other relief as the Court deems just and proper.

**DEFENDANT PULTE HOME CORPORATION'S
NEW MATTER TO WHICH A REPLY IS REQUESTED
PURSUANT TO RULE 3:12 OF THE VIRGINIA RULES**

COMES NOW Defendant Pulte Home Corporation ("PHC"), by and through counsel, pursuant to Rule 3:12 of the *Rules of the Virginia Supreme Court*, and sets forth the following new matter in connection with the Demurrer, Pleas in Bar and Motion Craving Oyer herein, and hereby requests a reply within twenty-one (21) days admitting or denying such new matter.

1. The document attached hereto as Exhibit A is a true and genuine copy of the express warranty between PHC and Plaintiffs that is referenced in the Amended Motion for Judgment.

2. Plaintiffs did not make an implied warranty claim within one year of the date of transfer of record title of their home.

3. Plaintiffs did not fully comply with the Dispute Settlement procedures set forth in Section II.D of the document attached as Exhibit A.

4. Plaintiffs did not make an express warranty claim within one year and thirty days of the date of transfer of record title of their home.

Respectfully submitted,

PULTE HOME CORPORATION

By: 

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Jeffrey J. Lopez
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Dated: July 10, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2000, a copy of Defendant Pulte Home Corporation's Demurrer, Pleas in Bar, Motion Craving Oyer, and New Matters, with attached Exhibits A and B, was served, via first-class mail, postage prepaid, on:

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Coordinating Counsel for Third-Party Defendants



Brian A. Coleman

PULTETM

Master Builder

HOME CARE KIT

THE
PULTE
PROTECTION
PLAN

Insured Limited Warranty



THE PULTE PROTECTION PLAN

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THE PULTE PROTECTION PLAN

I. INTRODUCTION

This introduction provides a general overview of the coverages in the Pulte Protection Plan which consists of the Limited Warranty, the Performance Standards and your Home Care Guide. The specific details, limitations and conditions of the Pulte Protection Plan are described in the Limited Warranty which is provided to you in this book. In general the Pulte Protection Plan is a commitment that materials and workmanship are warranted for one year from the time of closing. The heating, air conditioning, electrical and plumbing systems are warranted for two years from closing. Defects in materials and workmanship in the structural elements of the home are warranted for ten years from closing.

Some appliances, equipment and other components included in the home are not warranted by Pulte but are covered by separate warranties provided by the manufacturer or supplier. These warranties are assigned to you by Pulte at the time of closing. In the event that a claim is made under one of these warranties without response, Pulte will assist the home buyer in attempting to resolve the problem with the manufacturer or supplier.

THE SPIRIT OF THE WARRANTY - Our warranty commitment is easy to understand and based upon COMMON SENSE. We believe you have a right to expect a clean home which is complete and free of defects at the time of closing. Things should work. If there are problems because of defects in materials and workmanship, as outlined above and described in more detail later, Pulte will arrange for their repair or replacement. If a problem results from actions by occupants of the home or others or from ordinary wear and tear, Pulte is not responsible for the resulting repair or replacement.

THE RIGHTS OF YOUR HOME - We view your warranty in terms of what you, the buyer, have a right to expect. We view the issue of preventative maintenance in terms of what your home has a right to expect from you. No materials used in the construction of your home will last forever. Most will last for a long time, if properly maintained. It is our desire to help you understand how to prolong the life of your home through regular maintenance that is appropriate for the types of materials used in your home.

The following page describes in general terms, WHAT YOU HAVE A RIGHT TO EXPECT FROM PULTE and WHAT YOUR HOME HAS A RIGHT TO EXPECT FROM YOU. Following that is the LIMITED WARRANTY, WARRANTY EXCLUSIONS, LIMITATION OF LIABILITY, DISPUTE SETTLEMENT, REQUESTING WARRANTY SERVICE, DETAILED WARRANTY INFORMATION and helpful information on ways to keep your home in good condition.

YOUR RIGHTS AND THE RIGHTS OF YOUR HOME

This section discusses in general, layman's terms what you can expect from Pulte in the construction of your home and what your home should expect from you in ongoing maintenance and care. The Pulte "Home Care Guide" will provide you with most of the information you need to provide your home with the appropriate level of preventative maintenance.

YOU HAVE A RIGHT TO EXPECT FROM PULTE

YOUR HOME HAS A RIGHT TO EXPECT FROM YOU

1. SOIL DRAINAGE

Your home has been placed on good bearing soil. It was engineered to withstand the settlement that will occur. It should not settle in such a way as to create structural problems during the warranty period.

Your home and lot were designed with a particular drainage pattern which should carry rainwater away from the foundation. Water should not be directed to the edge of the foundation, either in the form of lot drainage or the watering of flowers.

2. CONCRETE SURFACES

The concrete surfaces in your home shall fulfill the functions for which they were intended without excessive settlement, cracking or secondary damage, such as leaking. Since concrete is likely to crack, standards are defined in a later section.

Concrete surfaces should be free of salts (for ice) and excessive weight such as a moving van. Yard drainage should be maintained to divert water away from concrete surfaces, if possible, to eliminate the chance it will undermine the surface and erode the bearing soil.

3. STRUCTURAL INTEGRITY

Your home was constructed plumb, level and square. Since homes are constructed by human beings, using a variety of materials, small tolerances are normal. What we consider unacceptable tolerances are defined in the detailed warranty section which follows.

Structural alterations to the home must be performed by professionals who understand the load bearing requirements of the change. The reason that local municipalities require permits for building alterations is to make sure that the structural integrity of the home is maintained.

4. INTRUSION OF THE ELEMENTS

Your home should not leak. Exceptions might occur such as when a driving rain forces water into vents, windows or under doors. Under normal circumstances, your home should protect you from the intrusion of the elements.

In many cases, the seal around doors and windows is caulk. This material will require annual inspection and any necessary replacement after one to two years. Water from yard and lawn watering devices should not come in contact with the structure.

YOUR RIGHTS AND THE RIGHTS OF YOUR HOME

(Continued)

**YOU HAVE A RIGHT
TO EXPECT FROM PULTE**

**YOUR HOME HAS A RIGHT
TO EXPECT FROM YOU**

5. MECHANICAL SYSTEMS

Those systems installed in your home to provide power, water, treated air, ventilation and waste disposal shall work.

Since the mechanical systems of your home were designed for normal usage, placing unreasonable demands upon them will present problems. Plugging several electrical devices into one circuit may cause it to overload. Loading materials into a drain may cause it to clog. Undue weight should not be placed upon pipes or shower heads because they can break. Some devices must be cleaned periodically (e.g., furnace filters) so that they can do what they were designed to do.

6. FINISHED SURFACES

Finished surfaces shall maintain uniform or characteristic appearance for a reasonable period of time. Cracks or surface deterioration shall be repaired as provided in the Limited Warranty

Wood requires cleaning and sealing to prevent problems of water penetration and continual exposure to the elements. Painted or sealed surfaces must be cleaned and refinished according to the requirements of your geographic area. If this is not done, the surface will deteriorate.

7. CARE & MAINTENANCE

Although things wear out, components in your home should last a reasonable length of time (assuming you give them appropriate care and maintenance). This time will vary with geographical regions, with the types of materials involved and usage. As time goes on, adjustments will be required.

Instructions for care and maintenance are included with many components of your home, including finished flooring, appliances and air handling equipment. Following these instructions will extend the life of these components.

8. COMMON ELEMENTS

If your new home is part of a multi-family development, the common elements should be in the same clean and completed condition as your unit. This includes entries, common hallways and common utility and service areas.

The common areas require the same care and maintenance as your home. Although your homeowner or condo association is responsible for maintenance, all residents should strive to keep these areas clean and usable.

II. THE LIMITED WARRANTY

THIS LIMITED WARRANTY INCLUDES PROCEDURES FOR INFORMAL SETTLEMENT OF DISPUTES, SUCH AS ARBITRATION, WHICH WILL BE BINDING ON YOU AND PULTE IF PERMITTED BY STATE LAW. ADDITIONAL INFORMATION MAY BE RECEIVED BY CALLING PULTE HOME CORPORATION AT (313)644-7300 OR THE CLAIMS ADMINISTRATOR AT (717)561-4480. YOU SHOULD READ THIS WARRANTY IN ITS ENTIRETY, INCLUDING THE ADDENDA AT THE END OF THIS WARRANTY BOOKLET, IN ORDER TO UNDERSTAND THE PROTECTION IT PROVIDES, EXCLUSIONS THAT APPLY, AND THE PERFORMANCE STANDARDS WHICH DETERMINE COVERAGE IN EACH CASE.

A. THE LIMITED WARRANTY

Pulte's Limited Warranty Commitment relates only to Covered Defects which are defined as defects in material and workmanship that are either part of the structure or are elements of the home as supplied by Pulte at the date of closing. This is not an insurance policy nor a maintenance agreement, but a definition of what the owners have a right to expect in terms of warranties.

Pulte has purchased Insurance coverage from Western Pacific Mutual Insurance Company, a Risk Retention Group ("Insurer") to benefit you if Pulte does not perform its obligations contained in this Limited Warranty.

This Limited Warranty is provided to the original purchaser of the home and to all subsequent owners who take title within the warranty periods identified below and use the home for their residence only.

One Year Coverage - Pulte warrants the home and all elements not otherwise expressly limited in this warranty to be free of defects in materials and workmanship of the original construction, as defined in the Performance Standards, for a period of one year after the closing date.

Two Year Coverage - Pulte warrants the workability, as defined in the Performance Standards, of the plumbing, electrical, heating, ventilating, air conditioning and other mechanical systems for a period of two years after the closing date.

Ten Year Coverage - Pulte warrants the Structural Elements of the home for a period of ten years after the original closing date to be free from defects in materials and workmanship if the defects diminish the ability of those Structural Elements to perform their load bearing functions as defined in the Performance Standards, rendering the home unsafe or uninhabitable. Structural Elements are defined as footings, bearing walls, beams, girders, trusses, rafters, bearing columns, lintels, posts, structural fasteners, subfloors and roof sheathing.

If a defect occurs in an item covered by this Limited Warranty, Pulte will repair or replace it to meet or exceed the Performance Standards. In the case of defects in Structural Elements, Pulte will repair or replace such Structural Elements to restore their load bearing functions, as designed, and make such other repairs as are necessary to return the home to safe living conditions and habitability.

Pulte assigns to the homeowners warranties for particular appliances and equipment furnished by the manufacturer to Pulte. Pulte provides no warranty on those items. If it is necessary to request warranty service in such a case, the homeowner must make a request directly to the manufacturer. In the unlikely event that the manufacturer is not responsive to the request, Pulte will assist the homeowner in attempting to obtain the necessary repairs or replacements from the manufacturer.

The benefits included in this Limited Warranty are only available when service is requested according to the procedures established by your local Pulte team and included in your warranty materials. In addition, your failure to reasonably provide access to the home during normal working hours for making repairs will relieve Pulte from its obligations under this warranty. Pulte's aggregate total liability shall not exceed the original contract price of the home.

Pulte reserves the right to use its judgment in determining the most appropriate method of repairing warranty defects. Pulte's offer to resolve an issue for which it bears no responsibility under this Limited Warranty does not create the responsibility to provide the resolution in another situation for which it bears no responsibility. Actions taken to cure defects will not extend the periods of coverage specified in this Limited Warranty.

Pulte cannot guarantee, nor does it warrant, exact color matches in situations where materials are replaced or areas are repainted or original materials are discontinued.

B. EXCLUSIONS

This Limited Warranty excludes any loss or damage which is not a Covered Defect, including:

1. Loss of or damage to any Real Property which is not part of the home covered by this Limited Warranty and which is not included in the original purchase price of the home as stated in the closing documents.
2. Any damage, to the extent it is made worse by:
 - a. Negligence, improper maintenance, or intentional or improper operation by anyone other than Pulte, its agents, or subcontractors.
 - b. Failure by you or anyone other than Pulte, its agents or subcontractors to comply with the warranty requirements of manufacturers of appliances, fixtures and equipment.
 - c. Failure by you to give timely notice to Pulte of any defects.
 - d. Changes in the grading of the ground by anyone other than Pulte, its employees, agents or subcontractors.
 - e. Changes, alterations or additions made to the home by anyone other than Pulte, after the Limited Warranty commencement date.
 - f. Dampness or condensation due to your failure to maintain adequate ventilation.
3. Loss or damage which the homeowner has not taken timely action to minimize.
4. Any defect caused by, or resulting from materials or work supplied by someone other than Pulte, its agents or subcontractors.
5. Normal wear and tear or normal deterioration.
6. Loss or damage, not otherwise excluded under this Limited Warranty, which does not constitute a defect in the construction of the home by Pulte, its agents or subcontractors.

F. INSURER'S RESPONSIBILITY

In the event Pulte is unable to meet its obligations under this Limited Warranty and a warranty claim must be resolved by the Insurer, the following conditions shall apply:

1. The decision of whether to repair or replace a defective item, or pay you the reasonable cost of doing so, is the Insurer's.
2. The total liability of the Insurer under this warranty is limited to and shall not exceed the lesser of the following:
 - a. the contract price of the home;
 - b. the reasonable cost of that part of the home damaged for like construction and use on the same premises;
 - c. the necessary amount to repair or replace the portion of the building rendered uninhabitable by a major structural defect less all amounts paid by or on behalf of the Insurer under this Limited Warranty.
3. A deductible shall be paid by the homeowner prior to repair or replacement by the Insurer according to the following schedule:

Year OneNo deductible;

Year Two\$250 deductible for all claims submitted in year two;

Years Three through Ten.....\$250 deductible for each claim submitted in years three through ten.

In the case of the common elements of a condominium, the deductible shall be \$250 per unit affected by the common element defect or \$5,000, whichever is less. No deductible applies for warranty service performed by Pulte.

4. Actions taken to cure defects will not extend the periods of coverage specified in this warranty.
5. When the Insurer finishes repairing or replacing a claim under this Limited Warranty, the homeowner must execute a full and unconditional release of all the Insurer's obligations with respect to the claim. The Insurer shall be subrogated to all the homeowner's rights of recovery against any person or entity and the homeowner agrees to execute and deliver any and all instruments or papers and to take other actions necessary to secure such rights, including but not limited to assignment of the proceeds of any other insurance or warranties to the Insurer. The homeowner shall do nothing to prejudice such rights of subrogation.
6. The Insurer provides warranty coverage in excess of coverage provided under other warranties or insurance, whether collectible or not.
7. Any claim involving a common element in a condominium must be made by an authorized representative of the condominium association. However, in a case where the authorized representative of the association refuses to submit a claim, each homeowner may submit a claim on their own behalf as outlined in Paragraph 3 above.
8. If the Insurer decides to pay the reasonable costs of repairing a claim, the payment shall be made to or on behalf of the homeowner and any mortgagee or their successors, as each interest may appear, provided the Insurer shall not have any obligation to make payment jointly to the homeowner and mortgagee where the mortgagee has not notified the Insurer in writing of its security interest in the home prior to such payment. Any mortgagee shall be completely bound by any conciliation or arbitration relating to a claim between the homeowner and the Insurer.

Pulte assigns to the homeowners warranties for particular appliances and equipment furnished by the manufacturer to Pulte. Pulte provides no warranty on those items. If it is necessary to request warranty service in such a case, the homeowner must make a request directly to the manufacturer. In the unlikely event that the manufacturer is not responsive to the request, Pulte will assist the homeowner in attempting to obtain the necessary repairs or replacements from the manufacturer.

The benefits included in this Limited Warranty are only available when service is requested according to the procedures established by your local Pulte team and included in your warranty materials. In addition, your failure to reasonably provide access to the home during normal working hours for making repairs will relieve Pulte from its obligations under this warranty. Pulte's aggregate total liability shall not exceed the original contract price of the home.

Pulte reserves the right to use its judgment in determining the most appropriate method of repairing warranty defects. Pulte's offer to resolve an issue for which it bears no responsibility under this Limited Warranty does not create the responsibility to provide the resolution in another situation for which it bears no responsibility. Actions taken to cure defects will not extend the periods of coverage specified in this Limited Warranty.

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B. EXCLUSIONS

This Limited Warranty excludes any loss or damage which is not a Covered Defect, including:

1. Loss of or damage to any Real Property which is not part of the home covered by this Limited Warranty and which is not included in the original purchase price of the home as stated in the closing documents.
2. Any damage, to the extent it is made worse by:
 - a. Negligence, improper maintenance, or intentional or improper operation by anyone other than Pulte, its agents, or subcontractors.
 - b. Failure by you or anyone other than Pulte, its agents or subcontractors to comply with the warranty requirements of manufacturers of appliances, fixtures and equipment.
 - c. Failure by you to give timely notice to Pulte of any defects.
 - d. Changes in the grading of the ground by anyone other than Pulte, its employees, agents or subcontractors.
 - e. Changes, alterations or additions made to the home by anyone other than Pulte, after the Limited Warranty commencement date.
 - f. Dampness or condensation due to your failure to maintain adequate ventilation.
3. Loss or damage which the homeowner has not taken timely action to minimize.
4. Any defect caused by, or resulting from materials or work supplied by someone other than Pulte, its agents or subcontractors.
5. Normal wear and tear or normal deterioration.
6. Loss or damage, not otherwise excluded under this Limited Warranty, which does not constitute a defect in the construction of the home by Pulte, its agents or subcontractors.

7. Loss or damage caused by or resulting from accidents, riots and civil commotion, theft, vandalism, fire, explosion, power surges or failures, smoke, water escape, falling objects, aircraft, vehicles, acts of God, lightning, windstorm, hail, mud slide, earthquake and volcanic eruption.
8. Loss or damage caused directly or indirectly by flood, wind driven water, surface water, waves, tidal waves, overflow of a body of water, or spray from any of these (whether or not driven by wind), water which backs up from sewers or drains, changes in the water table which were not reasonably foreseeable at the time of construction, or water below the surface of the ground (including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure), wetlands, springs or aquifers.
9. Loss or damage caused by soil movement, including subsidence, expansion or lateral movement of the soil (excluding flood and earthquake) which is covered by any other insurance or for which compensation is granted by state legislation.
10. Loss or damage to the home, persons or property directly or indirectly caused by insects, birds, vermin, rodents or other wild or domestic animals.
11. Loss or damage resulting from use of the home for non-residential purposes.
12. Any condition which does not result in actual physical damage to the home, including but not limited to, uninhabitability or health risk due to the presence or consequence of unacceptable levels of radon gas, formaldehyde or other pollutants and contaminants; or the presence of hazardous or toxic on-site materials.
13. Bodily injury or damage to personal property.
14. Loss or damage caused by or resulting from abnormal loading of structural elements by you which exceeds design loads as mandated by codes.
15. Consequential damages.

C. LIMITATION OF LIABILITY

IT IS UNDERSTOOD AND AGREED THAT PULTE'S LIABILITY UNDER THIS WARRANTY WHETHER IN CONTRACT, IN TORT, IN NEGLIGENCE OR OTHERWISE, IS LIMITED TO THE REMEDY PROVIDED IN THIS LIMITED WARRANTY. PULTE'S OBLIGATIONS UNDER THIS LIMITED WARRANTY AND UNDER THE PURCHASE AGREEMENT ARE LIMITED TO REPAIR AND REPLACEMENT. UNDER NO CIRCUMSTANCES SHALL PULTE BE LIABLE FOR ANY SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES, INCLUDING WITHOUT LIMITATION ANY DAMAGES BASED ON A CLAIMED DECREASE IN THE VALUE OF THE HOME, EVEN IF PULTE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

THIS LIMITED WARRANTY IS THE ONLY WARRANTY APPLICABLE TO THIS PURCHASE. ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ALL IMPLIED WARRANTIES OF FITNESS, MERCHANTABILITY OR HABITABILITY, ARE DISCLAIMED AND EXCLUDED.

D. DISPUTE SETTLEMENT

This Dispute Settlement provision sets forth the exclusive remedy of all disputes, claims or controversies.

All disputes, claims or controversies concerning your home which cannot be resolved between Pulte and you shall be submitted to the Claims Administrator, Residential Warranty Corporation ("Claims Administrator"), 5300 Derry Street, Harrisburg, PA, 17111-3598, (717)561-4480, in the form of written notice sent by certified mail. The notice must include your name, address, phone number (both home and work), a specific description of the defect and a copy of your written correspondence to Pulte. Certified notice must be received by the Claims Administrator for resolution no later than thirty days after the applicable warranty period expires.

The Claims Administrator will review your letter, respond in writing and, if necessary, send you a form by which you may request an inspection of the defect. Upon receipt of the form, the Claims Administrator will send an investigator (who may be an employee of the Claims Administrator) to view the defect and to report to both you and Pulte. Upon receipt of the investigator's report, which will generally be completed within 30 business days after the investigation, the Claims Administrator will report to you and Pulte. The report will state Pulte's obligations, if any. The findings of the Claims Administrator's report will be binding on you and Pulte unless you choose to file a timely claim for arbitration as described below.

If you disagree with the investigator's report and wish to submit a claim for arbitration, you have 30 days to notify the Claims Administrator and Pulte, in writing by certified mail, that you disagree. In such an event, disputes shall be submitted for binding arbitration to the American Arbitration Association or other independent arbitration service ("Arbitrator") as may be designated by the Claims Administrator for resolution in accordance with the rules and regulations of the Arbitrator. Each party shall bear its own expenses of the arbitration. However, if the Arbitrator finds in your favor, the amount you advance will be reimbursed by Pulte.

Upon receipt of an arbitration award, either you or Pulte may request an appeal of the award by notifying the Claims Administrator in writing by certified mail within 20 days. Appeals will be made to the Arbitrator in accordance with its standard rules and regulations.

Where a claimed defect is filed that cannot be observed or determined under normal conditions, it is your responsibility to substantiate the condition does exist. Any cost shall be paid by you, and, if properly substantiated, reimbursement will be made by Pulte.

E. REQUESTING WARRANTY SERVICE

The procedure varies for requesting warranty service under this Limited Warranty depending on where you purchase your home. As part of this warranty package, your local Pulte team will provide you with the proper procedure in your area.

F. INSURER'S RESPONSIBILITY

In the event Pulte is unable to meet its obligations under this Limited Warranty and a warranty claim must be resolved by the Insurer, the following conditions shall apply:

1. The decision of whether to repair or replace a defective item, or pay you the reasonable cost of doing so, is the Insurer's.
2. The total liability of the Insurer under this warranty is limited to and shall not exceed the lesser of the following:
 - a. the contract price of the home;
 - b. the reasonable cost of that part of the home damaged for like construction and use on the same premises;
 - c. the necessary amount to repair or replace the portion of the building rendered uninhabitable by a major structural defect less all amounts paid by or on behalf of the Insurer under this Limited Warranty.
3. A deductible shall be paid by the homeowner prior to repair or replacement by the Insurer according to the following schedule:

Year OneNo deductible;

Year Two\$250 deductible for all claims submitted in year two;

Years Three through Ten.....\$250 deductible for each claim submitted in years three through ten.

In the case of the common elements of a condominium, the deductible shall be \$250 per unit affected by the common element defect or \$5,000, whichever is less. No deductible applies for warranty service performed by Pulte.

4. Actions taken to cure defects will not extend the periods of coverage specified in this warranty.
5. When the Insurer finishes repairing or replacing a claim under this Limited Warranty, the homeowner must execute a full and unconditional release of all the Insurer's obligations with respect to the claim. The Insurer shall be subrogated to all the homeowner's rights of recovery against any person or entity and the homeowner agrees to execute and deliver any and all instruments or papers and to take other actions necessary to secure such rights, including but not limited to assignment of the proceeds of any other insurance or warranties to the Insurer. The homeowner shall do nothing to prejudice such rights of subrogation.
6. The Insurer provides warranty coverage in excess of coverage provided under other warranties or insurance, whether collectible or not.
7. Any claim involving a common element in a condominium must be made by an authorized representative of the condominium association. However, in a case where the authorized representative of the association refuses to submit a claim, each homeowner may submit a claim on their own behalf as outlined in Paragraph 3 above.
8. If the Insurer decides to pay the reasonable costs of repairing a claim, the payment shall be made to or on behalf of the homeowner and any mortgagee or their successors, as each interest may appear, provided the Insurer shall not have any obligation to make payment jointly to the homeowner and mortgagee where the mortgagee has not notified the Insurer in writing of its security interest in the home prior to such payment. Any mortgagee shall be completely bound by any conciliation or arbitration relating to a claim between the homeowner and the Insurer.

III. PULTE PERFORMANCE STANDARDS

This section establishes the standards by which it will be determined whether the concern you have with some element of your home is covered by this Limited Warranty and is the obligation of Pulte to correct. Where specific standards and actions are not shown, the standard shall be the accepted industry practice for workmanship and materials.

CATEGORY	ITEM	OBSERVATION	ACTION REQUIRED	COVERAGE
CEMENT	EXPANSION JOINTS	Cracks appear in the expansion joints in basements or on concrete foundation surfaces	Such action was the intent of the engineered joint. No action is required.	N/A
	FLOOR	Depression in floor exceeding 1/4" in 32" length	Pulte will fill area to tolerance.	2 years(4 years in Colorado)
		Uneven floor area where crown exceeds 1/4" in 32" length	Pulte will level area to tolerance.	2 years
	FOUNDATION WALLS	Cracks in the foundation walls that exceed 1/8" in width of vertical displacement	Pulte will patch the voids in the wall.	2 years
	SUMP PUMP	Sump pump fails to operate	Pulte will repair or replace.	2 years
	WATERPROOFING	Leaks in basement or crawlspace	Pulte will eliminate the cause of leaks. (Humidity and condensation issues are not warranted.)	2 years
CABINETS	KITCHEN/BATH	Cabinets separate from wall or ceiling 1/4" measured diagonally	Pulte will repair.	1 year
		Cracks in door panels	Pulte will replace.	1 year
		Door warpage exceeding 1/4" in height and width	Door will be replaced.	1 year
		Misalignment of doors	Pulte will adjust.	1 year
		Variation in stain color	Due to normal grain variations, Pulte cannot guarantee stain color.	N/A
CHIMNEY & FIREPLACE	BRICK	Exterior and interior brick veneer cracking in excess of 1/8"	Pulte will repair joints or brick.	2 years

CATEGORY	ITEM	OBSERVATION	ACTION REQUIRED	
CHIMNEY & FIREPLACE (continued)	BRICK (continued)	Firebox color is changed from fire and forms residue	Intense heat will alter color. Pulte has no responsibility.	N/A
	CHIMNEY	Chimney separation exceeding 1/2" from attached structure	Pulte will determine cause of separation and correct as necessary.	2 years
	FIREPLACE	Smoke escapes into living area	Pulte will correct if problem is caused by improper installation or design. NOTE: High winds or external factors such as trees can cause negative draft situations. Make sure damper is fully opened.	2 years
		Water infiltration into firebox from the flue	A certain amount of rainwater can be expected under certain conditions. No action is required.	N/A
	MASONRY	Cracking of firebrick and mortar joints	Intense heat may cause cracking. No action is required.	N/A
CONCRETE	DRIVEWAYS	Depressions which retain water in excess of 1" deep	Pulte will repair.	1 year
	FLATWORK	Concrete surfaces settle or heave in excess of 2" where it abuts another concrete surface	Pulte will repair.	2 years
		Cracks exceeding 1/4" in width or vertical displacement	Pulte will repair by patching.	1 year
	GARAGE FLOOR	Disintegration of the concrete surface resulting in the appearance of coarse aggregate below the surface	Pulte will repair concrete surfaces unless caused by salt or chemical damage.	2 years
	STOOPS	Stoop settles, heaves or separates in excess of 1" from home	Pulte will repair.	2 years
COUNTER TOPS	KITCHEN/BATHS	Delamination of counter top material	Pulte will repair.	1 year
		Open seams in counter tops	Pulte will repair.	1 year

CATEGORY	ITEM	OBSERVATION	ACTION REQUIRED	COVERAGE
COUNTER TOPS (continued)	KITCHEN/BATHS (continued)	Cracks in marble surfaces	Pulte will repair.	1 year
		Gaps between counter top and wall in excess of 3/16"	Pulte will repair.	1 year
DOORS	EXTERIOR	Failure to operate properly by binding, sticking, not latching or sealing	Pulte will make necessary corrections.	1 year
		Shrinkage of wood door panels	Panels will shrink and expand and may expose unpainted or unstained surfaces. No action is required.	N/A
		Split in door panel	Unless splits or cracks present problems of continual deterioration or leaking, Pulte will take no action; otherwise Pulte will correct.	1 year
		Warping in excess of 1/4" measured diagonally from corner to corner or to the extent they become inoperable or cease to be weather resistant	Pulte will correct or replace and refinish door.	1 year
	GARAGE	Fail to operate properly	Pulte will correct or adjust door as required.	1 year
		Leak (through) or under door	Pulte will make needed adjustments if necessary. Some entrance of the elements can be expected under high conditions.	1 year
DRYWALL (SHEETROCK)	INTERIOR FINISH	Cracks in drywall, nail pops	Pulte will repair any cracks, nail pops, blisters in tape, and corner bead pops on a one-time basis during first year.	1 year
		Excessive waviness or seams visible in normal light	Pulte will repair cracks 1/8" or greater or obvious irregularities. Pulte cannot be responsible for color variation.	2 years

CATEGORY	ITEM	OBSERVATION	ACTION REQUIRED	COVERAGE
EXTERIOR	TRIM	Excess warping, cupping, splitting or rotting of wooden members	Pulte will repair or replace as necessary.	1 year
		Exterior trim pulls away from its surface	Pulte will re-nail and seal the material to the surface on which it is attached.	1 year
		Open joints in exterior trim exceeding 1/4"	Pulte will correct the problem, on a one time basis.	1 year
	FLASHING	Flashing leaks	Leaks due to improperly installed flashing will be corrected.	2 years
	SHINGLES	Ice-damming causing leaks into living areas	In some conditions, snow build-up on roofs due to freeze/thaw cycles can result in ice-damming at the gutters, causing water to back up under shingles and enter the home. No action is required if condition is caused by radical swings of freezing and thawing in the weather. If condition is caused by poor insulation, Pulte will repair.	1 year
	WALLS	Cracks in stucco walls	Hairline cracks in masonry is normal. Those 1/8" or greater will be repaired.	1 year
		Siding materials become loose or detached	Unless the problem is a result of catastrophic winds, Pulte will correct.	2 years
		Siding materials show signs of deterioration and/or delamination	Pulte will hold manufacturer responsible for repairing or replacing faulty material.	2 years
	FLOORING	CARPET		
		Carpet becomes loose at edges	Pulte will repair.	1 year
		Carpet buckles	Pulte will re-stretch carpet on a one time basis.	1 year

CATEGORY	ITEM	OBSERVATION	ACTION REQUIRED	COVERAGE
FLOORING (continued)	CARPET (continued)	Fading, staining or discoloration	Manufacturer's warranty will apply if due to carpet defect.	1 year
		Premature wearing	Manufacturer's warranty will apply.	N/A
		Visible gaps in seams	Pulte will repair.	1 year
	HARDWOOD	Gaps in floors	Pulte will make a one time repair to gaps in excess of 1/8". Hardwood floors will expand and contract due to humidity changes within your home.	1 year
		Loose boards	Pulte will repair.	1 year
		Becomes loose or bubbles	Pulte will repair.	1 year
	RESILIENT	Fading or discolorations	Manufacturer's warranty will apply.	N/A
		Gaps in seams (sheet goods)	Pulte will repair.	1 year
		Gaps in seams exceed 1/8" (resilient block tile)	Pulte will repair.	1 year
		Indentations due to normal traffic	No action required.	N/A
		Subfloor causing depressions or ridges exceeding 1/8" on 6" span	Pulte will repair.	1 year
		Fasteners popping through	Pulte will repair.	1 year
FOUNDATION	FLOOR SLAB	Serious cracks and/or deterioration in the foundation floor slab which cause the home to be unsafe or uninhabitable	Pulte will repair cracks and repair the finished floor.	10 years
	FOOTINGS & WALLS	Serious cracks and/or deterioration in the foundation footings or foundation walls which cause the home to be unsafe or uninhabitable	Pulte will make the necessary repairs and/or replacement to the structural elements and related damage.	10 years

CATEGORY	ITEM	OBSERVATION	ACTION REQUIRED	COVERAGE
FRAMING	BEARING WALLS & BRACES	Deterioration of the bearing walls and/or braces which cause the home to be unsafe or uninhabitable	Pulte will make the necessary repairs and/or replacement to the structural elements and related damage.	10 years
	FLOOR & ROOF SHEATHING	Deterioration of floor and/or roof sheathing which causes the home to be unsafe or uninhabitable	Pulte will make the necessary repairs and/or replacement to the structural elements and related damage.	10 years
	STRUCTURAL FASTENERS	Failure of structural fasteners associated with the structural elements of the home which cause the home to be unsafe or uninhabitable	Pulte will make the necessary repairs and/or replacement to the structural elements and related damage.	10 years
	TRUSSES AND/OR JOISTS	Deterioration of floor trusses or joists and or roof trusses or joists which cause the home to be unsafe or uninhabitable	Pulte will make the necessary repairs and/or replacement to the structural elements and related damage.	10 years
	VENTS	Leaking through vents or louvers	Pulte will correct if there are problems with the vents or louvers, but not if the leak is from wind-driven rain or snow.	2 years
	WALLS/FLOORS	Crowns in walls or floors exceeding 1/4" in 32" length	Pulte will correct the problem.	1 year
		Delamination or deterioration of subflooring	Pulte will repair or replace faulty material.	1 year
		Depressions in walls or floors exceeding 1/4" in 32" length	Pulte will correct the problem	1 year
		The floor squeaks	Pulte will take corrective action to eliminate loose flooring and minimize squeaks on a one-time basis. The absence of squeaks cannot be guaranteed.	1 year

CATEGORY	ITEM	OBSERVATION	ACTION REQUIRED	COVERAGE
FRAMING (continued)	WALLS/FLOORS (continued)	Wall is out of plumb over 1/4" in a 32" vertical measurement	Pulte will correct the problem.	1 year
	WINDOWS	Condensation (or frost)	Condensation on interior window surfaces is the result of extreme temperature differences and high levels of humidity inside the home. No action is required.	N/A
		Defects, including stress cracks or failed seals in insulated windows	Pulte will replace defective glass. Manufacturer's warranty will apply after 2 years.	2 years
		Excess air infiltration	Some infiltration around windows is nor- mal especially during high winds. Pulte will take necessary corrective action by adjusting windows or weatherstripping.	2 years
INSULATION	INFILTRATION	Fail to operate properly	Pulte will correct or repair as needed.	2 years
		Insufficient insulation	Insulation shall be installed in accordance with applicable energy and building codes.	2 years
INTERIOR	CERAMIC TILE	Cracks in grout	Pulte will repair.	1 year
		Tile cracks or loosens	Pulte will repair.	1 year
	DOORS	Door is loose or rattles at latch	Pulte will repair.	1 year
		Door rubs on jamb	Pulte will repair.	1 year
		Split in door panel	Pulte will fill split and finish to match as close as possible.	1 year
		Delamination of door frame	Manufacturer's warranty will apply.	N/A
		Warping exceeds 1/4" vertically or horizontally	Pulte will replace.	1 year

CATEGORY	ITEM	OBSERVATION	ACTION REQUIRED	COVERAGE
INTERIOR (continued)	DOORS (continued)	Door is loose or rattles at latch	Pulte will repair.	1 year
	WALL COVERING (Pulte Installed)	Edge mismatched	Pulte will repair.	1 year
		Nails popping through wall covering	Pulte will repair.	1 year
		Open seams	Pulte will repair.	1 year
		Peeling of wall covering.	Pulte will repair.	1 year
MASONRY (BRICK)	EXTERIOR FINISH	1/8" or greater cracks	Pulte will repair cracks 1/8" or greater by refinishing joints.	2 years
		Efflorescence on masonry walls	Pulte will correct.	1 year
		Moisture entering home through masonry	Pulte will correct.	2 years
MECHANICALS	ELECTRICAL	Circuit breakers trip excessively	Pulte will correct.	2 years
		Malfunction of outlets, switches or fixtures	Pulte will correct.	2 years
	HEATING & COOLING	Condensation lines clog up	Pulte will correct.	2 years
		Ductwork separates	Pulte will correct.	2 years
		Leak in refrigerant lines	Pulte will correct.	2 years
		Not heating (cooling) properly	Pulte will take corrective action, if ASHRAE standards are not met.	2 years
		Settling of exterior HVAC unit	Pulte will correct excessive settling of 2" or more on a one-time basis.	2 years
	PLUMBING	Cracks or chips in plumbing fixtures	Pulte is not responsible unless condition is noted on the final walk-through.	N/A
		Defective plumbing, fixtures, fittings or appliances	Pulte will repair or replace.	2 years

CATEGORY	ITEM	OBSERVATION	ACTION	PERIOD	COVERAGE
MECHANICAL (continued)	PLUMBING (continued)	Faulty water supply system	Pulte will make necessary corrections to improperly installed water supply systems, but cannot be held responsible for conditions beyond their control, such as municipal system problems.		2 years
		Freezing and bursting of plumbing pipes	Pulte will make necessary corrections to assure that plumbing pipes are adequately protected against normal anticipated cold weather (except undrained exterior faucets).		2 years
		Leakage from any piping (not including condensation)	Pulte will make necessary repairs in any soil, waste, vent or water pipe.		2 years
		Leaky faucets.	Pulte will repair as necessary.		2 years
		Noisy water pipes (e.g., water hammer)	Pulte will correct as necessary.		2 years
		Septic system fails to operate properly	Freezing, soil saturation, underground springs, water run-off, excessive use and increase in the water table are among the causes not covered by this warranty. Pulte will repair or replace faulty workmanship and materials and conform with the Sewer Enforcement Officer's instructions as per design and installation only.		2 years
		Stopped up sewer, fixtures or drains	Pulte will assume responsibility for clogged sewers, fixtures and drains where defective construction or workmanship caused the problem.		2 years

CATEGORY	ITEM	OBSERVATION	ACTION REQUIRED	COVERAGE
PAINTING & CAULKING	EXTERIOR	Separation or deterioration of caulk	Pulte will repair.	2 years
		Excessive fading or uneven fading on a wall surface	Pulte will correct.	1 year
		Flaking, scaling of painted surfaces	Pulte will correct.	2 years
		Mildew appears on painted surfaces	Fungus must be cleaned when detected by homeowner as a maintenance item. No action is required.	N/A
	INTERIOR	Excessive or differential fading of painted surfaces	Pulte will repair.	1 year
		Scaling or flaking of painted surfaces	Pulte will repair.	2 years
		Cracking or deterioration of caulking	Pulte will repair on a one time basis.	1 year
ROOFING	EXTERIOR	Roof and roof flashing leaks	Pulte will make necessary repairs.	2 years
		Shingles blow off roof	Pulte will reseal or replace unless caused by wind velocities exceeding manufacturers tolerances.	2 years
		Uneven shading of roof shingles	Shade variations in shingles is normal. No action is required.	N/A
	SURFACE	Snow and ice build up on roof	Prevention of ice build-up is the responsibility of homeowner.	N/A
	SHEET METAL	GUTTERS	Gutters do not drain	Pulte will assure adequate fall to limit standing water depth to 1/2". Homeowner will be responsible to keep gutters clean.	2 years
Leaking gutters			Pulte will correct as necessary.	2 years

CATEGORY	ITEM	OBSERVATION	ACTION REQUIRED	COVERAGE
SHEET METAL (continued)	METAL AWNINGS	Color fading	None. This is to be expected with metal awnings.	N/A
SITE WORK	ASPHALT DRIVEWAYS	Indentations or depressions caused by settlement which retain water in excess of 1" deep	Pulte will repair.	1 year
		Cracks 1/4" in width	Pulte will repair.	1 year
	DRAINAGE	Improper drainage of the site; standing or ponding water in the yard beyond a 24 hour period (48 hours on swales)	Pulte will regrade yard or swales in 1st year if proper grades were not established initially. Homeowner is responsible for maintaining drainage of lot. No grading determination can be made during frost conditions.	1 year
	GRADING	Settlement of soil exceeding 6" in depth	Pulte will fill affected areas on a one time basis, reinstalling displaced plant material if originally installed by Pulte.	1 year
	LANDSCAPING	Trees, shrubs and grass die after move-in	See information provided by local Pulte team.	Varies by geographical region

APPENDICES

HUD ADDENDUM (Applicable to FHA/VA Financed Homes Only):

The following language is added to Section II.A:

Notwithstanding anything to the contrary herein contained, during the first year of coverage, Pulte will correct problems with, or restore the reliable function of appliances and equipment damaged during installation or improperly installed by Pulte. In addition, Pulte will correct Construction Deficiencies in workmanship and materials resulting from the failure of the home to comply with standards of quality as measured by acceptable trade practices. "Construction Deficiencies" are defects (not of a structural nature) in the home that are attributable to poor workmanship or to the use of inferior materials which result in the impaired functioning of the home or some part thereof. Defects resulting from abuse by you or someone else or from normal wear and tear are not considered Construction Deficiencies. Buyer may ask for a review and resolution of a disputed claim by HUD prior to engaging in arbitration.

Where a covered defect is determined to exist and where either Pulte or the Insurer elects to pay the reasonable cost of repair or replacement in lieu of making such repair or replacement, the cash offer must be in writing and you will be given two (2) weeks to respond. Cash offers over \$5,000 are subject to an on-site review by a HUD-approved fee inspector (inspection costs to be paid by Pulte or the Insurer, as appropriate) unless:

- (a) The cash offer is made pursuant to a binding bid by an independent third party contractor which will accept an award of a contract from you pursuant to such bid;
- (b) Payment is being made in settlement of legal action; or
- (c) You are represented by legal counsel.

The effective date will be the date on which closing or settlement occurs in connection with the initial sale of the home. In no event will the effective date be later than the date of FHA endorsement of your mortgage on the home.

The warranty for basement slabs in the state of Colorado is extended from the first through the fourth year.

MARYLAND ADDENDUM (applicable only if your home is located in Maryland)

You should contact the New Home Warranty Security Plan personally, to verify the existence of your warranty. Further, you should report any warranty problems which are not promptly resolved by Pulte to the New Home Warranty Security Plan.

MONTGOMERY COUNTY, MARYLAND ADDENDUM (applicable only if your home is located in Montgomery County Maryland.)

On November 18, 1986, Montgomery County, Maryland enacted Executive Regulations prescribing the form and coverage of minimum warranty standards on all new homes sold in that country. The Executive Regulations took effect on December 18, 1986.

Should the provisions of this limited warranty agreement be more rigid or less rigid than those enacted by Montgomery County, Maryland, the more rigid requirements shall apply wherever they are in conflict.

* * * *

The following sections are amended as indicated and shall apply to all new homes constructed by Pulte, for which footer concrete has been placed or poured after December 17, 1986:

Section IIA

YEAR ONE COVERAGE

Commencing on the effective date of warranty and subject to the terms and conditions listed herein, Pulte warrants that for a period of one year your home will be free from defects due to nonconformity with the warranty standards set forth in Section IV of this warranty. With respect to fixtures, appliances and items of equipment, the warranty is for one year, except for those fixtures, appliances and items of equipment relating to the heating, cooling, electrical or mechanical systems which will be covered for two (2) years.

YEARS ONE AND TWO COVERAGE

Commencing on the effective date of warranty and subject to the terms and conditions listed herein, Pulte warrants that for a period of two years, your home will have no major Structural Defects (as defined in Section II of this warranty) and that the cooling, heating, ventilating, electrical, and plumbing systems will be free from defects due to nonconformity with the warranty standards set forth in Section IV of this warranty.

Actions taken to cure defects will not extend the periods of coverage specified in this warranty provided that Pulte does not attempt to conceal or cosmetically repair the defect in effecting a cure.

When Pulte finishes repairing or replacing a defective item, you must sign and deliver to Pulte a full and unconditional release of all legal obligations with respect to the defect. If the Insurer fulfills such obligations of Pulte, you must sign and deliver to the Insurer a full and unconditional release of all legal obligations of the Insurer with respect to the defect when the Insurer finishes repairing or replacing a defective item or prior to the Insurer paying you the reasonable cost of doing so. This release is binding provided that Pulte (or the Insurer or its agents) does not attempt to conceal or cosmetically repair the defect in effecting a cure.

Section II.B.8

Deleted in its entirety.

Section II.B.15

Exclusions include all consequential damages including but not limited to costs of transportation, food, moving, storage, or other incidental expenses related to relocation during repairs. Pulte's responsibility will include actual reasonable shelter expenses during repairs. In order for the dis-

pute settler to award shelter expenses. a determination must be made that the repair activity renders the house unsafe or uninhabitable during the term of the repair. Consequential damages to real property as a result of a defect or repair of a defect are covered.

Section II.D

All disputes, claims or controversies concerning the home which cannot be resolved between Pulte and the homeowner shall be submitted to the claims administrator. Written notice by certified mail must be received by the claims administrator within 30 days after the expiration of the applicable warranty period. The notice should include your name, address, phone number (both home and work), a specific description of the defect, the page and section number of the warranty confining the applicable warranty standard(s), and a copy of your written notice to Pulte.

The claims administrator will review your complaint and, if necessary, send you a form by which you may request an inspection of the defect. Upon receipt of the form, the claims administrator will cause an investigator, who may be an employee of the claims administrator, to view the defect and to report to both you and Pulte. Upon receipt of the investigator's report, which will be completed within 20 days after the investigation, the claims administrator will report to you and Pulte. The report will state Pulte's obligations. Upon receipt of this report, you have 30 days to accept the report or file a claim for arbitration. **IF YOU FAIL TO ACT, YOU WILL BE DEEMED TO HAVE DISCONTINUED YOUR CLAIMS AND NEITHER PULTE NOR THE INSURER WILL BE BOUND BY THE DECISION.**

Where a claimed defect is filed that cannot be observed or determined under normal conditions, it is the homeowner's responsibility to substantiate that the condition does exist. Any cost shall be paid by the homeowner, and if properly substantiated, reimbursement shall be made by Pulte.

If you disagree with the investigator's report, you have 30 days to notify the claims administrator and Pulte, in writing, that you disagree. In such event, disputes shall be submitted for arbitration to the Service ("Service" is the American Arbitration Association or such other independent arbitration service as may be designated by the administrator) for resolution in accordance with the laws and regulations of Montgomery County, MD regarding new home warranties and builder licensing. The cost of arbitration shall be borne by Pulte or the Insurer and each has agreed to be bound by the final award of arbitration.

Section II.E

Deleted in its entirety.

Section III.A

If performance by Pulte or Insurer or any of their respective obligations under this Agreement is delayed by an event not resulting from their own conduct, such performance will be excused until the delaying effects of the event are remedied. Such events include acts of God or the common enemy, war, riot, civil commotion or sovereign conduct.

VIRGINIA

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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JENNIFER T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

TIM L. PECKINPAUGH)	
PAMELA S. McKINNEY-PECKINPAUGH)	
)	
Plaintiff	)	Law 184719
)	
vs.)	
)	
PULTE HOME CORPORATION, <i>et al.</i>)	
)	
Defendants)	

DEMURRER TO THIRD-PARTY MOTION FOR JUDGMENT

(American Stucco & Stone, L.L.C. & American EIFS Stone & Stucco, Inc.)

Comes Now, Third-Party Defendants, American Stucco & Stone, L.L.C. and American EIFS Stone & Stucco, Inc., by counsel, and hereby file this Demurrer to the Third-Party Motion for Judgment filed by Pulte Home Corporation in the above captioned action as follows:

1. The underlying Amended Motion for Judgment filed by the Plaintiff herein arises out of alleged defective construction of the Plaintiff's home. Plaintiff claims damages resulting from the use of synthetic stucco cladding known as E.I.F.S. on their home and asserts claims against Pulte Home Corporation, the builder, Parex, Inc., the E.I.F.S. manufacturer, and Coronado Corporation and/or CSS, L.L.C., as the E.I.F.S. applicator.

2. Pulte Home Corporation as Third-Party Plaintiff, filed a Third-Party Motion for Judgment asserting liability against various persons and entities, and including five (5) counts against Third-Party Defendants, American Stucco & Stone, L.L.C. ("American Stucco") and American EIFS Stone & Stucco, Inc. The Counts against American Stucco & Stone, L.L.C are

for Breach of Contract (Count IV), Breach of Express Warranties (Count VI), Breach of Implied Warranties (Count VIII), Indemnification (Count XI), and Contribution (Count XII).

3. The claims of Third-Party Plaintiff, Pulte Home Corporation (“Pulte”) in Counts IV, VI, VIII, XI, and XII should be dismissed for the reasons set forth in the following Paragraphs.

4. Count Four (IV), a claim for breach of contract, fails to set forth a claim against American Stucco or American EIFS. The pleading is insufficient in that it fails to allege the actual existence of “any sales contract, indemnification agreement, or other contract”. Indeed, the allegation in Paragraph 33 simply states, “*To the extent that* any sales contract, indemnification agreement, or other contract was entered into ..., PHC is an intended beneficiary under any such contract(s).” (*emphasis added*). American Stucco and American EIFS assert that there is no privity of contract between either entity and Pulte, nor any allegation in the Third-Party Motion for Judgment that any such contract or agreement *actually* exists which would subject either American Stucco or American EIFS to liability to Pulte. If Pulte is asserting a contract action against American Stucco or American EIFS, then it is required to allege the specific contract upon which it relies. Pulte has failed to allege the *actual* existence, nature and terms of such contract, nor has it attached the same to its Third-Party Motion for Judgment. Furthermore, there is simply no factual support for Pulte’s claim that it is an intended third-party beneficiary of any such contracts. The Virginia Supreme Court has required a party asserting a third-party beneficiary claim show that that party was clearly intended to be a beneficiary of a contract. American Stucco and American EIFS should not be required to respond to such vague

allegations where Pulte cannot allege the actual existence of any contract, the terms of any such contract, or the facts supporting its claim as a third-party beneficiary of such contract.

5. Count VI, a claim for breach of an express warranty, fails to set forth a claim against American Stucco or American EIFS. The pleading is insufficient in that it fails to allege the actual existence of any express oral or written warranty. Indeed, the allegation in Paragraph 40 simply states, "*To the extent, if any*, that PHC or its agents approved the use ... of synthetic stucco of Plaintiff's house, that approval was based upon the express oral or written warranties of American EIFS and/or American Stucco". American Stucco and American EIFS asserts that there is no such express oral or written warranties issued by either entity, nor any allegation in the Third-Party Motion for Judgment that such express oral or written warranties exist which would subject American Stucco or American EIFS to liability to Pulte. If Pulte is asserting an express warranty claim against American Stucco or American EIFS, then it is required to allege the specific warranty upon which it relies. Pulte has failed to allege the *actual* existence, nature, and terms of any such warranties. Furthermore, there is simply no factual support for Pulte's claim that it is an intended third-party beneficiary of any such express warranty. The Virginia Supreme Court has required a party asserting a third-party beneficiary claim show that that party was clearly intended to be a beneficiary. American Stucco and American EIFS should not be required to respond to such vague allegations where Pulte cannot allege the actual existence of any warranty, the nature and terms of any such warranty, or the facts supporting its claim as a third-party beneficiary.

6. Count VIII, relating to the breach of implied warranties or merchantability and fitness for a particular purpose should be dismissed. Pulte fails to allege any basis for finding that the implied warranties are applicable in this case. American Stucco and American EIFS, as third-party defendants, cannot be liable to Pulte under an implied warranty theory if Pulte is not liable to the Plaintiffs for such implied warranty claims. Pulte has filed a demurrer to the Plaintiff's implied warranty claims stating that there are no applicable warranties to the Plaintiff with the exception of the express Pulte Protection Plan warranty. In addition, the U.C.C. implied warranties do not apply to ordinary building components that are used in construction and affixed to realty. Finally, Plaintiffs fail to allege any notice of the alleged product defect to American Stucco or American EIFS prior to filing suit as required by Virginia Code § 8.2-714 and § 8.2-607(3)(a).

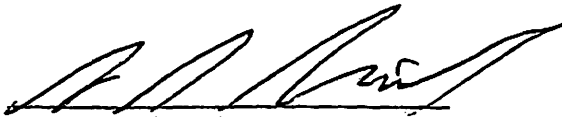
7. Count XI fails is deficient in that it fails to set forth a claim against American Stucco or American EIFS. With respect to American Stucco and American EIFS, there is no factual allegations of any contract between American Stucco and/or American EIFS and Pulte which would support any claim for express or implied indemnification. There are simply no allegations which would support any duty to indemnify Pulte, contractual or otherwise. It is worth noting that in Count II Pulte asserts facts alleging a direct claim for indemnification under the contract. It has not and cannot do so in Count XI. American Stucco and American EIFS should not be required to respond to such vague allegations where Pulte cannot allege any contractual relations from which any implied or express indemnification would arise.

8. Count XII fails is deficient in that it fails to set forth a claim against American Stucco or American EIFS. Any statutory or common law duty to contribute would have to be based upon a claim in contract (indemnification) or tort. In tort, contribution is only applicable where there are joint tort-feasors and there are no allegations supporting such a claim. There are no facts alleging that American Stucco and/or American EIFS would be directly liable to the Plaintiff and Plaintiff has not asserted such a claim, and such is a pre-requisite to a claim for contribution under Virginia Code §8.01-34. Further, any claims by Plaintiff against American Stucco or American EIFS would be barred by the economic loss rule.

9. These Third-Party Defendants incorporate their Memorandum of Points and Authorities filed herein.

WHEREFORE, Third-Party Defendants, American Stucco & Stone, L.L.C., and American EIFS Stone & Stucco, Inc., respectfully request that this honorable Court sustain their Demurrer and that Counts Four (4), Six (6), Eight (8), Eleven (11) and Twelve (12) of Pulte Home Corporation's Third-Party Motion for Judgment be dismissed with prejudice as to, American Stucco & Stone, L.L.C., and American EIFS Stone & Stucco, Inc. These Third-Party Defendants further request that the Court award these Defendants all costs and attorney fees incurred herein in defense of this matter and that these Defendants receive such other relief as the Court deems just and equitable.

Respectfully Submitted,
AMERICAN STUCCO & STONE, L.L.C. and
AMERICAN EIFS STONE & STUCCO, INC.



Ralph D. Rinaldi, Esq.

Cowles, Rinaldi, Judkins & Korjus, Ltd.

10521 Judicial Drive, Suite 204

Fairfax, Virginia 22030

(703) 385-9060

*Counsel for American EIFS Stone & Stucco, Inc.
& American Stucco & Stone, L.L.C.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Demurrer was sent by first class, postage prepaid, regular mail this 18th day of July, 2000, to:

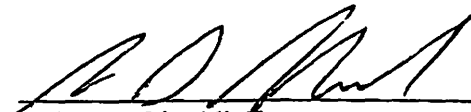
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Ralph D. Rinaldi, Esq.

VIRGINIA

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

FILED
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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

TIM L. PECKINPAUGH)	
PAMELA S. McKINNEY-PECKINPAUGH)	
)	
Plaintiff	)	Law 184719
)	
vs.)	
)	
PULTE HOME CORPORATION, <i>et al.</i>)	
)	
Defendants)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF DEMURRER TO THIRD-PARTY MOTION FOR JUDGMENT
(American Stucco & Stone, L.L.C. & American EIFS Stone & Stucco, Inc.)

Comes Now, Third-Party Defendants, American Stucco & Stone, L.L.C. and American EIFS Stone & Stucco, Inc., by counsel, and in support of the Demurrer to the Third-Party Motion for Judgment filed by Pulte Home Corporation in the above captioned action states as follows:

Introduction

The underlying Amended Motion for Judgment filed by the Plaintiff herein arises out of alleged defective construction of the Plaintiff's home. Plaintiff claims damages resulting from the use of synthetic stucco cladding known as E.I.F.S. on their home and asserts claims against Pulte Home Corporation, the builder, Parex, Inc., the E.I.F.S. manufacturer, and Coronado Corporation and/or CSS, L.L.C., as the E.I.F.S. applicator. Pulte Home Corporation as Third-Party Plaintiff, filed a Third-Party Motion for Judgment asserting liability against various persons and entities, and including five (5) counts against Third-Party Defendants, American

Stucco & Stone, L.L.C. (“American Stucco”) and American EIFS Stone & Stucco, Inc., (“American EIFS”), both distributors of the Parex E.I.F.S product. The Counts against American Stucco and American EIFS are for Breach of Contract (Count IV), Breach of Express Warranties (Count VI), Breach of Implied Warranties (Count VIII), Indemnification (Count XI), and Contribution (Count XII).

I. Count IV (Breach of Contract) and Count VI (Breach of Contract) Should be Dismissed for Failure to state a Claim against American Stucco and/or American EIFS - No Actual Contract or Express Warranty is Alleged.

Both Count Four (IV), a claim for breach of contract, and Count VI, a claim for breach of express warranty fail to set forth a claim against American Stucco or American EIFS. The pleading is insufficient in that Pulte does not allege in either count the actual existence of any contract, indemnification agreement, “other contract”, or express warranty. American Stucco and American EIFS assert that there is no privity of contract between either entity and Pulte, nor any allegation in the Third-Party Motion for Judgment that any such contract or express warranty *actually* exists which would subject either American Stucco or American EIFS to liability to Pulte. If Pulte is asserting a contract action or express warranty against American Stucco or American EIFS, then it is required to allege the specific contract or express warranty upon which it relies. Pulte has failed to allege the *actual* existence, nature and terms of such contract or express warranty, nor has it attached the same to its Third-Party Motion for Judgment.

Furthermore, there is simply no factual support for Pulte’s claim that it is an intended third-party beneficiary of any such contract or express warranty. The Virginia Supreme Court has required that a party asserting a third-party beneficiary claim show that that party was

“clearly and definitely intended” to be a beneficiary of a contract and such facts must be alleged.

Valley Company v. Rolland, 218 Va. 257 (1977).

American Stucco and American EIFS should not be required to respond to such vague allegations where Pulte cannot allege the actual existence of any contract or express warranty and where its has not identified or described the contract, warranty, or nature and terms thereof. Neither has Pulte alleged any facts supporting its claim as a clear and definite intended third-party beneficiary of such contract or express warranty.

II. Count VIII (Breach of Implied Warranty should be Dismissed American Stucco and American EIFS have no Implied Warranty Obligations to Pulte.

Count VIII, relating to the breach of implied warranties or merchantability and fitness for a particular purpose should be dismissed.

First, the U.C.C. implied warranties do not apply to ordinary building components that are used in construction and are incorporated into and affixed to realty. Winchester Homes, Inc. v. Hoover Universal, Inc., 30 Va. Cir. 22 (1992) (*Fairfax Circuit Court*, Law 100865). The U.C.C. warranties do not apply to manufactured “goods” incorporated into realty - such building components are no longer goods under the U.C.C. *Id.*

Second, Plaintiffs fail to allege any notice of the alleged product defect to American Stucco or American EIFS prior to filing suit as required by Virginia Code § 8.2-714 and § 8.2-607(3)(a). Without the statutory notice, Pulte’s claims are barred.

Third, Virginia law bars U.C.C. warranty claims for economic loss absent privity of contract. See Beard Plumbing & Heating, Inc. v. Thompson Plastic, Inc., 254 Va. 240 (1997) (holding that privity of contract is required to support a claim for consequential damages for

breach of implied warranty of merchantability). Similarly, Pulte cannot assert a claim for direct damages against American Stucco or American EIFS since Pulte is not a “buyer” and there is no privity of contract between Pulte as “buyer” and American Stucco or American EIFS as “seller”. See Virginia Code 8.2-714. Whether Pulte’s alleged damage claims are for direct or consequential damages, and regardless of which implied warranty is at issue, the economic loss rule bars Pulte’s claim under Count VIII, and Count VIII should therefore also be dismissed.

Finally, Pulte fails to allege any basis for finding that the implied warranties are applicable in this case. American Stucco and American EIFS, as third-party defendants, cannot be liable to Pulte under an implied warranty theory if Pulte is not liable to the Plaintiffs for such implied warranty claims. Third party liability is derivative, and if Plaintiff’s cannot assert such warranty claims against Pulte, then Pulte cannot assert such claims against American Stucco or American EIFS. Pulte has filed a Demurrer to the Plaintiff’s Amended Motion for Judgment (Count III, Implied Warranties) stating that there are no applicable warranties to the Plaintiff with the exception of the express Pulte Protection Plan warranty. See Winchester Homes, Inc. v. Hoover Universal, Inc., 30 Va. Cir. 22 (1992) (Fairfax Circuit Court, Law 100865).

II. Count XI (Indemnification) and Count XII (Contribution) should be Dismissed as there is no factual support alleged with respect to such claims

Count XI is deficient in that it fails to set forth a claim against American Stucco or American EIFS. With respect to American Stucco and American EIFS, there are simply no factual allegations of any contractual relationship between American Stucco and/or American EIFS and Pulte which would support any claim for express or implied indemnification. Indemnification must necessarily grow out of a contractual relationship. VEPCO v. Wilson, 221

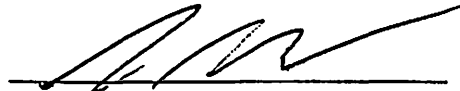
Va. 979 (1981). It is worth noting that in Count II Pulte asserts facts alleging a direct claim for indemnification under the contract. It has not and cannot do so in Count XI. American Stucco and American EIFS should not be required to respond to such vague allegations where Pulte cannot allege any contractual relations from which any implied or express indemnification would arise.

Count XII fails to set forth a claim against American Stucco or American EIFS. Any statutory or common law duty to contribute would have to be based upon a claim tort. In tort, and pursuant to Virginia Code 8.01-34, contribution is only applicable where there are joint tortfeasors and there are no allegations supporting such a claim. See Pierce v. Martin, 230 Va. 94 (1985). There are no facts alleging that American Stucco and/or American EIFS are joint tortfeasors, or that either would be directly liable to the Plaintiff and Plaintiff has not asserted such a claim. Such is a pre-requisite to a claim for contribution under Virginia Code §8.01-34. Further, Plaintiff has no claims against American Stucco or American EIFS as any such claims would be barred by the economic loss rule.

WHEREFORE, Third-Party Defendants, American Stucco & Stone, L.L.C., and American EIFS Stone & Stucco, Inc., respectfully request that this honorable Court sustain their Demurrer and that Counts Four (4), Six (6), Eight (8), Eleven (11) and Twelve (12) of Pulte Home Corporation's Third-Party Motion for Judgment be dismissed with prejudice as to, American Stucco & Stone, L.L.C., and American EIFS Stone & Stucco, Inc. These Third-Party Defendants further request that the Court award these Defendants all costs and attorney fees incurred herein in defense of this matter and that these Defendants receive such other relief as the

Court deems just and equitable.

Respectfully Submitted,
AMERICAN STUCCO & STONE, L.L.C. and
AMERICAN EIFS STONE & STUCCO, INC.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum was sent by first class, postage prepaid, regular mail this 18th day of July, 2000, to:


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Ralph D. Rinaldi, Esq.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

FILED
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00 JUL 27 PM 2:27
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

PAUL ANDERSON, *et al*,

v.

At Law No. 183665

PULTE HOME CORPORATION, *et al*,

DEAN BERGER, *et. al*,

v.

At Law No. 183428

PULTE HOME CORPORATION, *et al*,

DOUGLAS S. BURDIN, *et. al*,

v.

At Law No. 184141

PULTE HOME CORPORATION, *et al*,

PAOLO COLOMBI, *et. al*,

v.

At Law No. 184142

PULTE HOME CORPORATION, *et al*,

HENRY FRANCIS EDEN, *et. al*,

v.

At Law No. 183921

PULTE HOME CORPORATION, *et al*,

DAVID GANG,

v.

At Law No. 186501

PULTE HOME CORPORATION, *et al*,

JACK M. HAWKHURST, *et al*,

v.

At Law No. 185075

PULTE HOME CORPORATION, *et al*,

EDWARD P. JARMAS, *et al*,

v.

At Law No. 185073

PULTE HOME CORPORATION, *et al*,

MICHAEL R. LINCOLN, *et al*,

v.

At Law No. 184015

PULTE HOME CORPORATION, *et al*,

MICHAEL MALCHOW, <i>et al.</i> ,)	
v.	)	At Law No. 184008
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
<u>TIM L. PECKINPAUGH, <i>et al.</i>,</u>)	
v.	)	At Law No. 184719
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
<u>MICHAEL J. REBIBO, <i>et al.</i>,</u>)	
v.	)	At Law No. 183920
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
<u>H. KENT RODGERS, <i>et al.</i>,</u>)	
v.	)	At Law No. 185074
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
<u>MICHAEL J. ROWEN, <i>et al.</i>,</u>)	
v.	)	At Law No. 184424
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
<u>JAMES R. WEAVER, <i>et al.</i>,</u>)	
v.	)	At Law No. 184107
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	

**DEFENDANT PULTE HOME CORPORATION'S CONSOLIDATED
RESPONSE TO DEFENDANT PAREX, INC.'S MOTION CRAVING OYER**

COMES NOW Defendant/Cross-Plaintiff Pulte Home Corporation ("PHC"), by and through counsel, and states as follows in response to the Motion Craving Oyer filed by Defendant/Cross-Defendant Parex, Inc. ("Parex"):

1. The Plaintiffs in each of the fifteen (15) above-captioned cases filed an Amended Motion for Judgment on June 15, 2000 against PHC, Parex, CSS, L.L.C. ("CSS") and Coronado Corporation ("Coronado"). The Amended Motions for Judgment

arise out of the alleged use of defective synthetic stucco in the construction of the Plaintiffs' home.

2. PHC, as the alleged builder of the homes, filed a Cross-Claim against Parex and CSS in each of the 15 cases, as well as a Third-Party Motion for Judgment against American EIFS Stone & Stucco Supply, Inc. ("American EIFS"), American Stucco & Stone L.L.C. ("American Stucco"), Coronado, Bernard Franks and Benjamin Franks. The claims against Parex in PHC's Cross-Claim are contained in Counts Four (Breach of Contract), Six (Breach of Express Warranties), Eight (Breach of Implied Warranties), Nine (Indemnification) and Ten (Contribution).

3. PHC's Breach of Contract and Breach of Express Warranties counts against Parex are predicated on PHC's understanding, on information and belief, that Parex (the manufacturer of the synthetic stucco) entered into contracts and issued warranties concerning its product to certain of PHC's subcontractors and/or suppliers (such as CSS, Coronado, American EIFS and/or American Stucco). Accordingly, PHC has alleged that, to the extent that Parex entered into such contracts and issued such warranties, PHC is an intended beneficiary of such contracts and warranties, and is therefore entitled to recover for the breach thereof.

4. In the instant Motion, Parex craves *oyer* of "any contract or express agreement forming the basis of" PHC's Breach of Contract count, as well as "any alleged express warranty forming the basis of" PHC's Breach of Express Warranties count. In response, PHC states that it is not yet in possession of any written contract entered into by Parex, nor any written warranty issued by Parex. PHC further states that it has served (or, in the case of Parex, will soon serve) Requests for Production of Documents on each of the Cross-Defendants and Third-Party Defendants in an effort to obtain the aforementioned written contracts and warranties.

WHEREFORE, PHC respectfully requests that this Honorable Court enter an Order denying Parex's Motion Craving *Oyer* as premature, and such other relief as the Court deems just and proper.

Respectfully submitted,

PULTE HOME CORPORATION

By: 

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Dated: July 27, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2000, a copy of Defendant Pulte Home Corporation's Consolidated Response to Defendant Parex, Inc.'s Motion Craving *Oyer* to was served, via facsimile, on:

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Brian A. Coleman

COPY

FILED

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

00 NOV 30 PM 1:59

PAUL ANDERSON, et al.,

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

v.

At Law No. 183665

PULTE HOME CORPORATION, et al.

DEAN BERGER, et al.,

v.

At Law No. 183428

PULTE HOME CORPORATION, et al.

DOUGLAS S. BURDIN, et al.,

v.

At Law No. 184141

PULTE HOME CORPORATION, et al.

PAOLO COLOMBI, et al.,

v.

At Law No. 184142

PULTE HOME CORPORATION, et al.

HENRY FRANCIS EDEN, et al.,

v.

At Law No. 183921

PULTE HOME CORPORATION, et al.

DAVID GANG,

v.

At Law No. 186501

PULTE HOME CORPORATION, et al.

JACK M. HAWXHURST, et al.,

v.

At Law No. 185075

PULTE HOME CORPORATION, et al.

EDWARD P. JARMAS, et al.,

v.

At Law No. 185073

PULTE HOME CORPORATION, et al.

MICHAEL R. LINCOLN, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 184015
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
MICHAEL MALCHOW, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 184008
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
TIMOTHY L. PECKINPAUGH, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 184719
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
MICHAEL J. REBIBO, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 183920
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
H. KENT RODGERS, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 185074
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
MICHAEL J. ROWEN, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 184424
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
JAMES R. WEAVER, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 184107
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	

PAREX' CONSOLIDATED MEMORANDUM IN SUPPORT OF PLEAS IN BAR

COMES NOW Defendant Parex, Inc., by and through counsel, and appears and submits this Consolidated Reply to Plaintiffs' Consolidated Opposition to Demurrers and Pleas in Bar in the above cases, and states as follows:

I. Plaintiffs' Claims Are Barred for Negligence Per Se

Plaintiffs claims in all of the above cases for negligence per se fail as a matter of law in that they are barred by the statute of limitations. The applicable statute of limitations is that for negligence, Code of Virginia § 8.01-243. That statute provides for a two year statute of limitations.

It is clear that in every case, any violations of the building code would have to occur on or before the issuance of the certificate of occupancy for the structure. At that point, the EIFS would have been installed and either met or failed the building code. Here is a listing of the dates of the Certificates of Occupancy in this matter:

Anderson	3/17/98
Berger	9/30/97
Burdin	11/20/96
Colombi	10/20/96
Eden	5/29/97
Gang	6/21/96
Hawxhurst	7/24/96
Jarmas	1/29/98
Lincoln	10/17/97
Malchow	10/28/95
Peckinpaugh	9/25/95
Rebibo	6/26/97
Rodgers	7/3/96
Rowen	7/24/97
Weaver	10/14/97

Given the application of a two year statute of limitations from the time of issuance of a certificate of occupancy, it is clear that all of these claims are time barred. As such, Parex is entitled to entry of an order dismissing the negligence per se claims set forth in the various Amended Motions for Judgment with prejudice.

Parex anticipates the argument that somehow the Amended Motion for Judgment relates back to the original filing date. This is inaccurate. Pleadings relate back only when they share

commonality of claims and allegations. In the present case, the negligence per se claim is entirely different from the original claim for negligence and should not relate back. See e.g., Ely v. Shirley's Barbecue, Inc., 30 VCO 302 (City of Roanoke Cir. Ct., March 1993)(negligence per se a different claim from negligence and statute of limitations not tolled by original filing of negligence action). The source of the duties alleged is wholly different, and proof of one claim is not necessarily proof of the other. One could envision a situation where a party is alleged to be "negligent" which in no way involves allegations of a code violation, and indeed the original Motions for Judgment contained no allegations of negligence per se as to Parex.

Accordingly, the pleadings should not relate back to the original filing date. These new and different claims were initiated upon the filing of the Amended Motions for Judgment. This occurred in June, 2000. As such, the negligence per se claims are time barred and should be dismissed.¹

WHEREFORE, Defendant Parex, Inc. respectfully requests that the Court enter an Order sustaining its various Pleas in Bar, dismissing the Plaintiffs' claims with prejudice for negligence per se, dismissing the Virginia Consumer Protection Act and false advertising claims with prejudice in all cases with the exception of Anderson and Jarmas, awarding it its costs, and such other relief as the Court deems proper.

¹ For clarity's sake, it appears that the Virginia Consumer Protection Act and false advertising claims in the Anderson and Jarmas cases appear to be timely filed. Parex reserves the right to assert any additional limitations defenses it may become aware of during discovery.

Respectfully submitted,
RUSSELL & RUSSELL, P.C.

By: 

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Counsel for Defendant, Parex, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Parex, Inc.'s Consolidated Memorandum in Support of Pleas in Bar to Amended Motions for Judgment was served, on this 29th day of August, 2000, via first class mail to the counsel of record set forth below.

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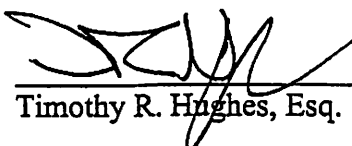
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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

TIM L. PECKINPAUGH, et al.,

Plaintiffs,

v.

PAREX, INC., et al.,

Defendants.

Law No. 184719

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FILED
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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

**DEFENDANT PAREX, INC.'s
MEMORANDUM IN SUPPORT OF DEMURRER
TO AMENDED MOTION FOR JUDGMENT**

COMES NOW Defendant, Parex, Inc. ("Parex"), by and through counsel, and appears and submits the following Memorandum in Support of Demurrer to Amended Motion for Judgment, and states as follows:

INTRODUCTION

This case arises out of the construction and sale of a home to Plaintiffs. Plaintiffs bring this action against a remote manufacturer of materials, Parex, sounding in negligence per se, fraud, constructive fraud, violation of the Virginia Consumer Protection Act, and deceptive advertising.¹ As demonstrated below, the allegations fail to pass muster under Virginia law and are subject to demurrer.

I. Plaintiffs Have No Negligence Per Se Claim Against Parex

Plaintiffs cannot state a claim against Parex for negligence per se. As demonstrated below, the Virginia Uniform Statewide Building Code governs the conduct of the permit holder, be it the owner or the contractor. There are no provisions creating legal duties on the part of remote manufacturers of materials towards home owners as asserted in this case. As such, Virginia law

¹ The Court previously sustained Parex' demurrers on all counts, including sustaining the demurrers to implied warranty counts with no leave to amend

does not support application of a negligence per se theory against Parex in this case.

In support of their claims, Plaintiffs here allege a violation of Virginia Uniform Building Code §§ 106.4, 1403.3, 1404.7, 1405.1 “*et seq.*”, and 1701.1 “*et seq.*”.² Plaintiffs fail, however, to even point to a single section of the code which imposes specific duties upon a manufacturer that support a negligence per se claim under Virginia law. This posture misapprehends the entire structure of the Virginia Uniform Statewide Building Code and require a somewhat detailed response.

A. General Provisions

Virginia adopted the Virginia Uniform Statewide Building Code (“VUSBC”) by in large part adopting the BOCA (Building Official’s Congress of America) National Building Code.³ In general, the code provides, “The construction, alteration, repair, addition and removal of all structures shall comply with this code.” VUSBC § 102.1. There is no generalized control over the actions of material manufacturers set out in the code.

The VUSBC provides that enforcement of the code be effectuated by local departments of building inspection. VUSBC §§ 103.0, 104.0. The local code official is empowered to enforce the code and act on questions relative to the mode or manner of construction and materials used in the erection, addition to or alteration of structures. VUSBC § 105.1. The means for such enforcement in construction is through requirements for applications for permits to erect structures: the code official is empowered to issue such permits and inspect the structure for compliance with applicable

² It must be emphasized that the Court required Plaintiffs to specifically enumerate in their amended pleadings all statutory code sections they relief upon as support for a negligence per se claim. The sections cited are obviously generalized citations which do not meet the intent of the Court’s order. Further, even these entire sections of the code do not provide a basis for plaintiff’s claims as demonstrated below.

³ In depending on when the permit application was filed, either the 1993 BOCA code or the 1996 BOCA code (effective April 15, 1997) could apply. Certain amendments to the original BOCA code were adopted. For the purposes of these motions, the 1993 and 1996 versions of the code are almost identical, and as such, the variations between the two versions are of no moment.

codes. VUSBC § 105.2.

B. Permit Application

The VUSBC requires application for a permit for construction of any structure. VUSBC § 107.1. The owner, or their licensed design professional, applies for the permit. VUSBC § 107.3. A contractor may apply for the permit conditioned upon providing that person's license or certification. VUSBC § 107.3.1. The code official then reviews the application, and accompanying construction documents, for compliance with the code. VUSBC § 108.1. The documents are then stamped as approved and a copy must be maintained at the site along with the permit. VUSBC §§ 108.5, 108.8. Thus, the owner, contractor and perhaps design professional are involved in submissions for code compliance of a project; a remote material manufacturer is not a part of the process.

C. Inspections

The permit holder is required to ensure that all inspections are conducted. VUSBC § 113.2. The code official is permitted to designate such additional inspections as are required but must notify the permit holder. Id. The code official determines the need for any special inspections prior to issuance of the building permit. VUSBC § 114.2.1.

D. Violations

The VUSBC provides that it is unlawful to erect, construct, alter, extend, repair, remove, demolish, or occupy a building in conflict with the provisions of the code. VUSBC § 116.1. In the event of a violation, the code official is to provide notice and has the power to stop work on the project after notice to the owner. VUSBC §§ 116.2, 117.1. If the notice is not complied with, the code official is to request the legal counsel for the jurisdiction to institute proceedings to restrain, correct, or abate such violation or to require the removal or termination of the unlawful occupancy

of the offending structure. VUSBC § 116.3.

E. Analysis

The basic tenets of the VUSBC thus demonstrate that the code provisions apply to permit applications and permit holders. In this case, the owner, permit applicant, contractor, and party responsible for compliance with the VUSBC was the builder, Pulte. There are no duties established as to a remote manufacturer under any of these provisions.

Viewed against this backdrop, the specific citations within the VUSBC cited by Plaintiffs in their Amended Motion for Judgment become clear. VUSBC § 106.4 provides that any “alternative materials” are not inherently barred by the VUSBC; rather, a party must be submitted and approved by the local code official as satisfactory and complying with the code. Such submissions and approvals would be the responsibility of the permit applicant. Notably, the VUSBC specifically discussed and contemplates “synthetic stucco” as a building material so it is hard to see how Plaintiffs can even maintain EIFS is an “alternative material” within the meaning of the code. VUSBC § 1405.1, 1405.8.

Similarly, the homes in question all received building permits after application. The structures were inspected and approved by the local code official as demonstrated by the stipulated certificates of occupancy which have previously been made a part of the record in this matter. This clearly demonstrates the legal point that the siding material was approved by the local code official. See, VUSBC § 1403.3, 1405.1. More importantly for purposes of this Demurrer, the obligations to submit and obtain approval of all materials and construction in this matter rest with the permit holder, not Parex.

The final “violation” cited by Plaintiffs is a failure to “test and develop” its products in accordance with “VUSBC 1701.1 *et seq.*” First, this section of the VUSBC pertains to requirements

for special inspections before a building code official approves a structure. VUSBC §§ 113.2, 1701.1. Once again, the permit applicant is required to provide special inspections where application is made for construction described in the section. VUSBC § 1705.1. Typical matters which require a “special inspection” are fabrication of structural load bearing members, steel construction, welding, concrete, prepared fill, sprayed-on fireproofing, and the like. VUSBC §§ 1705.2, 1705.3, 1705.3.3.2, 1705.4, 1705.7, 1705.12. Such inspections are to be performed by an “approved agency” at the expense of the owner of the property. VUSBC § 1705.1. Notably, special inspections are required for field application of EIFS. VUSBC § 1705.13.

There is nothing in the code placing any testing requirement upon Parex. Instead, this portion of the code requires Pulte to list the special inspection requirement in its permit application if necessary and to produce such inspections of the field application of the EIFS to obtain approval of the project. Obviously the local code official did not insist on special inspections of EIFS application in this case as the home construction was approved and a residential use permit issued.

Based on the above, it is clear the VUSBC imposes no obligations upon Parex and provides no tort duties running from Parex to Plaintiffs. Accordingly, Plaintiffs cannot establish a legal duty to maintain a negligence per se claim against Parex and the demurrer should be sustained.

II. Plaintiffs Fail to Allege Fraud and Constructive Fraud

Even after having amended, Plaintiffs still fail to properly allege claims for actual fraud and constructive fraud. First, Plaintiffs are required to allege fraud and constructive fraud with the required specificity, “showing specifically in what the fraud consists, so that the defendant may have the opportunity of shaping his defense accordingly.” Mortarino v. Consultant Engineering Services, 251 Va. 289, 295, 467 S.E.2d 778, 782 (1996). Plaintiffs fail to specifically allege how and when Parex misrepresented its product to the Plaintiffs. Second, Plaintiffs fail to demonstrate any causal

connection between representations made by Parex and Plaintiffs' alleged damages, or that Plaintiffs relied upon any representations made by Parex in purchasing their home.

Rather than restating its prior arguments, Parex notes that Plaintiffs cannot assert any direct contact, discussions, or even written documentation reviewed and relied upon by the plaintiffs. As previously noted, Plaintiffs have not alleged that Parex had any relationship with or duty toward Plaintiffs that would require any type of disclosure. See, Winchester Homes, Inc. v. Hoover Universal, Inc., 27 Va. Cir. 62 , 63 (Fairfax Circuit Court, January 6, 1992). Indeed, Plaintiffs have not alleged any facts indicating that Parex deliberately decided not to disclose material information to the Plaintiffs. See, Norris v. Mitchell, 255 Va. 235, 240-241, 495 S.E.2d 809, 812 (1998) (concealment of material facts as grounds for fraud claim require showing that defendant deliberately decided not to disclose a material fact). Accordingly, Plaintiffs have failed to plead sufficient facts to state a claim for fraud or constructive fraud.

On a final note, Virginia law has now clearly spoken on the issue of exactly what "constructive fraud" is. The Supreme Court of Virginia has specifically described this claim as negligent misrepresentation. Richmond Metropolitan Authority v. McDevitt, Street, & Bovis, Inc., 256 Va. 553, 559, 507 S.E. 2d 344, 347 (1998). As such, this claim requires a cognizable duty in negligence owed from Parex to the Plaintiffs. This duty is lacking due to the absence of privity and the economic losses asserted as damages in this case. Sensenbrenner v. Rust, Orling & Neale, 236 Va. 419, 374 S.E. 2d 55 (1988). Finding that economic loss claims require a showing of privity of contract, and that constructive fraud is in essence a claim for negligent misrepresentation, another circuit court has dismissed claims of constructive fraud against parties not in privity. See, NAP Chesterfield LP v. JH Martin & Sons Contractors, Inc., 1999 WL 1486250 (Chesterfield County Cir. Ct., 1999)(see attached). This Court should do the same and sustained the demurrer of Parex.

III. Plaintiffs Do Not State Cognizable Violations of the Consumer Protection Act

Plaintiffs fail to properly state a claim for violation of the Virginia Consumer Protection Act. Plaintiffs have alleged violation of the Virginia Consumer Protection Act based on the sale of a product manufactured by Parex to the Builder, Pulte Home Corporation, which was used in the construction of Plaintiffs' home. This use of the product, "as component parts in the construction" of a home was not a use "primarily for personal, family or household purposes as envisioned by the Act." Winchester Homes, Inc. v. Hoover Universal, Inc., 27 Va. Cir. 62, 63 (Fairfax Circuit Court, January 6, 1992). Further, this commercial transaction by Parex does not, "fall within the ambit of the Virginia Consumer Protection Act." Id. This claim also suffers from the same deficiencies as the fraud and constructive fraud claims. Thus, Plaintiffs fail to state a cause of action for violation of the Virginia Consumer Protection Act.

V. Plaintiffs Fail to Allege a Violation of Va. Code Ann. § 18.2-216 With Particularity

Plaintiffs fail to properly allege a claim in Count XVI for violation of Va. Code Ann. § 18.2-216. Va. Code Ann. § 18.2-216 expressly prohibits the public dissemination of a "representation or statement of fact which is untrue, deceptive or misleading, or [] a practice which is fraudulent." At its core, § 18.2-216 is a misrepresentation-based claim.

As set forth above, a misrepresentation claim must be pled with particularity. See, Mortarino, 251 Va. at 295. Plaintiffs have not met their pleading requirements, as Plaintiffs have only made conclusory allegations that Parex distributed "untrue, deceptive or misleading" advertising. See, Motion for Judgment at ¶ 109. Plaintiffs have not even alleged the specific misrepresentations allegedly made by Parex which were seen and relied upon by Plaintiffs. Moreover, Plaintiffs fail to demonstrate any causal nexus between the alleged misrepresentations and the claimed damages, or that Plaintiffs saw or relied upon any such alleged misrepresentations.

See, Evaluation Research Corporation v. Alequin, 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994).

Thus, Plaintiffs' claim for violation of Va. Code § 18.2-216 suffers from the same pleading defects as Plaintiffs' fraud claims.

CONCLUSION

The Amended Motion for Judgment still fails to properly state claims against Parex. The negligence per se claim fails to assert a proper legal duty owed by Parex to Plaintiffs. The fraud and constructive fraud claims fail due to lack of specificity and a complete absence of any representations, false or otherwise, made upon Parex upon which Plaintiff relied. Further, the constructive fraud claims fail due to lack of privity of contract. Finally, the Consumer Protection Act and False Advertising Claims fail due to the same problems raised with respect to the other misrepresentation claims. Accordingly, the Plaintiffs' Amended Motion for Judgment should be dismissed with prejudice.

WHEREFORE, Defendant, Parex, Inc., respectfully requests that the Court enter an Order sustaining its Demurrer, dismissing with prejudice Plaintiffs' claims for negligence per se, actual and constructive fraud, violation of the Virginia Consumer Protection Act, violation of Va. Code Ann. § 18.2-216, and such other relief as the Court deems proper.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Parex, Inc.'s Memorandum in Support of Demurrer to Amended Motion for Judgment was served, on this 29th day of August, 2000, via first class mail to the counsel of record set forth below.

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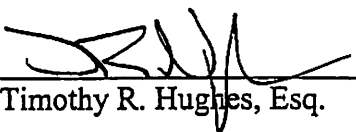
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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PAUL ANDERSON, <u>et al.</u> ,	:	
v.	:	At Law No. 183665
<u>PULTE HOME CORPORATION, et al.</u>	:	
DEAN BERGER, <u>et al.</u> ,	:	
v.	:	At Law No. 183428
<u>PULTE HOME CORPORATION, et al.</u>	:	
DOUGLAS S. BURDIN, <u>et al.</u> ,	:	
v.	:	At Law No. 184141
<u>PULTE HOME CORPORATION, et al.</u>	:	
PAOLO COLOMBI, <u>et al.</u> ,	:	
v.	:	At Law No. 184142
<u>PULTE HOME CORPORATION, et al.</u>	:	
HENRY FRANCIS EDEN, <u>et al.</u> ,	:	
v.	:	At Law No. 183921
<u>PULTE HOME CORPORATION, et al.</u>	:	
DAVID GANG,	:	
v.	:	At Law No. 186501
<u>PULTE HOME CORPORATION, et al.</u>	:	
JACK M. HAWXHURST, <u>et al.</u> ,	:	
v.	:	At Law No. 185075
<u>PULTE HOME CORPORATION, et al.</u>	:	
EDWARD P. JARMAS, <u>et al.</u> ,	:	
v.	:	At Law No. 185073
<u>PULTE HOME CORPORATION, et al.</u>	:	

MICHAEL R. LINCOLN, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 184015
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
MICHAEL MALCHOW, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 184008
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
TIMOTHY L. PECKINPAUGH, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 184719
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
MICHAEL J. REBIBO, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 183920
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
H. KENT RODGERS, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 185074
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
MICHAEL J. ROWEN, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 184424
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
JAMES R. WEAVER, <u>et al.</u> ,	:	
	:	
v.	:	At Law No. 184107
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	

**PAREX' CONSOLIDATED MEMORANDUM IN SUPPORT OF DEMURRERS TO
CROSS-CLAIMS OF PULTE**

COMES NOW Defendant Parex, Inc., by and through counsel, and appears and submits this Consolidated Memorandum in Support of Demurrers to Cross-claims of Pulte in the above cases, and states as follows:

INTRODUCTION

These cases involve the construction of residential single family homes. Plaintiffs are homeowners who have sued their builder, Pulte Home Corporation ("Pulte"). Pulte in turn filed a Cross-claim against co-Defendant Parex seeking recovery in breach of contract, breach of express warranty, breach of implied warranty, active/passive indemnification and contribution.

As set forth below, Pulte's Cross-claim fails to state a claim against Parex. First, for contribution to lie, Pulte and Parex must owe a joint tort duty to the plaintiff. Parex owes no such duty in tort to Plaintiffs due to the lack of privity of contract. Thus contribution will not lie.

Similarly, indemnification will only arise under Virginia law pursuant to a contractual relationship. Pulte had no such relationship with Parex. As such, the indemnity claims should be dismissed.¹

Pulte asserts third party beneficiary status without even being able to produce a single contract or warranty. There are no allegations of the alleged contractual terms of such "contracts" that Pulte claims it is the beneficiary of. This is purely an attempt to create causes of action out of thin air with literally no factual basis whatsoever, and the Court should recognize the same and dismiss these claims on demurrer.

Finally, the Court has already disposed of the implied warranty claims asserted by Plaintiffs in the underlying Motions for Judgment. Pulte also lacks privity of contract and thus the same ruling should apply. The implied warranty claims should be dismissed.

¹ Parex has filed Pleas in Bar in these cases as to various aspects of the Cross-claims as well. At this time, Parex is reserving argument on these matters given the status of Plaintiffs' claims and discovery in this matter. It is Parex' understanding that its Demurrers to Pulte's Cross-claims, as well as its Demurrers and Pleas in Bar to the Amended Motions for Judgment, are what is scheduled for argument at this time.

ARGUMENT

I. Contribution Amongst Joint-Tortfeasors Will Not Lie

Pulte seeks contribution from Parex pursuant to Virginia Code § 8.01-34. That statute provides for contribution amongst joint tortfeasors. The claims alleged in this case do not and cannot result in joint tortfeasor liability status as to Parex and Pulte. As such, the contribution claim should be dismissed.

In order to obtain contribution, there must be a joint liability to the plaintiff. VEPCO v. Wilson, 221 Va. 979, 980-81, 277 S.E. 2d 149, 150 (1981). The Supreme Court of Virginia has clearly stated, “[B]efore contribution may be had it is essential that a cause of action by the person injured lie against the alleged wrongdoer from whom contribution is sought.” Id., quoting Bartlett v. Roberts Recapping, Inc. Bartlett v. Roberts Recapping, Inc., 207 Va. 789, 792, 153 S.E.2d 193, 196 (1967). As such, on the face of its pleading, Pulte must demonstrate that it can be a joint tortfeasor with Parex as to the claims asserted by Plaintiffs.

Given the lack of a contractual relationship, Parex cannot be liable to Plaintiffs. Virginia law provides that recovery of economic losses will not lie absent privity of contract. Sensenbrenner v. Rust, Orling & Neale Architects, Inc., 236 Va. 419, 374 S.E.2d 55 (1988). Indeed, this very Court in this very case has reviewed and applied this precedent in sustained Parex’ previous demurrers to Plaintiffs’ negligence and breach of implied warranty claims. As such, Parex cannot be a joint tortfeasor as to the underlying claims of Plaintiffs and contribution will not lie. The Court should sustain Parex’ demurrers to Pulte’s various Cross-claims for contribution.

II. Indemnification Will Not Lie

Pulte next asserts a claim for indemnification alleging if it is found liable, its action were “passive” or “secondary”, and that Parex’ actions were “active” or “primary” permitting equitable indemnification. This claim, as the others, stands in clear contravention of established Virginia precedent. As such, Parex is entitled to dismissal of the claim.

Virginia law clearly provides that indemnification will only arise from a contractual relationship. Vepco, 221 Va. at 980. This controlling precedent has never been overruled, altered or otherwise dismissed. Pulte fails to allege such a contractual relationship and the claim thus fails.

It is true that certain Virginia cases have discussed “equitable indemnification”. Equitable indemnification, “arises when a party without personal fault, is nevertheless legally liable for damages caused by the negligence of another.” Carr v. the Home Insurance Co., 250 Va. 427, 429, 463 S.E.2d 457, 458 (1995). As with contribution, indemnity claims require direct liability on the part of the indemnitor (Parex) to the underlying plaintiff. Vepco, 221 Va. at 980-81; see also, Chantilly Partners v. Federline, 1991 WL 835108 (Fairfax Cty. Cir. Ct. 1991)(lack of privity between injured party and indemnity defendant barred non-contractual indemnification claim); see also, Winchester Homes, Inc. v. Hoover Universal, 1996 WL 1065495 (Fairfax Cty. Cir. Ct. 1996)(indemnification must arise from relationship between indemnitee and indemnitor). Pulte does not and cannot allege a contract or other relationship with Parex supporting indemnification.

Further, while the Supreme Court of Virginia has discussed the “active/passive” theory of indemnification only in passing and without specific approval of such claims, the circuit courts construing such claims have determined that such an analysis only applies where the indemnity

plaintiff is found vicariously liable for the indemnity defendant's actions. Nancy Parker v. 900 E. Marshall St. Assoc., 1989 WL 646460 (Richmond Cir. Ct. 1989); Siegel's Super Markets v. Elmo Montgomery, 1990 WL 751090 (Richmond Cir. Ct. 1990); Kristiansen v. William A. Hazel, Inc., 1993 WL 946337 (Fairfax Cty. Cir. Ct. 1993). This is consistent with the Vepco requirement of a contractual relationship. There was no contract or other relationship between Pulte and Parex pursuant to which Pulte could be held vicariously liable for Parex' actions.

Finally, where the underlying allegations base liability against the indemnity plaintiff's active negligence or misconduct, implied indemnification is improper as a matter of law. Kristiansen v. William A. Hazel, Inc., 1993 WL 946337 (Fairfax Cir. Ct. 1993). The Amended Motions for Judgment invoke allegations of Pulte's own direct misrepresentations. Further, the Amended Motions for Judgment contain many specific allegations of improper performance/negligence by Pulte in the performance of its contractual allegations, violations of building codes, failures to follow accepted building practices, and failures to follow manufacturer's installation requirements. There, on the facts alleged in the various Amended Motions for Judgment, Pulte could never recover in indemnification. These claims should be dismissed.

III. There Are No Properly Alleged Express Warranty or Contract Claims

Pulte stoops to creative pleading in an attempt to avoid total dismissal of its claims. It alleges that it is a clear and definite intended third party beneficiary of certain "express warranties" and "contracts", and then attempts to assert breach of warranty and breach of contract claims against Parex.

There is a major problem with this effort. Pulte cannot produce a single warranty or contract. Pulte cannot allege what the terms of these alleged agreements are. Parex is

challenged to find how a party can in good faith allege the existence of a third party beneficiary relationship when it has absolutely no idea what the contract says. Further, there is literally no allegation of what Parex warranted and how Parex violated such "warranties" and "contracts".

Parex knows and understands that Virginia is a notice pleading state and that the moving party is entitled to have all factual allegations and resulting inferences taken as true. This latitude should not extend, however, to blatant attempts to creatively plead relationships which parties have no basis for asserting. Based on the utter lack of factual allegations, coupled with the Consolidated Responses of Pulte to Parex' Motion Craving Oyer, the Court should sustain Parex' Demurrers to breach of contract and breach of express warranty.

WHEREFORE, Defendant, Parex, Inc. respectfully requests that the Court enter an Order sustaining its Demurrers to the Cross-claims of Pulte Home Corporation, dismissing with prejudice the claims set forth in the Cross-claims, and such other relief as the Court deems proper.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Parex, Inc.'s Consolidated Memorandum in Support of Demurrers and Pleas in Bar to Cross-claims was served, on this 2nd day of August, 2000, via first class mail to the counsel of record set forth below.

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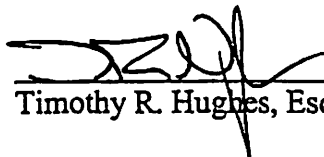
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CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

PAUL ANDERSON, <i>et al.</i> ,)	
)	
v.	)	At Law No. 183665
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
DEAN BERGER, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 183428
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
DOUGLAS S. BURDIN, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 184141
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
PAOLO COLOMBI, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 184142
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
HENRY FRANCIS EDEN, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 183921
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
DAVID GANG,)	
)	
v.	)	At Law No. 186501
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
JACK M. HAWXHURST, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185075
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	

EDWARD P. JARMAS, *et al.*,

v.

At Law No. 185073

PULTE HOME CORPORATION, *et al.*,

MICHAEL R. LINCOLN, *et al.*,

v.

At Law No. 184015

PULTE HOME CORPORATION, *et al.*,

MICHAEL MALCHOW, *et al.*,

v.

At Law No. 184008

PULTE HOME CORPORATION, *et al.*,

TIM L. PECKINPAUGH, *et al.*,

v.

At Law No. 184719 ✓

PULTE HOME CORPORATION, *et al.*,

MICHAEL J. REBIBO, *et al.*,

v.

At Law No. 183920

PULTE HOME CORPORATION, *et al.*,

H. KENT RODGERS, *et al.*,

v.

At Law No. 185074

PULTE HOME CORPORATION, *et al.*,

MICHAEL J. ROWEN, *et al.*,

v.

At Law No. 184424

PULTE HOME CORPORATION, *et al.*,

JAMES R. WEAVER, *et al.*,

v.

At Law No. 184107

PULTE HOME CORPORATION, *et al.*,

**DEFENDANT PULTE HOME CORPORATION'S
CONSOLIDATED BRIEF IN SUPPORT OF ITS DEMURRER AND PLEAS IN BAR**

BACKGROUND

All of the fifteen above-referenced suits arise out of the installation of a type of synthetic stucco known as "EIFS" on Plaintiffs' homes. Pulte Home Corporation ("PHC") is alleged to have built and/or sold the homes. In all but one of the suits, the same eight counts are brought against PHC.¹

This is the second round of demurrers and pleas. In an Order dated June 2, 2000, this court partially sustained and partially overruled PHC's demurrers and special pleas as to Plaintiffs' original Motion for Judgment ("MFJ"), and granted Plaintiffs leave to amend. The Amended Motions for Judgment ("AMFJ") were filed on June 15, 2000, to which PHC again demurred and asserted pleas in bar as to all counts. These are the subject of the instant Memorandum.

THE PLEADINGS

In the May 25, 2000 hearing on the Defendants' initial demurrers and pleas, there was some confusion as to which documents were part of the pleadings and could be considered on demurrer. So there is no misunderstanding this time, the Purchase Agreements between PHC and the Plaintiffs (the relevant portion of which is attached as Exhibit B to PHC's demurrer)² are part of the pleadings by Orders dated February 11, 2000 and July 28, 2000. Additionally, PHC's limited warranty, the Pulte Protection Plan (the "PPP Warranty"), may be considered on demurrer by virtue of (1) PHC's attachment of same to its demurrer as Exhibit A, *see, e.g., Lockett v. City of Harrisonburg School Board*, 14 Va. Cir. 76, 81 (Rockingham 1988) (document may be considered on demurrer by craving *oyer* or by attaching it to the demurrer), (2) Plaintiffs' improper denial of the authenticity of the PPP Warranty in response to PHC's Rule 3:12 pleading (to be the subject of a separate Motion to Compel), or (3) the fact that at least some of the Purchase Agreements incorporate the PPP Warranty, *see, e.g., PHC's Demurrer to Anderson AMFJ*, Exhibit B at 6 (incorporating Home Care Manual, which includes the PPP Warranty).

ARGUMENT

For the reasons set forth below, as supplemented by PHC's previously filed briefs, PHC submits that its demurrer and pleas in bar to the fifteen AMFJ should be sustained.

¹ The counts are Negligence *Per Se* (Count One), Breach of Express Warranty (Count Two), Breach of Implied Warranties (Count Three), Breach of Contract (Count Four), Actual Fraud (Count Five), Constructive Fraud (Count Six), Violation of the Virginia Consumer Protection Act (Count Fifteen) and Violation of Va. Code Ann. § 18.2-216 (Count Sixteen). The Peckinpaughs (Law No. 184719) brought only six counts, omitting Breach of Contract and Violation of § 18.2-216.

² Each Purchase Agreement contains a number of addenda, varying depending on the Plaintiffs, none of which have any bearing on the issues before this Court unless otherwise indicated.

I. DEMURRER

A. Demurrer as to Negligence Per Se

1. Liability for negligence *per se* is barred by an enforceable contractual disclaimer and waiver of rights contained in Plaintiffs' Purchase Agreements with PHC, see PHC's Demurrer, Exhibit B at 2-3³ (disclaiming "liability whether in contract, in tort, under any warranty, or otherwise," and limiting recovery "to the remedy provided in the limited [PPP] warranty"), and reiterated in the PPP Warranty, see PHC's Demurrer, Exhibit A at 6 (same). Such waivers are valid and enforceable in Virginia, and are not subject to change at the whim of one party. See, e.g., Chesapeake & O.R. Co. v. Clifton Forge-Waynesboro Tel. Co., 216 Va. 858, 224 S.E.2d 317 (1976) (holding that a railroad not acting as a common carrier may, like any other entity, contractually exempt itself from liability for negligence); Nido v. Ocean Owners' Council, 237 Va. 664, 378 S.E.2d 837 (1989) (upholding a limitation of liability provision between a unit owner and the condominium owners' association); Envirotech Corp. v. Halco Engineering, 234 Va. 583, 364 S.E.2d 215 (1988) (parties to a contract who allocate the risks and remedies should be held to their bargains). Further, these disclaimers are capitalized, printed in boldface, conspicuous in lettering, and appear in two different documents. "Where an agreement is complete on its face and is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself." Lerner v. The Gudelsky Co., 230 Va. 124, 132 (1985); see Coker v. State Farm Fire and Casualty Co., 45 Va. Cir. 510, 518 (Fairfax 1998) (Klein, J.). Accordingly, liability for negligence *per se* has been validly disclaimed and waived.

2. Even absent the contractual disclaimer, there could be no liability against PHC for negligence *per se* based on the rule in Virginia that, where a negligence count accompanies a breach of contract count, "the duty tortiously or negligently breached must be a common law duty, *not one existing between the parties solely by virtue of the contract.*" Foreign Mission Board v. Wade, 242 Va. 234, 241, 403 S.E.2d 144, 148 (1991) (emphasis added), quoted in Richmond Metro. Auth. v. McDevitt Street Bovis, Inc., 256 Va. 553, 558, 507 S.E.2d 344, 347 (1998). Here, it is self-evident that Plaintiffs would have no cause of action for purported building code violations against PHC absent the existence of the sales contract between Plaintiffs and PHC; indeed, Plaintiffs would not have the home at all. This count is a thinly disguised claim for negligent breach of a construction contract, as already ruled by this Court in an earlier synthetic stucco case. See Blanchette v. Toll Brothers, Inc., 48 Va. Cir. 386, 387 (Fairfax 1999) (Thatcher, J.) ("Plaintiffs allege Negligence Per Se *Defendants*

³ The quoted language appears on page 2 of all Purchase Agreements except four (Anderson, Berger, Jarmas and Weaver), in which the language appears on page 3.

are correct in citing the rule of Foreign Mission Board in this case”).⁴ Hence Foreign Mission Board bars Plaintiffs’ improper attempt to convert a contract claim into a tort claim.⁵

3. Even if otherwise actionable, a review of the penultimate paragraph of Plaintiffs’ negligence *per se* count reveals its deficiency. See, e.g., Berger AMFJ ¶ 27(a)-(o). Subparagraphs (d) through (o) do not even identify the statutory standard allegedly violated, and are thus deficient on their face. Subparagraphs (a), (b) and (c), which are predicated on alleged violations of the Virginia Uniform Statewide Building Code (“USBC”), are deficient in that they fail to allege or establish that the harm they claim to have suffered is of the type protected by that particular code provision. See VEPCO v. Savoy Constr. Co., 224 Va. 36, 45, 294 S.E.2d 811, 817 (1982). Further, most cited USBC provisions concern the design, construction and durability of EIFS, and are thus invalid against PHC because PHC lacks the requisite “underlying common law duty” to Plaintiffs concerning such matters. See Talley v. Danek Medica. Inc., 179 F.3d 154 (4th Cir. 1999), quoting Williamson v. Old Brogue, Inc., 232 Va. 350 (1986) (“negligence per se does not create a cause of action where none otherwise exists”). Such provisions are also inapplicable because the USBC defines synthetic stucco as an “approved” exterior cladding. USBC § 1405.1. Still other cited provisions, such as § 115.1, mention only vague standards of reasonableness that cannot form the basis of a negligence *per se* claim. See Restatement (Second) of Torts § 285 illus. 5; McNeil Pharm. v. Hawkins, 686 A.2d 567, 579 (D.C. 1996) (no negligence *per se* if statute “merely repeat[s] the common law duty of reasonable care”).

B. Demurrer as to Breach of Express Warranty

1. This count has been waived based on counsel for Plaintiffs’ July 28, 2000 representation to this Court (Williams, J.) that Plaintiffs are not relying on the PPP Warranty. At the time, the Court – apparently recognizing the significance of counsel’s statement – remarked, “so it is on the record . . .” Counsel’s disclaimer operates as a complete waiver of the breach of express warranty count because the AMFJ, as drafted, relies only on the PPP Warranty. See, e.g., Berger AMFJ ¶ 33 (“Pursuant to the Contract between Pulte and plaintiffs, Pulte provided an express warranty, that . . . Pulte would repair or replace any defective materials and/or workmanship which became known or apparent during the warranty period”). Plaintiffs are bound by their pleadings, just as they are bound by their counsel’s representations to this Court.

⁴ Ultimately the Court in Blanchette did not apply the rule in Foreign Mission Board because “Plaintiffs have alternatively pleaded for rescission of the contract.” 48 Va. Cir. at 387-88. By contrast, since the present Plaintiffs have not sought rescission, but rather legal damages, the rule applies.

2. Even if the AMFJ was drafted in such a way as to allege the existence of express warranties other than the PPP Warranty, abandonment of the PPP Warranty claim would still be tantamount to abandonment of the entire breach of express warranty count because both the Purchase Agreement and the PPP Warranty expressly disclaim and waive the existence of any other express warranties. See PHC's Demurrer, Exhibit A at 6 & Exhibit B at 2-3; Part I.A.1, supra.

3. Finally, even if the PPP Warranty hadn't been abandoned, it is clear from its face that mandatory conditions precedent have not been met. In particular, as conclusively evidenced by the very fact that these suits were filed (and are not seeking confirmation of an arbitration award), the unambiguous mandatory arbitration clauses in the PPP Warranty have not been honored. See PHC Demurrer, Exhibit B at 7; see also Va. Code Ann. § 8.01-581.01 (arbitration agreements are "valid, enforceable and irrevocable"); Va. Code Ann. § 8.01-577(B) ("submission of any claim or controversy to arbitration pursuant to [an] agreement shall be a condition precedent to institution of suit or action thereon . . ."). Accordingly, this count should be dismissed in any event.

C. Demurrer as to Breach of Implied Warranty

1. Because a purchaser of a new dwelling acquires no implied warranties under Virginia common law, see Davis v. Tazewell Place Assoc., 254 Va. 257, 492 S.E.2d 162 (1997), citing Bruce Farms v. Coupe, 219 Va. 287, 289 (1978), the *only* potential implied warranties are those legislatively provided by Va. Code Ann. § 55-70.1, and these have been validly waived in the Purchase Agreement. See PHC Demurrer, Exhibit B at 2-3. This Court already concluded as much in the first round of demurrers with respect to the Purchase Agreements executed by Plaintiffs Anderson, Berger, Jarmas and Weaver, and this prior ruling should still stand since Plaintiffs' allegations in this count are wholly unchanged from their original MFJ.

2. A nearly identical disclaimer is contained in the Purchase Agreements of the other eleven suits, but unlike the other four, close examination reveals that the disclaimer language is not two points larger than the other type. PHC Demurrer, Exhibit B at 2. However, this shortcoming does not render these disclaimers invalid, since Va. Code Ann. § 55-70.1(C) requires the larger font type only where the disclaimer language purports to sell the home "as is." Id. Here, the homes were not being sold as is; rather, they were sold with the PPP Warranty (which offers far more protection than the statutory warranties). Given the plain wording of § 55-70.1(C), the principal that statutes in

⁵ To the extent that this argument is inapplicable to the Peckinpaughs – who, as subsequent purchasers, did not include a breach of contract count – the Peckinpaughs' suit is nonetheless barred by the economic loss rule by virtue of their lack of privity with PHC. See Sensenbrenner v. Rust, Orling & Neale, 236 Va. 419, 374 S.E.2d 55 (1988).

derogation of the common law should be strictly construed, and the common sense notion that a disclaimer can be slightly less obvious if the home is not being sold “as is,” the two-point requirement is inapplicable. Here, PHC’s disclaimer is printed in capitalized, boldfaced letters, is otherwise conspicuous within the meaning of § 8.1-201(10), expressly mentions § 55-70.1 and its provisions, and is repeated in substance in the PPP Warranty. Accordingly, all implied warranty disclaimers are valid.

D. Demurrer as to Breach of Contract

1. For the same reasons discussed in Part I.A.1, supra, liability for breach of contract is barred by the express disclaimer of liability – including liability “in contract” – and corresponding waiver of rights in Plaintiffs’ Purchase Agreements with PHC. See PHC’s Demurrer, Exhibit B at 2-3.

2. Even if the Purchase Agreement were actionable, Plaintiffs failed to allege satisfaction of the mandatory conditions precedent to recovery thereunder, including written notice of default. See PHC Demurrer, Exhibit B at 4-5 (“[i]n the event we have not complied with our obligations under this Agreement you will send us notice setting forth the default, in detail, and we will have ten (10) days after receiving the notice within which to fulfill our obligations”). Additionally, four of the Purchase Agreements have mandatory arbitration clauses. See PHC Demurrer (Anderson, Berger, Jarnas & Weaver), Exhibit B at 5; see also Part I.B.3, supra. “A party seeking to recover on a contract right must allege and prove performance of any express conditions precedent upon which his right to recovery depends,” Lerner v. The Gudelsky Co., 230 Va. 124, 132-133 (1985) (emphasis added), and Plaintiffs have failed to do so here.

3. Finally, the breach of contract count is deficient because the contractual obligations alleged by Plaintiffs to have been breached are simply nonexistent, as a review of the Purchase Agreements demonstrates. Specifically, Plaintiffs contend that PHC “failed to perform the necessary remedial activities to correct the defect in plaintiffs’ house,” see, e.g., Berger AMFJ ¶ 47, but the Purchase Agreements mention no requirements concerning any contractual obligation to remediate or correct defects. See PHC Demurrer, Exhibit B. Rather, the Purchase Agreement defers all such matters to the PPP Warranty. *Id.* at 2-3. “[A] court considering a demurrer may ignore a party’s factual allegations contradicted by the terms of authentic, unambiguous documents that properly are part of the pleadings,” see Ward’s Equipment, Inc. v. New Holland North America, Inc., 493 S.E.2d 516, 518, 254 Va. 379 (1997), and doing so here reveals this count’s deficiency.

E. Demurrer as to Actual Fraud

1. Plaintiffs cannot prove reasonable reliance. First, statements made by PHC salespersons and agents are barred by the extensive “No Oral Representations” clause in the Purchase

Agreements, the effect of which is to preclude a jury finding of reasonable reliance. See PHC Demurrer, Exhibit B at 5-6. By signing the contracts, Plaintiffs affirmed their knowledge that PHC's Representatives lack the authority to make any binding promises or representations, and that Plaintiffs are not relying on any such promises or representations. Id. This clear and well-drafted clause is binding. See Martin & Martin, Inc. v. Bradley Enterprises, Inc., 256 Va. 288, 292, 504 S.E.2d 849, 851 (1998) (enforcing "entire agreement" clause providing that "no party has made representations"); Bank of Montreal v. Signet Bank, 193 F.3d 818 (4th Cir. 1999) (as a matter of law, reliance not justifiable where agreement recites that signatory will not rely on other signatory's representations); see also Restatement (Second) of Agency § 260(1). Second, the allegations predicated on "documents provided to plaintiffs on or before closing," see, e.g., Berger AMFJ ¶¶ 54-56, are deficient for failure to allege that the documents were received prior to contract. There can be no actionable reliance if the documents were reviewed after Plaintiffs were already contractually obliged to purchase the home.

2. The substance of the allegations is likewise defective. A careful review of the actual fraud counts reveals representations that, if made, constituted mere opinions, trade talk, puffery, or promises as to future events. See, e.g., Tate v. Colony House Builders, Inc., 257 Va. 78, 82 (1999). ("the mere expression of an opinion, however strong and positive the language may be, is no[t] fraud. . . . trade talk, or puffing, do[es] not constitute fraud"); Watson v. Avon Street Bus. Ctr., Inc., 226 Va. 614, 311 S.E.2d 795 (1984) (statements that roof is a "25-year roof" and "a good roof" are "typical seller's talk, expressions of opinion insufficient to frame a jury issue").

3. The actual fraud count is yet another improper attempt to recast a contract claim as a tort count, and is barred by Foreign Mission Board and McDevitt Street Bovis. In some circumstances, claims for actual fraud may escape this rule, but not in this case because just as in McDevitt Street Bovis, there is no fraud in the inducement allegation "that [PHC] did not intend to fulfill its contractual duties at the time it entered into the [Purchase Agreement]." 256 Va. at 560; see Part I.A.2, supra.

4. Claims of fraud and constructive fraud must be pled with particularity, see Tuscadora v. B.V.A. Credit Corp., 218 Va. 849 (1978), and just as this court ruled in the first round of demurrers, Plaintiffs' Amended Motions still lack the requisite specificity. Many dates are omitted, and Plaintiffs often fail to identify which persons provided them with the alleged oral or written misrepresentations.

F. Demurrer as to Constructive Fraud

1. This count is barred for each of the reasons set forth in Part I.E, supra.

2. Additionally, since "[t]he essence of constructive fraud is negligent misrepresentation," McDevitt Street Bovis, 256 Va. at 559, constructive fraud is appropriately viewed as sounding in

negligence. As such, McDevitt Street Bovis makes clear that constructive fraud cannot be plead as fraud in the inducement to avoid the rule of Foreign Mission Board. See also Virginia Transformer Corp. v. P.D. George Co., 932 F. Supp. 156, 162-63 (W.D. Va. 1996).⁶ For this same reason, the contractual disclaimer of liability "in tort", though concededly inapplicable to actual fraud, does apply to constructive fraud. See Part I.A.1, *supra*; Robberecht v. Maitland Bros., 220 Va. 109 (1979).

G. Demurrer as to the Virginia Consumer Protection Act

1. Plaintiffs fail to allege anywhere in the VCPA count that they relied on any of PHC's purported misrepresentations. Hence, this count is facially deficient.

2. The VCPA claims also fail because they are not set forth with specificity as was required by this Court's June 2, 2000 Order; in fact, the VCPA allegations in the MFJ and AMFJ are *entirely identical*. Additionally, Plaintiffs continue to lump PHC together with Coronado, CSS and Parex without specifying who said or did what. A demurrer is properly sustained if "plaintiffs' method of grouping the defendants into categories makes it impossible to ascertain what representations were made to whom, when the particular representations were made, and if a particular plaintiff relied on any of the statements." Adams v. Central Fidelity Bank, 38 Va. Cir. 14, 16 (Fairfax 1995).

3. The Peckinpaughs' VCPA claim fails for the additional reason that the Peckinpaughs did not buy from PHC; hence, PHC does not fall within the statutory definition of a "supplier" that would subject them to VCPA liability. See Va. Code Ann. § 59.1-198; see, e.g., Link, et al. v. Toll Brothers, et al., Law No. 184843 (Order dated 4/5/00 sustaining VCPA demurrer as to subsequent purchasers) (Ney, J.).

H. Demurrer as to 18.2-216

1. As with the VCPA count, this false advertising count fails because Plaintiffs did not allege that they relied (or even saw) any written PHC advertisements.

2. This false advertising count also fails for its lack of particularity and intermingling of defendants as discussed in Part I.G.2, *supra*; see Order dated 6/2/00 at 4.

II. **PLEAS IN BAR**

Many of Plaintiffs' counts are also barred by the applicable statute of limitations. For ease of analysis, the attached Exhibit A sets forth for each case the Plaintiffs' name(s), the date of execution of the Purchase Agreement, the date of settlement on the new home, and the date the suit was filed.

⁶ Based on similar logic, the constructive fraud claim of the Peckinpaughs is barred by the economic loss rule. See Virginia Transformer Corp., 932 at 162-63; Genito Glenn, L.P. v. National Housing Building Corp., 50 Va. Cir. 71, 81-82 (Va. Beach 1999).

A. One-Year Statute of Limitations for Anderson, Berger, Jarmas & Weaver on All Counts

As a preliminary matter, the Purchase Agreement for the above four Plaintiffs shortens the statute of limitations for all counts to one year. PHC Demurrer, Exhibit B at 3.⁷ Contractual provisions of this sort are enforceable in Virginia. See Board of Supervisors v. Samson, 235 Va. 516, 520, 369 S.E.2d 178, (1988) (upholding one-month limitation period); see also Southwood Builders, Inc. v. Peerless Ins., 235 Va. 164, 171, 366 S.E.2d 104, 108 (1988); Virginia Fire and Marine Ins. Co. v. Wells, 83 Va. 736, 739-40, 3 S.E. 349, 350-51 (1887). In fact, *this specific PHC disclaimer* has always been upheld by this Court, even as to fraud counts. See, e.g., Blastos, et al. v. Pulte Home Corp., Law No. 141976 (Final Order dated 1/6/96 and Letter Opinion dated 12/12/95) (Wooldridge, J.).⁸

Since both the contract date and the closing date of these four Plaintiffs predates their filing date by more than one year, see Exhibit A, all counts which accrued as of the date of injury (i.e., all but the two fraud counts) must be summarily dismissed. PHC respectfully requests an evidentiary hearing as to the fraud counts for which the "discovery rule" applies. See Part II.C, infra.

B. Two-Year Statute of Limitations for Negligence Per Se

Under Va. Code Ann. § 8.01-243(A), a two-year statute of limitations applies to the negligence *per se* count, which begins to run from the date of injury pursuant to § 8.01-230. See, e.g., Link, et al. v. Toll Brothers, et al., Law No. 184843 (Order dated 4/5/00 applying two-year limitation period to EIFS negligence *per se* count) (Ney, J.); see also Ely v. Shirley's Barbecue, Inc., 30 Va. Cir. 302, 303-05 (Roanoke 1993) (negligent construction and code violation case was subject to two-year limitation); accord Va. Code Ann. § 36-106(D) (providing two-year limitation period for prosecutions under USBC). Accordingly, all counts for negligence *per se* except those brought by Plaintiffs Anderson, Jarmas and Weaver⁹ are time-barred because they were commenced more than two years after the cause of action accrued.

C. Two-Year Statute of Limitations for Actual and Constructive Fraud

Both fraud counts brought by Plaintiff Gang are time-barred because a review of his Amended Motion reveals that he knew or should have known of the alleged fraudulent statements more than two

⁷ "No mediation, arbitration or action, regardless of form, arising out of this transaction and/or any obligations between the parties, may be brought by you more than one (1) year after the cause of action has accrued."

⁸ The Honorable David Stitt also affirmed the validity of the contractual statute of limitations on March 31, 2000, in Aragon v. Pulte Home Corporation, Law No. 2000-0185815.

⁹ Additionally, insofar as the negligence *per se* count in the AMFJ does not relate back to negligence count in the original MFJ, see Ely, supra, 30 Va. Cir. at 303-05, the claims of these three Plaintiffs are barred based on the June 15, 2000 AMFJ filing date. Moreover, as set forth in Part II.A, supra, these three Plaintiffs are among the four whose claims, including negligence *per se*, are subject to the one-year statute of limitations provided in the Purchase Agreement, and are therefore time-barred in any event.

years before he filed suit. See Va. Code Ann. § 8.01-243(A); § 8.01-249(1). Specifically, Gang alleges that on April 1 and 8, 1997, more than two years prior to the commencement of his suit, a home inspection was performed on Plaintiffs' home which "indicated that the synthetic stucco was installed improperly, and that excess moisture was still entering the house," and that "[a]s a result of this inspection and addition reports in the media, Plaintiff became concerned that his house was, and is, experiencing severe moisture intrusion problems." Gang AMFJ ¶ 17; see also Gang MFJ ¶ 16. Given this admitted knowledge and concern regarding his synthetic stucco and moisture intrusion problems, Gang's actual and constructive fraud counts are time-barred.¹⁰

D. Failure to Satisfy Conditions Precedent to Express Warranty

Based on Plaintiffs' withdrawal of reliance on the PPP Warranty and resulting abandonment of its express warranty count, PHC does not expect to present evidence on its plea based on Plaintiffs' failure to satisfy the conditions precedent to that warranty, but reserves the right to do so.

E. Three-Year Aggregate Limitation Period for Implied Warranties

The implied warranties under Va. Code Ann. § 55-70.1 "provide a warranty period of one year from the date of transfer or possession, and prescribe a statute of limitations of two years from the date of the breach of the warranty." Tazewell Place Assoc., 254 Va. at 261; see Va Code Ann. § 55-70.1(E). PHC disputes that all Plaintiffs gave notice of an exterior cladding moisture intrusion defect within the one-year statutory notice period, and respectfully requests an evidentiary hearing on this issue. However, even assuming that proper notice was given, the subsequent two-year limitation period has expired as to Plaintiffs Gang, Hawxhurst, Malchow, Rodgers and Peckinpugh. See Exhibit A.

F. Two-Year Statute of Limitations for VCPA and Va Code Ann. § 18.2-216

The VCPA provides that a cause of action that accrues on or after July 1, 1995 must be brought within two years after accrual as provided in § 8.01-230. See Va. Code Ann. § 59.1-204.1. Section 8.01-230 codifies the common law rule that the limitation period shall begin to run from the date of injury, i.e., the date of the wrongful act, not the date of discovery. See id. & Revisers' Note thereto. The deceptive advertising statute, § 18.2-216, is likewise subject to a two-year statute of limitations, though this is by virtue of the "catch-all" provisions of § 8.01-248 since the deceptive advertising statute contains no limitation period. The discovery rule of § 8.01-249(1) is inapplicable to either count. See Wilson. et al. v. Dryvit Systems, Inc., Law No. 180479 (Order dated 11/23/99 applying §8.01-248 to § 18.2-216 without discovery rule); Byrd v. Crosstate Mortgage and Investments, Inc., 34 Va. Cir. 17 (Richmond 1994) (declining to apply discovery rule to VCPA). Applying these two-year

¹⁰ To the extent not ripe for disposition on the pleadings, PHC reserves the right to present evidence in support of this plea.

periods from the date of contract,¹¹ the VCPA and § 18.2-216 counts are time-barred as to all Plaintiffs except Anderson, Jarmas and Weaver, for whom the one-year contractual limitation period applies in any event. See Exhibit A; Part II.A, supra.

III. REQUESTS FOR RELIEF

A. Contractual Limitations on Relief

PHC demurred to Plaintiffs' request for relief based on the contractual limitations to recovery set forth in the Purchase Agreement. PHC requests a ruling that except as to the actual fraud count, Plaintiffs' remedies are limited by the Purchase Agreement to the Limited [PPP] Warranty referenced therein. See PHC Demurrer, Exhibit B at 2-3. Such contractual limitations are fully enforceable in Virginia. See Part I.A.1, supra.

B. Attorneys' Fees and Punitive Damages

Plaintiffs request an award of attorneys' fees should be stricken for each AMFJ in which the VCPA and actual fraud counts are dismissed. The punitive damages request should also be stricken due to the vague and insubstantial nature of the actual fraud count for which such damages are sought.

IV. CONCLUSION

For the reasons discussed herein, PHC's demurrer and pleas should be sustained, and all of Plaintiffs' counts against PHC should be dismissed with prejudice. To the extent any count is not dismissed, PHC requests a ruling as to the contractual limitations on recovery set forth in Part III.

Respectfully submitted,

PULTE HOME CORPORATION

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Dated: September 1, 2000

¹¹ Plaintiffs could only have been "injured" by the alleged false advertising materials disseminated by PHC if they were reviewed prior to contract. Similarly, Plaintiffs could not have been misled in a consumer transaction under the VCPA unless PHC's misstatements occurred prior to contract.

EXHIBIT A

LAW NO.	PLAINTIFFS	DATE OF AGREEMENT	CLOSING DATE	DATE OF SUIT	IMPLIED WARRANTIES PROPERLY WAIVED	SUIT FILED W/IN 3 YEARS
183665	Anderson, Paul & Tiffini	01/25/1998	03/20/1998	10/06/1999	YES	N/A
183428	Berger, Dean & Elaine	04/09/1997	09/30/1997	09/24/1999	YES	N/A
184141	Burdin, Doug & Dianna	04/26/1996	11/22/1996	10/28/1999	NO	YES
184142	Columbi, Paolo & Mary	10/30/1995	12/23/1996	10/28/1999	NO	YES
183921	Eden, Henry & McWethy, Pat	08/02/0996	05/30/1997	10/19/1999	NO	YES
186501	Gang, David	10/27/1995	07/15/1996	03/01/2000	NO	NO
185075	Hawthurst, Jack & Linda	12/02/1995	07/31/1996	11/30/1999	NO	NO
185073	Jamas, Edward & Rebecca	12/11/1997	01/30/1998	11/30/1999	YES	N/A
184015	Lincoln, Michael & Wendy	01/19/1997	10/24/1997	10/22/1999	NO	YES
184008	Malchow, Michael & Jakubcak, Doreen	09/16/1995	12/29/1995	10/21/1999	NO	NO
183920	Rebibo, Michael & Cynthia	01/05/1997	06/27/1997	10/19/1999	NO	YES
185074	Rodgers, Kent & Christine	12/10/1995	07/08/1996	11/30/1999	NO	NO
184424	Rowen, Michael & Lori	01/10/1997	07/24/1997	11/12/1999	NO	YES
184107	Weaver, James & Susan	10/02/1997	10/29/1997	10/27/1999	YES	N/A
184719	Boutcher-Peckinpaugh	05/04/1996	05/23/1996	11/30/1999	NO	NO

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2000, a copy of Defendant Pulte Home Corporation's Consolidated Brief in Support of its Demurrer and Pleas in Bar was served, via facsimile and first-class mail, on:

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FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

PAUL ANDERSON, <i>et al.</i> ,)	
)	
v.	)	At Law No. 183665
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
DEAN BERGER, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 183428
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
DOUGLAS S. BURDIN, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 184141
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
PAOLO COLOMBI, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 184142
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
HENRY FRANCIS EDEN, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 183921
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
DAVID GANG,)	
)	
v.	)	At Law No. 186501
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
JACK M. HAWXHURST, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185075
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	

EDWARD P. JARMAS, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185073
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
MICHAEL R. LINCOLN, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184015
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
MICHAEL MALCHOW, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184008
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
TIM L. PECKINPAUGH, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184719
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
MICHAEL J. REBIBO, <i>et al.</i> ,)	
)	
v.	)	At Law No. 183920
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
H. KENT RODGERS, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185074
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
MICHAEL J. ROWEN, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184424
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
JAMES R. WEAVER, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184107
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	

**DEFENDANT PULTE HOME CORPORATION'S
CONSOLIDATED BRIEF IN OPPOSITION TO THE DEMURRERS
OF THE CROSS-DEFENDANTS AND THIRD-PARTY DEFENDANTS**

BACKGROUND

All of the fifteen above-referenced suits arise out of the installation of a type of synthetic stucco known as "EIFS" on Plaintiffs' homes. Plaintiffs' original Motion for Judgment named three defendants: Pulte Home Corporation ("PHC"), the alleged builder of the homes; CSS, L.L.C. ("CSS"), an alleged subcontractor of PHC which applied the synthetic stucco; and Parex, Inc. ("Parex"), the alleged manufacturer and supplier of the synthetic stucco.

All three defendants filed demurrers and pleas to the Motion for Judgment, and PHC additionally filed a Motion for Leave to file a Cross-Claim against CSS and Parex and a Third-Party Motion for Judgment against subcontractor Coronado Corp. ("Coronado"), synthetic stucco suppliers American EIFS Stone & Stucco Supply, Inc. ("American EIFS") and American Stucco & Stone, L.L.C. ("American Stucco"), and two principals of CSS, Coronado, American EIFS and/or American Stucco: Bernard Franks and Benjamin Franks. In the resulting Orders dated June 2, 2000, the Court sustained in part and overruled in part the original defendants' various demurrers and pleas and granted Plaintiffs leave to amend, and additionally granted PHC leave to file its cross-claims and third-party claims. Plaintiffs' Amended Motions for Judgment ("AMFJ") were filed shortly thereafter (which now include Coronado as a defendant), as were PHC's Cross-Claims ("CC") and Third-Party Motions for Judgment ("3P MFJ"). Additional demurrers and/or pleas were filed to Plaintiffs' and PHC's claims, the latter of which are the subject of the instant Memorandum.

ARGUMENT

The only defensive pleadings that were filed and briefed in response to PHC's cross and third-party claims are demurrers filed by Parex, American EIFS and American Stucco.¹ Due to the similarity of the arguments made by these three defendants in connection with the five counts asserted against each, PHC will consolidate its response and address the five counts seriatim.

I. BREACH OF CONTRACT

PHC's breach of contract count is predicated on a third-party intended beneficiary theory, and specifically the allegation that any sales contracts and/or indemnification agreements entered into by

¹ Coronado, CSS, Bernard Franks and Benjamin Franks each filed an Answer and Grounds of Defense to PHC's claims. Benjamin Franks additionally filed a corporate veil Plea in Bar, but did not file a supporting brief. PHC assumes that Benjamin Franks has either abandoned this plea or intends to later seek an evidentiary hearing on this issue. Parex, for its part, filed a Plea in Bar in connection with PHC's Breach of Contract count, but Parex's brief addresses only its Demurrer.

Parex, American EIFS and/or American Stucco with each other or with CSS or Coronado would, by intent and design, inure to PHC's benefit. See CC ¶¶ 28-30; 3P MFJ ¶¶ 32-34. American EIFS and American Stucco demur based on PHC's failure to allege the "actual existence" of a contract and the purported lack of factual support for its claim. Similarly, Parex contends that PHC's inability to produce a copy of the contract is dispositive. These arguments misconstrue the nature of third-party claims, and overstate PHC's pleading requirements.

Under Virginia's notice pleading rules, if a pleading "is drafted so that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer." CaterCorp. Inc. v. Catering Concepts, Inc., 246 Va. 22, 24 (1993); accord Virginia Rules 1:4(d) & 1:4(j) ("a simple statement . . . of the essential facts is sufficient"). PHC's breach of contract count meets this standard: it informs the defendants that they need look no further than their contracts with the other parties to ascertain the nature of PHC's claim. This pleading requirement is even more relaxed under Rules 3:9 (Cross-Claim) and 3:10 (Third-Party Practice), which state that a party may file a cross and/or third-party claim upon a person "who is or may be liable to [the cross or third-party claimant] for all or part of [the plaintiff's claim]" (emphasis added); see also Va. Code Ann. § 8.01-281A (cross and/or third-party claims may be based on alternative theories of liability). Thus PHC's breach of contract count is a properly pled contingent claim.

Equally deficient is American EIFS' and American Stucco's argument that "there is simply no factual support for Pulte's claim that it is an intended third-party beneficiary." This argument is one for the merits, or perhaps summary judgment, but is inappropriate at this stage since a demurrer "admits the truth of all material facts properly pleaded." CaterCorp. Inc., 246 Va. at 24. Here, PHC expressly alleged that it would be an intended beneficiary, CC ¶ 29; 3P MFJ ¶ 33, which is sufficient under Va. Code Ann. § 55-22. A purported lack of "factual support" is no defense on the pleadings.

Parex relies solely on PHC's present inability to produce a copy of a contract. This is irrelevant: the contract need not be part of the pleadings for PHC's claim for breach to be properly pled, see, e.g., Wilt v. Water and Wastewater Equip. Manuf. Ass'n, Inc., 43 Va. Cir. 118, 122 (1997) (denying motion craving *oyer* of contract where plaintiff denied having possession of same), and an oral contract may be sufficient in any event. See Copenhaver v. Rogers, 238 Va. 361 (1989). Furthermore, PHC believes that contracts exist in the possession of Parex or the other parties, and PHC is entitled to obtain them through discovery. In this regard, it is noteworthy that American EIFS and American Stucco have not filed a plea in bar to this count based on the nonexistence of a contract of which PHC is an intended beneficiary. Likewise, Parex did file a plea in bar on this issue, but declined to brief it.

Moreover, PHC filed document requests and interrogatories to all three defendants seeking to obtain the contracts – some of which are long overdue – but to date, no responses has been received. See Ex. A.² In short, Parex’s argument is, at best, premature.

Parex also appears to question the good faith basis of PHC’s allegation that it stands to recover as a third-party beneficiary. Again, the short (and dispositive) answer is that on demurrer, PHC’s allegations must be taken as true. However, to respond more directly, the Subcontract attached to PHC’s Cross-Claim and Third-Party Motion for Judgment expressly requires that the subcontractor (i.e., Coronado and/or CSS) procure indemnity agreements for PHC’s benefit from any and all product suppliers in connection with all purchase orders, see CC & 3P MFJ, Ex. A at 2 (§ V.F) (“the Subcontractor shall require in its purchase orders that each supplier indemnify the Subcontractor and the Contractor from all losses arising from their materials and their delivery thereof”), and all supply agreements, see *id.*, addendum (“General Specifications”) at 1-2 & 6. Indeed, last page of the Subcontract sets forth the required supply agreement indemnification language. *Id.*, addendum at 6. PHC thus properly pleaded claims that are grounded on the reasonable premise that Coronado and CSS honored their duties under the Subcontract.

II. BREACH OF EXPRESS WARRANTY

American EIFS, American Stucco and Parex have grouped PHC’s breach of express warranty count together with its breach of contract count, and applied the same arguments to both. These arguments fall short for the reasons set forth above. However, there are also additional reasons why the demurrers on this breach of express warranty count should be overruled.

First, although PHC would be an intended beneficiary of any warranty issued pursuant to the Subcontract, see CC & 3P MFJ, Ex. A, addendum at 1 (“suppliers shall warrant all material and workmanship effective from the date of settlement”), PHC is not required under Virginia’s U.C.C. to establish third-party beneficiary status to recover under an express warranty. See Va. Code Ann. § 8.2-318 (abolishing privity defense in express and implied warranty claims); see also Part III, *infra*.

Second, PHC has pled two different breach of express warranty counts. In addition to the written warranty claim, PHC seeks recovery under express oral warranties “by way of affirmations of fact, promises, descriptions, and/or use of samples and/or models regarding the appearance, durability and/or water-resistance” of the synthetic stucco. CC ¶ 36; 3P MFJ ¶ 40. Such express warranties are specifically recognized under the U.C.C., see Va. Code Ann. § 8.2-313, and are presumed to be part of

² The responses of American EIFS and American Stucco were due on July 24, 2000, and are now almost two months late. Parex’s responses were due August 17, 2000, but PHC and Parex have agreed to extend this date to September 20, 2000.

the bargain even if purchased through an intermediary, or not purchased at all. See Yates v. Pitman Manuf., Inc., 257 Va. 601, 606 (1999). For this reason, too, defendants' arguments are inapplicable. See Rule 1:4(k) (where one statement is independently sufficient, "the pleading is not made insufficient by the insufficiency of one or more of the alternative statements").

Finally, Parex's defense that PHC "cannot produce a single warranty" rings especially hollow on this count. Not only has PHC requested but not yet received responses to its discovery on this issue, *see* Ex. A, but CSS has *specifically admitted* that it received warranties from Parex. See Ex. B.³

III. BREACH OF IMPLIED WARRANTY

PHC's implied warranty claims are based on U.C.C. Sections 8.2-314 (merchantability) and 8.2-315 (fitness for particular purpose) of the Virginia Code. See CC ¶¶ 44-47; 3P MFJ ¶¶ 48-51. American EIFS and American Stucco advance four defenses to these claims, to which PHC will reply serially. Parex, for its part, declines to brief this issue at all, apparently content to rely on the fact that the Plaintiff homeowners' non-U.C.C. implied warranty claims were dismissed. The demurrers should be overruled.

American EIFS and American Stucco first rely on Winchester Homes, Inc. v. Hoover Universal, Inc., 30 Va. Cir. 22 (Fairfax 1992) ("Winchester I") for the proposition that synthetic stucco is not a "good" to which U.C.C. warranties apply. This is plainly wrong, as the Winchester I case itself demonstrates. In that case, which involved flame retardant-treated plywood ("FRTP") installed in homes, the builder was asserting not its own claims, but claims *assigned to it by the homeowners*. Id.⁴ Given this fact, the defendant manufacturer asserted that the relevant transaction was the sale from the builder to the homeowner – i.e., after the FRTP was incorporated into the home – and thus the FRTP was not a movable "good" within the meaning of §§ 8.2-102 & 8.2-105. See 30 Va. Cir. at 29-30. The builder responded that the earlier transaction should control, i.e. when the FRTP was sold by the manufacturer to the builder (and thus was still a "good"). Id. Judge Lee ultimately agreed with the manufacturer that since the builders were standing in the shoes of the homeowners, "the second [builder-to-homeowner] transaction determines the rights of the parties," and that § 8.2-318 was therefore inapplicable since the goods were incorporated into realty. Id. at 33. Here, PHC stands in their own shoes, not in

³ CSS states that it "was mailed the warranties from Parex and passed them on to Pulte." See Ex. B. PHC disputes the latter part of this statement.

⁴ Accord Winchester Homes, Inc. v. Hoover Universal, Inc., 39 Va. Cir. 107, 109 n.3 (Fairfax 1996) ("Winchester II") ("Winchester I was the homeowners' suit as distinguishable from Winchester II").

those of the homeowners. Hence, the manufacturer-to-builder series of transactions controls, and it is undisputed that the synthetic stucco was a movable “good” during that time.⁵

Second, American EIFS and American Stucco claim that the implied warranty claims are barred because PHC did not provide statutory notice of breach under Va. Code Ann. § 8.2-714 and § 8.2-607(3)(1). However, these sections apply only to a “buyer,” and American EIFS and American Stucco concede in the very next paragraph that “Pulte is not a buyer.” *Id.* The Supreme Court of Virginia recently held as much in Yates, 257 Va. at 603-05. In any event, if PHC was a “buyer,” this fact-based notice defense would only be available as a plea and/or on the merits, not on demurrer. See Providence Village, 33 Va. Cir. at 173.

Third, American EIFS and American Stucco contend that PHC’s lack of privity with them is an absolute bar to recovery under a U.C.C. implied warranty theory. They are wrong. It is true that the economic loss rule bars tort recovery in non-U.C.C. cases where privity is absent, see, e.g., Sensenbrenner v. Rust, Orling & Neal Architects, Inc., 236 Va. 419 (1988), but an anti-privity statute applies to U.C.C. claims, see Va. Code Ann. § 8.2-318,⁶ and PHC’s implied warranty claims – unlike the Plaintiffs’ claims – are subject to the U.C.C. These defendants have not – and cannot – cite any case which holds that the economic loss rule and/or lack of privity bars U.C.C. warranty claims.

The lone case which they do cite – Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc., 254 Va. 240, 244-46 (1997) – actually *supports* PHC’s position. That U.C.C. case originated with the Fourth Circuit, which concluded that “Sensenbrenner and its progeny . . . requir[e] privity for economic losses in tort but not necessarily for a breach of warranty,” Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc., 152 F.3d 313, 319 (4th Cir. 1998), and therefore certified the question to the Supreme Court of Virginia. In response, the Supreme Court agreed that § 8.2-318 abrogates the privity requirement, but limited its response to the specific question presented to it by the Fourth Circuit: that is, whether *consequential damages* under § 8.2-715(2) are recoverable absent privity in U.C.C. warranty cases. 254 Va. at 243-44; see id. at 244 (“we assume that the Court of Appeals concluded that the economic loss damages claimed by Beard were consequential damages rather than direct dam-

⁵ Though Winchester I is clearly distinguishable, it should be noted that the holding in that case is inconsistent with that of another FRTP case, Providence Village Townhouse Condominium Ass’n v. Amurcon-Loudoun Corp., 33 Va. Cir. 165, 168-70 (Loudoun 1994) (overruling demurrer because “[i]t is a question of fact as to whether the Plaintiffs [a condominium association, which purchased from a builder] are entitled to recover for such warranties pursuant to the provisions of 8.2-318”).

⁶ This statute provides that “[l]ack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied . . .” Va Code Ann. § 8.2-318.

ages”). The Court ultimately concluded the express language of § 8.2-715(2) “imposes a contract requirement only where recovery of consequential damages is sought,” and therefore trumps § 8.2-318 to that limited extent. *Id.* (emphasis added). Thus, under *Beard*, the economic loss rule is inapplicable to U.C.C. implied warranty claims for direct damages, but § 8.2-715 does require privity for consequential damages. The case law uniformly supports this proposition both post-*Beard*, see, e.g., *Genito Glenn, L.P. v. National Housing Bldg. Corp.*, 50 Va. Cir. 71, 76 (Va. Beach 1999) (after *Beard*, “a plaintiff can still recover direct economic damages in a warranty case regardless of privity of contract”), and pre-*Beard*, see, e.g., *W.J. Rapp, Co., Inc. v. Whitlock Equip. Corp.*, 222 Va. 80 (Va. 1981) (applying 8.2-318 to economic loss claim against remote manufacturer); *Smoot Lumber Co. v. Pahlavani*, 36 Va. Cir. 58 (Fairfax 1995) (overruling demurrer to U.C.C. warranty claim for economic loss despite lack of privity); *Providence Village*, 33 Va. Cir. at 173 (FRTP negligence claims are “barred by the economic loss rule *limiting recovery to warranty claims*”) (emphasis added). This rule is consistent with the manner in which PHC pled this count, as its “Wherefore” clause requests “direct damages under Section 8.2-714(2) of the Virginia Code, together with consequential damages to the extent available by law . . .” CC at 12; 3P MFJ at 14. Hence the economic loss rule is no bar.⁷

Even if, despite *Beard*, a privity requirement *did* apply to PHC’s implied warranty claims, American EIFS’ and American Stucco’s demurrers could not be sustained because privity does exist on the face of the pleadings by virtue of PHC’s veil-piercing allegations. Specifically,

the unity of interest and ownership between Bernard and Benjamin Franks and the entities through which they operated, including but not limited to Coronado, CSS, American EIFS and American Stucco, was such that the separate personalities of the entities and the individuals did not exist, and to adhere to that separateness would work an injustice.

3P MFJ ¶ 14. Accordingly, since PHC is in privity with its subcontractors, Coronado and CSS, and since these four companies operate as a single entity within the meaning of PHC’s Third-Party Motion for Judgment, it follows that PHC is likewise in privity with American EIFS and American Stucco.

Fourth and finally, American EIFS and American Stucco seem to suggest that they can only be liable to PHC under an implied warranty theory if PHC is likewise liable to Plaintiffs under an implied warranty theory. This is plainly wrong. Third-party liability is indeed derivative, but certainly nothing

⁷ American EIFS and American Stucco also appear to contend that PHC cannot recover even direct damages because PHC is not a “buyer” under the U.C.C. This contention, if accurate, only serves to prove that PHC may recover both kinds of damages, since the privity limitation of § 8.2-715 applies only to “buyers.” Cf. *Yates*, 257 Va. at 603-05.

in Rule 3:10 requires that the *theories of recovery* be identical.⁸ To the contrary, Va. Code Ann. § 8.01-281(A) and Rule 1:4(k) expressly allow third-party claimants to plead alternative theories of recovery. This argument should be rejected with the others.

IV. INDEMNIFICATION

PHC's common law indemnification claims are based on the theory that any liability incurred by PHC "would be derivative, constructive, passive and/or secondary, while the acts and omissions of [American EIFS, American Stucco and/or Parex] would be the active, direct and primary cause of Plaintiffs' damages." CC ¶ 49; 3P MFJ ¶ 60. According to American EIFS, American Stucco and/or Parex, this is not a viable theory of liability because a "contractual relationship" is required to plead indemnity under VEPCO v. Wilson, 221 Va. 979 (1981). They are mistaken.

Subsequent decisions of the Virginia appellate courts, and of the Fairfax Courts in particular, have backpedaled from the anomalous language of VEPCO. As summarized by Judge Annunziata:

Defendant cites [VEPCO] for the proposition that indemnity "must necessarily grow out of a contractual relationship." This proposition, not necessary to the disposition of that case, has either been abandoned in Virginia law or interpreted broadly to allow the contractual basis for indemnity to be an express contract, implied contract, or even a quasi-contract arising from equitable considerations.

Hanners v. Pender Mill I Assoc., 21 Va. Cir. 177 (Fairfax 1990) (citing multiple cases); accord Kristiansen v. Hazel, 33 Va. Cir. 113 (Fairfax 1993) (implied indemnification recognized in Virginia); Sanderling v. Donohoe Co., Inc., 47 Va. Cir. 345 (Fairfax 1998) (McWeeny, J.) (same); Winchester II, 39 Va. Cir. 107 (Fairfax 1996) (Lee, J.) (same); see also Sykes v. Stone & Webster Eng. Corp., 186 Va. 116 (discussing principles of implied indemnity); Carr v. Home Ins. Co., 250 Va. 427 (1995) (discussing principles of equitable indemnity).⁹

PHC's indemnity claim is sufficiently pled. As discussed in Kristiansen, an implied contractual right to indemnification is "premised on broad restitutionary principles," and "rests on the concept that one person is unjustly enriched at the expense of another when the other discharges liability that should be his responsibility to pay." 33 Va. at 114. In this regard, the critical question is whether the indemnitee's negligence is "active or passive," or "primary or secondary." *Id.*, citing Philip Morris Inc. v. Emerson, 235 Va. 380, 411 (1988). PHC's implied indemnity allegations fit squarely within

⁸ Followed to its logical extension, a defendant liable for fraud could only bring third-party claims for fraud; a defendant liable for trespass could only bring third-party claims for trespass; and so forth. Presumably written contractual indemnification agreements would be invalid unless the indemnitee was held liable under a breach of contract theory.

⁹ Even if a contractual relationship is required, such a relationship at least exists between PHC and the two American entities based on PHC's veil-piercing allegations. Further, the Subcontract itself specifically extends to "suppliers."

these standards. *See* CC ¶ 49; 3P MFJ ¶ 60. Further, PHC may recover under equitable indemnification principles which “allow the innocent party to recovery from the negligent actor for the amounts paid to discharge the liability,” *Carr*, 250 Va. at 429, or express indemnification principles if, for example, Coronado and/or CSS fulfilled their duty under the Subcontract to procure the required supplier indemnification agreement. *See* CC & 3P MFJ, Ex. A, addendum at 6.

Parex’s additional arguments are likewise based on variations of the VEPCO reasoning, and are unavailing. First, Parex claims that under VEPCO, a claim for indemnification requires proof that the indemnitor is jointly liable to the injured party (i.e., Plaintiffs). However, recent cases suggest that implied indemnification requires proof that “the actual *cause* of the injury to the third party was the act of the indemnitor,” but not that the indemnitor was directly liable as such. *Winchester II*, 39 Va. Cir. at 114 (emphasis added). In any event, this is not a pleading requirement. Second, Parex contends that, “consistent with the VEPCO requirement,” PHC must prove “vicarious liability” under an actual contract. As indicated above, the judges of this and other courts have since rejected this contract requirement. Finally, Parex claims that since the Amended Motions for Judgment “contain many specific allegations of improper performance/negligence by Pulte,” PHC “could never recover in indemnification.” This is a distortion of Philip Morris, which actually requires that a defendant be “guilty of active negligence” to bar an active/passive liability pass-through. 235 Va. at 411 (emphasis added). Certainly a plaintiff cannot not defeat a defendant’s indemnification claim merely by *alleging* that the defendant engaged in active negligence. The critical inquiry on demurrer is the *defendant’s* pleading, and so long as it is *possible* that the defendant’s liability could be “passive” or “secondary,” an indemnification claim will lie. *Compare Kristiansen*, 33 Va. Cir. at 115-16 (indemnification claim insufficiently pled where defendant could only be liable for active negligence, and failed to allege passive or secondary liability). And so here, PHC has pled and can prove that even if the synthetic stucco was defective, PHC was unaware of this fact and/or reasonably relied on the contrary representations of the cross- and third-party defendants. Thus the demurrer should be overruled.

V. CONTRIBUTION

PHC’s contribution claims are based on the defendants’ duty under common law and/or Va. Code Ann. § 8.01-34 to contribute toward PHC’s discharge of any common obligation to Plaintiffs for the same indivisible injury. *See* CC ¶ 51; 3P MFJ ¶ 62. This count is properly pled.

American EIFS, American Stucco and Parex point out that a contribution plaintiff cannot recover from a contribution defendant “unless the injured party could have recovered against the contribution defendant.” *Pierce v. Martin*, 230 Va. 94 (1985). However, as clarified in Gemco-Ware, Inc. v.

Rongene Mold and Plastics Corp., 234 Va. 54, 58 (1987), "in order for contribution to lie, the injured party's cause of action against the third-party defendant need not be presently enforceable; it merely is necessary that the plaintiff, at some time in the past, have had an enforceable cause of action against the party from whom contribution is sought." And this is precisely what PHC has pled: i.e., PHC is entitled to contribution "in view of Plaintiffs' presently or previously existing cause of action to recover from [American EIFS, American Stucco and Parex] for the same indivisible injury." CC ¶ 51; 3P MFJ ¶ 62.

These defendants can defeat PHC's contribution claim only if each of Plaintiffs' counts against them is dismissed, and it is further shown that Plaintiffs never had a cause of action against them. Thus a dismissal obtained by virtue of a mere procedural defense (i.e., statute of limitations) would be insufficient to avoid PHC's contribution claim under Gemco-Ware. Rather, each defendant must establish that no *cause* of action (as opposed to a *right* of action) ever existed. 234 Va. at 58-59.

CONCLUSION

For the reasons discussed herein, the demurrers of American EIFS, American Stucco and Parex should be overruled. To the extent that the Court may disagree, PHC respectfully requests leave to amend the affected count(s) to conform to the Court's ruling.

Respectfully submitted,

PULTE HOME CORPORATION

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Dated: September 15, 2000

EXHIBIT
A

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

PAUL ANDERSON, et al.,

Plaintiffs,

V.

PULTE HOME CORPORATION, et al.,

Defendants.

At Law No. 183665

**PULTE HOME CORPORATION'S
INTERROGATORIES TO PAREX, INC.**

TO: Parex, Inc.
c/o Timothy R. Hughes, Esq.
RUSSELL & RUSSELL
150 South Washington Street
Suite 101
Falls Church, VA 22046

COMES NOW Defendant/Cross-Plaintiff/Third-Party Plaintiff Pulte Home Corporation ("PHC"), by counsel, pursuant to Rule 4:8 of the *Rules of the Virginia Supreme Court* and requests that Defendant/Cross-Defendant Parex, Inc. ("Parex") answer the following interrogatories under oath, within twenty-one (21) days of service hereof.

I. DEFINITIONS

1. "And" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of any Interrogatory any information which might otherwise be construed to be outside its scope.

9. Identify each and every contract, whether written or oral, and whether express or implied, to which Parex was a party in connection with any of the transactions identified in your Answer to Interrogatory No. 6, or in which CSS, Coronado, American EIFS, American Stucco or Plaintiffs was also a party, or otherwise in connection with the supply, distribution or sale of synthetic stucco to any of the homes at Wheatland Estates, with specific reference to Plaintiffs' Home.

ANSWER:

10. Identify each and every warranty, whether written or oral, and whether express or implied, issued by Parex or on Parex's behalf in connection with any of the transactions identified in your Answer to Interrogatory No. 6, or issued to Coronado, CSS, American EIFS, American Stucco or Plaintiffs, or otherwise in connection with the supply, distribution or sale of synthetic stucco to any of the homes at Wheatland Estates, with specific reference to Plaintiffs' Home.

ANSWER:

11. Describe in detail Parex's policies and practices on the issuing of warranties for its products at the time the houses in Wheatland Estates were being built, including the process, if any, by which a warranty could be obtained from Parex.

ANSWER:

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

PAUL ANDERSON, et al,

Plaintiffs,

v.

PULTE HOME CORPORATION, et al,

Defendants.

At Law No. 183665

**PULTE HOME CORPORATION'S
REQUEST FOR PRODUCTION OF DOCUMENTS TO PAREX, INC.**

TO: Parex, Inc.
c/o Timothy R. Hughes, Esq.
RUSSELL & RUSSELL
150 South Washington Street
Suite 101
Falls Church, VA 22046

COMES NOW the Defendant/Cross-Plaintiff/Third-Party Plaintiff, Pulte Home Corporation ("PHC"), by counsel, pursuant to Rule 4:9 of the *Rules of the Virginia Supreme Court*, and requests that Defendant/Cross-Defendant Parex, Inc. provide its responsive documents within twenty-one (21) days of receipt of this pleading to counsel for PHC, Drinker Biddle & Reath LLP, 1500 K Street, N.W., Suite 1100, Washington, D.C. 20005.

I. DEFINITIONS AND INSTRUCTIONS

1. These requests are continuing so as to require you to supplement your responses if you obtain further or different material before trial.

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JAMES L. HUGHES
CLERK, CIRCUIT COURT
FAIRFAX, VA

19. All documents reflecting the corporate structure of Parex, including the identity of all parent entities, sister entities and subsidiary entities.

20. All documents which mention, refer, or relate to the Subcontract attached as Exhibit A to the Cross-Claim.

21. All documents which mention, refer, or relate to the work performed at Wheatland Estates, including work relating to the installation, supply, distribution, sale or purchase of synthetic stucco.

22. All documents which mention, refer, reflect, or relate to the synthetic stucco sold and ultimately applied to Plaintiffs' Home.

23. All contracts between Parex and any of the Parties.

24. All contracts between Parex and any of the persons or entities identified in Parex's Answer to PHC's Interrogatory No. 6.

25. All contracts between Parex and any other person or entity which mention PHC, or in which PHC may be a third-party beneficiary.

26. All contracts between Parex and any other person or entity which relate in any way to the synthetic stucco to be sold and/or installed on the homes in Wheatland Estates.

27. All warranties and indemnity agreements provided by Parex to any of the Parties.

28. All warranties and indemnity agreements issued by or on behalf of Parex to any of the persons or entities identified in Parex's Answer to PHC's Interrogatory No. 6.

29. All warranties and indemnity agreements mentioning PHC issued by or on behalf of Parex to any other person or entity which mention PHC, or in which PHC may be a third-party beneficiary.

30. All warranties and indemnity agreements issued by or on behalf of Parex which relate in any way to the synthetic stucco to be sold and/or installed on the homes in Wheatland Estates.

31. All requests for any warranties and/or indemnity agreements received from any person or entity, including any Party, in connection with any of the homes or work performed in Wheatland Estates.

32. All insurance agreements and policies under which any person or entity may be liable to you, or otherwise obligated to defend and/or indemnify you, in order to satisfy or reimburse you for part or all of any judgment or settlement that may result from this action.

33. All documents consisting of, reflecting or relating to any communication to or from any insurer concerning the allegations in the Motion for Judgment and/or the Cross-Claim, including all notice letters and responses thereto, and all disclaimer letters and reservation of rights letters received from such insurers.

34. All Certificates of Insurance issued by Parex to any person or entity, including any Party, in connection with any of the homes or work performed in Wheatland Estates.

35. All Certificates of Insurance received by Parex from any person or entity, including any Party, in connection with any of the homes or work performed in Wheatland Estates.

36. All documents, from January 1, 1991 to the present, reflecting or relating to the process by which an applicator may become a "Parex Approved Applicator," or otherwise become certified by Parex to install synthetic stucco manufactured by Parex.

MICHAEL MALCHOW, *et al*,

v.

PULTE HOME CORPORATION, *et al*,

TIM L. PECKINPAUGH, *et al*,

v.

PULTE HOME CORPORATION, *et al*,

MICHAEL J. REBIBO, *et al*,

v.

PULTE HOME CORPORATION, *et al*,

H. KENT RODGERS, *et al*,

v.

PULTE HOME CORPORATION, *et al*,

MICHAEL J. ROWEN, *et al*,

v.

PULTE HOME CORPORATION, *et al*,

JAMES R. WEAVER, *et al*,

v.

PULTE HOME CORPORATION, *et al*,

FILED
00 AUG -21 2008
At Law No. 184719
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

At Law No. 184719

At Law No. 183920

At Law No. 185074

At Law No. 184424

At Law No. 184107

NOTICE OF SERVICE

This is to certify that on the 27th day of July, 2000, a copy of (1) Defendant Pulte Home Corporation's Request for Production of Documents to Parex, Inc.; and (2) Pulte Home Corporation's Interrogatories to Parex were sent, via hand-delivery, to:

Timothy R. Hughes, Esq.
RUSSELL & RUSSELL
150 South Washington Street
Suite 101
Falls Church, VA 22046
Counsel for Parex, Inc.

And via first-class mail to:

David H. Wise, Esq.
Kavita S. Knowles, Esq.
FULLERTON & WISE
4021 University Drive, Suite 204
Fairfax, VA 22030
Counsel for Plaintiffs

Daniel K. Bryson, Esq.
LEWIS & ROBERTS, P.L.L.C.
1305 Navaho Drive, Suite 400
Raleigh, NC 27609
Counsel for Plaintiffs

Christopher E. Hassell, Esq.
Heather Shoaf Deane, Esq.
GILBERG & KIERNAN
1250 Eye Street, N.W., 6th Floor
Washington, D.C. 20005
*Counsel for CSS, L.L.C.
and Benjamin Franks*

Ralph D. Rinaldi, Esq.
COWLES, RINALDI, JUDKINS &
KORJUS, LTD.
Suite 204, Courthouse Square
Fairfax, VA 22030
*Counsel for American EIFS Stone &
Stucco Supply, Inc., and American
Stucco & Stone, L.L.C.*

Robert R. Sparks, Jr., Esq.
HERGE, SPARKS & CHRISTOPHER,
LLP
6862 Elm Street, Suite 360
McLean, VA 22101
*Counsel for Coronado Corp. and
Bernard Franks*

PULTE HOME CORPORATION

By: 

Michael J. McManus (#15521)
Jeffrey J. Lopez
Brian A. Coleman (#41352)
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
Telephone: 202/842-8800
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Jordan M. Samuel (#24185)
Jordan M. Samuel, P.C.
2009 North 14th Street, Suite 510
Arlington, VA 22201
Telephone: 703/522-1125
Telecopier: 703/522-1124

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

PAUL ANDERSON, *et al*,

Plaintiffs,

v.

PULTE HOME CORPORATION, *et al*.

Defendants.

At Law No. 183665

**PULTE HOME CORPORATION'S INTERROGATORIES
TO AMERICAN EIFS STONE & STUCCO SUPPLY, INC.**

TO: American EIFS Stone & Stucco Supply, Inc.
c/o Ralph D. Rinaldi
Cowles, Rinaldi, Judkins & Korjus, Ltd.
Suite 204 Courthouse Square
10521 Judicial Drive
Fairfax, Virginia 22030

COMES NOW Defendant/Third-party Plaintiff Pulte Home Corporation ("PHC"), by counsel, pursuant to Rule 4:8 of the *Rules of the Virginia Supreme Court* and requests that Third-Party Defendant American EIFS Stone & Stucco Supply, Inc. answer the following interrogatories under oath, within twenty-eight (28) days of service hereof.

I. DEFINITIONS

1. "And" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of any Interrogatory any information which might otherwise be construed to be outside its scope.

19. Identify each and every contract and warranty, whether written or oral, express or implied, which American EIFS has or had which relates to the supply of synthetic stucco at, or the work performed on, the houses at Wheatland Estates, including but not limited to every contract with, and every warranty issued by or to: PHC; any agent of PHC; any supplier, provider, materialman or manufacturer of synthetic stucco; and any subcontractor or sub-subcontractor.

ANSWER:

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

PAUL ANDERSON, *et al.*,

Plaintiffs,

v.

PULTE HOME CORPORATION, *et al.*

Defendants.

At Law No. 183665

**PULTE HOME CORPORATION'S REQUEST FOR PRODUCTION
OF DOCUMENTS TO AMERICAN EIFS STONE & STUCCO SUPPLY, INC.**

TO: American EIFS Stone & Stucco Supply, Inc.
c/o Ralph D. Rinaldi
Cowles, Rinaldi, Judkins & Korjus, Ltd.
Suite 204 Courthouse Square
10521 Judicial Drive
Fairfax, Virginia 22030

COMES NOW the Defendant/Third-Party Plaintiff, Pulte Home Corporation ("PHC"), by counsel, pursuant to Rule 4:9 of the *Rules of the Virginia Supreme Court*, and requests that Third-Party Defendant American EIFS Stone & Stucco Supply, Inc. provide its responsive documents within twenty-eight (28) days of receipt of this pleading to counsel for PHC, Drinker Biddle & Reath LLP, 1500 K Street, N.W., Suite 1100, Washington, D.C. 20005.

I. DEFINITIONS AND INSTRUCTIONS

1. These requests are continuing so as to require you to supplement your responses if you obtain further or different material before trial.

35. All documents which mention, refer, or relate to the work performed at Wheatland Estates, including work relating to the installation, supply, distribution, sale or purchase of synthetic stucco.

36. All documents which mention, refer, reflect, or relate to the synthetic stucco applied to the house referenced in the Motion for Judgment.

37. All contracts between American EIFS and any of the Parties.

38. All contracts between American EIFS and any person or entity other than the Parties which refer or relate to any Party, the Subcontract, the work performed at Wheatland Estates, or the allegations in the Motion for Judgment or the Third-Party Motion for Judgment.

39. All contracts in which American EIFS is an intended third-party beneficiary which refer or relate to any Party, the Subcontract, the work performed at Wheatland Estates, or the allegations in the Motion for Judgment or the Third-Party Motion for Judgment.

40. All warranties, indemnity agreements, and requests for any warranties and/or indemnity agreements, received by American EIFS from any of the Parties, or provided by American EIFS to any of the Parties.

41. All warranties, indemnity agreements, and requests for any warranties and/or indemnity agreements, received by American EIFS from any person or entity other than the Parties, or provided by American EIFS to any person or entity other than the Parties, which refer or relate to any work performed at Wheatland Estates.

42. All insurance agreements and policies under which any person or entity may be liable to you, or otherwise obligated to defend and/or indemnify you, in order to satisfy or reimburse you for part or all of any judgment or settlement that may result from this action.

43. All documents consisting of, reflecting or relating to any communication to or from any insurer concerning the allegations in the Motion for Judgment and/or the Third-Party Motion for Judgment, including all notice letters and responses thereto, and all disclaimer letters and reservation of rights letters received from such insurers.

44. All Certificates of Insurance issued by or on behalf of American EIFS to any of the Parties.

45. All Certificates of Insurance received by American EIFS from any person or entity which refers or relates to any work performed at Wheatland Estates.

46. All documents reflecting or relating to any training given or received by American EIFS regarding the installation or application of synthetic stucco, including synthetic stucco manufactured by Parex, Inc.

47. All documents, including plans, specifications, manuals, drawings, blueprints and brochures, which refer or relate to the installation or application of synthetic stucco on any house in Wheatland Estates, including the house referenced in the Motion for Judgment.

48. All documents reflecting, referring, or relating to the supply, distribution, sale, or any other work of any kind performed by American EIFS in connection with the synthetic stucco applied to the houses in Wheatland Estates, including the house referenced in the Motion for Judgment.

49. All documents, including all purchase orders, invoices and receipts, which reflect, refer or relate to the purchase or sale of synthetic stucco for use on any of the houses in Wheatland Estates, including the house referenced in the Motion for Judgment.

50. All documents, including but not limited to bank and account statements, cancelled checks, balance sheets and ledgers, reflecting payments received by

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

PAUL ANDERSON, *et al.*,

Plaintiffs,

v.

PULTE HOME CORPORATION, *et al.*

Defendants.

At Law No. 183665

**PULTE HOME CORPORATION'S
INTERROGATORIES TO AMERICAN STUCCO & STONE, L.L.C.**

TO: American Stucco & Stone, L.L.C.
c/o Ralph D. Rinaldi
Cowles, Rinaldi, Judkins & Korjus, Ltd.
Suite 204 Courthouse Square
10521 Judicial Drive
Fairfax, Virginia 22030

COMES NOW Defendant/Third-party Plaintiff Pulte Home Corporation ("PHC"), by counsel, pursuant to Rule 4:8 of the *Rules of the Virginia Supreme Court* and requests that Third-Party Defendant American Stucco & Stone, L.L.C. answer the following interrogatories under oath, within twenty-eight (28) days of service hereof.

I. DEFINITIONS

1. "And" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of any Interrogatory any information which might otherwise be construed to be outside its scope.

2. "Relating to" or "relates to" means without limitation embodying, mentioning or concerning, directly or indirectly, the subject matter identified in the Interrogatory.

19. Identify each and every contract and warranty, whether written or oral, express or implied, which American Stucco has or had which relates to the supply of synthetic stucco at, or the work performed on, the houses at Wheatland Estates, including but not limited to every contract with, and every warranty issued by or to: PHC; any agent of PHC; any supplier, provider, materialman or manufacturer of synthetic stucco; and any subcontractor or sub-subcontractor.

ANSWER:

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

PAUL ANDERSON, *et al.*,

Plaintiffs,

v.

PULTE HOME CORPORATION, *et al.*

Defendants.

At Law No. 183665

**PULTE HOME CORPORATION'S REQUEST FOR PRODUCTION
OF DOCUMENTS TO AMERICAN STUCCO & STONE, L.L.C.**

TO: American Stucco & Stone, L.L.C.
c/o Ralph D. Rinaldi
Cowles, Rinaldi, Judkins & Korjus, Ltd.
Suite 204 Courthouse Square
10521 Judicial Drive
Fairfax, Virginia 22030

COMES NOW the Defendant/Third-Party Plaintiff, Pulte Home Corporation ("PHC"), by counsel, pursuant to Rule 4:9 of the *Rules of the Virginia Supreme Court*, and requests that Third-Party Defendant American Stucco & Stone, L.L.C. provide its responsive documents within twenty-eight (28) days of receipt of this pleading to counsel for PHC, Drinker Biddle & Reath LLP, 1500 K Street, N.W., Suite 1100, Washington, D.C. 20005.

I. DEFINITIONS AND INSTRUCTIONS

1. These requests are continuing so as to require you to supplement your responses if you obtain further or different material before trial.

33. All documents which mention, refer, or relate to any entity in which American Stucco, Bernard Franks or Benjamin Franks has an ownership interest.

34. All documents which mention, refer, or relate to the Subcontract.

35. All documents which mention, refer, or relate to the work performed at Wheatland Estates, including work relating to the installation, supply, distribution, sale or purchase of synthetic stucco.

36. All documents which mention, refer, reflect, or relate to the synthetic stucco applied to the house referenced in the Motion for Judgment.

37. All contracts between American Stucco and any of the Parties.

38. All contracts between American Stucco and any person or entity other than the Parties which refer or relate to any Party, the Subcontract, the work performed at Wheatland Estates, or the allegations in the Motion for Judgment or the Third-Party Motion for Judgment.

39. All contracts in which American Stucco is an intended third-party beneficiary which refer or relate to any Party, the Subcontract, the work performed at Wheatland Estates, or the allegations in the Motion for Judgment or the Third-Party Motion for Judgment.

40. All warranties, indemnity agreements, and requests for any warranties and/or indemnity agreements, received by American Stucco from any of the Parties, or provided by American Stucco to any of the Parties.

41. All warranties, indemnity agreements, and requests for any warranties and/or indemnity agreements, received by American Stucco from any person or entity other than the Parties, or provided by American Stucco to any person or entity other than the Parties, which refer or relate to any work performed at Wheatland Estates.

42. All insurance agreements and policies under which any person or entity may be liable to you, or otherwise obligated to defend and/or indemnify you, in order

to satisfy or reimburse you for part or all of any judgment or settlement that may result from this action.

43. All documents consisting of, reflecting or relating to any communication to or from any insurer concerning the allegations in the Motion for Judgment and/or the Third-Party Motion for Judgment, including all notice letters and responses thereto, and all disclaimer letters and reservation of rights letters received from such insurers.

44. All Certificates of Insurance issued by or on behalf of American Stucco to any of the Parties.

45. All Certificates of Insurance received by American Stucco from any person or entity which refers or relates to any work performed at Wheatland Estates.

46. All documents reflecting or relating to any training given or received by American Stucco regarding the installation or application of synthetic stucco, including synthetic stucco manufactured by Parex, Inc.

47. All documents, including plans, specifications, manuals, drawings, blueprints and brochures, which refer or relate to the installation or application of synthetic stucco on any house in Wheatland Estates, including the house referenced in the Motion for Judgment.

48. All documents reflecting, referring, or relating to the supply, distribution, sale, or any other work of any kind performed by American Stucco in connection with the synthetic stucco applied to the houses in Wheatland Estates, including the house referenced in the Motion for Judgment.

49. All documents, including all purchase orders, invoices and receipts, which reflect, refer or relate to the purchase or sale of synthetic stucco for use on any of the houses in Wheatland Estates, including the house referenced in the Motion for Judgment.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

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JUSTICE: FREY
CLERK: CIRCUIT COURT
FAIRFAX, VA

PAUL ANDERSON, *et al*,

Plaintiffs,

v.

PULTE HOME CORPORATION, *et al*.

Defendants.

At Law No. 183665

NOTICE OF SERVICE

This is to certify that on the 19th day of June, 2000, a copy of Pulte Home Corporation's Interrogatories to All Third-Party Defendants; Pulte Home Corporation's Request for Production of Documents to All Third-Party Defendants; and Pulte Home Corporation's Request for Admissions to All Third-Party Defendants were sent, via first-class mail, postage prepaid, to:

David H. Wise, Esq.
Kavita S. Knowles, Esq.
FULLERTON & WISE
4021 University Drive, Suite 204
Fairfax, VA 22030

Daniel K. Bryson, Esq.
LEWIS & ROBERTS, P.L.L.C.
1305 Navaho Drive, Suite 400
Raleigh, NC 27609

Timothy R. Hughes, Esq.
RUSSELL & RUSSELL
150 South Washington Street
Suite 101
Falls Church, VA 22046

Christopher E. Hassell, Esq.
James A. Allen, Esq.
GILBERG & KIERNAN
1250 Eye Street, N.W., 6th Floor
Washington, D.C. 20005

Ralph D. Rinaldi, Esq.
COWLES, RINALDI, JUDKINS &
KORJUS, LTD.
Suite 204 Courthouse Square
10521 Judicial Drive
Fairfax, Virginia 22030

PULTE HOME CORPORATION

By: 

Michael J. McManus (#15521)
~~Jeffrey J. Lopez~~
Brian A. Coleman (#41352)
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
Telephone: 202/842-8800
Telecopier: 202/842-8465

Jordan M. Samuel (#24185)
2009 North 14th Street, Suite 510
Arlington, VA 22201
Telephone: 703/522-1125
Telecopier: 703/522-1124

Dated: June 21, 2000

EXHIBIT
B

COPY

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

PAUL ANDERSON
TIFFANI ANDERSON

Plaintiffs,

v.

PULTE HOME CORPORATION, *et. al.*

Defendants.

Law No.: 183665

DEFENDANT'S ANSWERS TO PAREX, INC.'S FIRST SET OF
INTERROGATORIES TO CO-DEFENDANT CSS, L.L.C. a/k/a CORONADO
STUCCO & STONE

COMES NOW the defendant, CSS, L.L.C. a/k/a/ Coronado Stucco & Stone, by and through its attorneys, GILBERG & KIERNAN, and submits the following Objections and Answers to Plaintiff's First Interrogatories pursuant to Rule 33 of the Rules of this Court:

GENERAL OBJECTIONS

1. Defendant CSS, L.L.C. a/k/a/ Coronado Stucco & Stone objects to all instructions and interrogatories to the extent that they require or purport to require supplementation beyond that which is required by the applicable Rules.
2. Defendant CSS, L.L.C. a/k/a/ Coronado Stucco & Stone objects to all instructions and interrogatories which require or purport to require the provision of the conclusions, opinion, or contentions of counsel which pertain or require a determination of appropriate or advisable areas for inquiry and investigation of matters set forth therein. Defendant CSS, L.L.C. a/k/a/ Coronado Stucco & Stone interposes the attorney/client and attorney/work-product privileges regarding all such matters.
3. Defendant CSS, L.L.C. a/k/a/ Coronado Stucco & Stone objects to all instructions and interrogatories which require or purport to require the provision of home addresses and telephone numbers and other personal information regarding its directors, officers, employees, and agents as unduly burdensome, irrelevant and outside the reasonable scope of discovery, excepting for such information as reasonably necessary for Plaintiff or his attorney to contact and obtain information from such persons.

- c. the policy number;
- d. the claims in this case for which such insurance is or may be available;
- e. a description of the types of coverage afforded;
- f. the amount of the deductible;
- g. the conditions, if any, that the insurer has stated must be satisfied before it will satisfy, or indemnify or reimburse for payments made to satisfy, such a judgment; and
- h. the conditions, if any, upon which the insurer has purported to reserve its rights to decline coverage.

ANSWER: Please see attached insurance certificate.

INTERROGATORY NO. 22:

Please set forth in full and complete detail all facts supporting any contention you may have that Parex issued a warranty to you or any other individual or entity on this project. Please include in your description an identification of all individuals who have knowledge of the facts you assert in your response.

ANSWER: The warranties were made out to Plaintiffs. CSS was mailed the warranties from Parex and passed them on to Pulte at the completion of the project.

INTERROGATORY NO. 23:

Please set forth in full and complete detail all facts supporting any contention you may have that EIFS is a defective product or caused any defects or damages on the project. Please include in your description an identification of all individuals who have knowledge of the facts you assert in your response.

ANSWER: None.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2000, a copy of Defendant Pulte Home Corporation's Consolidated Brief in Oppositions to the Demurrers to its Cross-Claim and Third-Party Motion For Judgment was served, via facsimile and first-class mail, on:

David H. Wise, Esq.
Kavita S. Knowles, Esq.
FULLERTON & WISE
4021 University Drive, Suite 204
Fairfax, VA 22030
Counsel for Plaintiffs

Daniel K. Bryson, Esq.
LEWIS & ROBERTS, P.L.L.C.
1305 Navaho Drive, Suite 400
Raleigh, NC 27609
Counsel for Plaintiffs


Timothy R. Hughes, Esq.
RUSSELL & RUSSELL
150 South Washington Street
Suite 101
Falls Church, VA 22046
Counsel for Parex, Inc.

David P. Corrigan, Esq.
Harman, Claytor, Corrigan & Wellman, P.C.
P.O. Box 70280
Richmond, VA 23255
*Counsel for American
Stucco & Stone, L.L.C.*

Christopher E. Hassell, Esq.
James A. Allen, Esq.
GILBERG & KIERNAN
1250 Eye Street, N.W., 6th Floor
Washington, D.C. 20005
*Counsel for CSS, L.L.C.
and Benjamin Franks*

Ralph D. Rinaldi, Esq.
COWLES, RINALDI, JUDKINS &
KORJUS, LTD.
Suite 204, Courthouse Square
Fairfax, VA 22030
*Counsel for American EIFS Stone &
Stucco Supply, Inc.*

Robert R. Sparks, Jr., Esq.
HERGE, SPARKS & CHRISTOPHER,
LLP
6862 Elm Street, Suite 360
McLean, VA 22101
*Counsel for Coronado Corp. and
Bernard Franks*



Brian A. Coleman

PO

FILED
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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

PAUL ANDERSON, *et al.*,

v.

At Law No. 183665 ✓

PULTE HOME CORPORATION, *et al.*,

DEAN BERGER, *et. al.*,

v.

At Law No. 183428 ✓

PULTE HOME CORPORATION, *et al.*,

DOUGLAS S. BURDIN, *et. al.*,

v.

At Law No. 184141 ✓

PULTE HOME CORPORATION, *et al.*,

PAOLO COLOMBI, *et. al.*,

v.

At Law No. 184142 ✓

PULTE HOME CORPORATION, *et al.*,

HENRY FRANCIS EDEN, *et. al.*,

v.

At Law No. 183921 ✓

PULTE HOME CORPORATION, *et al.*,

DAVID GANG,

v.

At Law No. 186501 ✓

PULTE HOME CORPORATION, *et al.*,

JACK M. HAWXHURST, *et al.*,

v.

At Law No. 185075 ✓

PULTE HOME CORPORATION, *et al.*,

EDWARD P. JARMAS, <i>et al.</i> ,)	
v.	)	At Law No. 185073 ✓
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
MICHAEL R. LINCOLN, <i>et al.</i> ,)	
v.	)	At Law No. 184015 ✓
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
MICHAEL MALCHOW, <i>et al.</i> ,)	
v.	)	At Law No. 184008 ✓
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
TIM L. PECKINPAUGH, <i>et al.</i> ,)	
v.	)	At Law No. 184719 ✓
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
MICHAEL J. REBIBO, <i>et al.</i> ,)	
v.	)	At Law No. 183920 ✓
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
H. KENT RODGERS, <i>et al.</i> ,)	
v.	)	At Law No. 185074 ✓
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
MICHAEL J. ROWEN, <i>et al.</i> ,)	
v.	)	At Law No. 184424 ✓
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
JAMES R. WEAVER, <i>et al.</i> ,)	
v.	)	At Law No. 184107 ✓
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	

**DEFENDANT PULTE HOME CORPORATION'S CONSOLIDATED
REPLY BRIEF IN SUPPORT OF ITS DEMURRER AND PLEAS IN BAR**

In support of its demurrer and pleas in bar to the Amended Motions for Judgment ("AMFJ") in the fifteen above-referenced cases, Pulte Home Corporation ("PHC") respectfully submits this Reply¹ to Plaintiffs' Memorandum in Opposition.

I. PLEAS IN BAR

Plaintiffs seem to believe that the mere assertion in their brief "that they intend to rely upon the doctrines of waiver, equitable estoppel, unclean hands, and Virginia Code § 8.01-229(D)" is sufficient to create a factual dispute and a jury trial on PHC's pleas of the applicable statutes of limitation. They are mistaken.

The rule that statutes of limitation begin to run when the right of action accrues is not easily circumvented in Virginia. See Westminster Investing Corp. v. Lamps Unlimited, Inc., 237 Va. 543, 547 (1989) ("courts are obligated to enforce statutes of limitation strictly and to construe any exception thereto narrowly"). As further stated in Westminster Investing, it is

well settled that in its terms the statute is absolute, admitting of no exception which itself does not recognize, unless under certain extraordinary circumstances, wherein the positive and plain requirements of an equitable estoppel preclude its application.

237 Va. at 547, quoting Boykins Corp. v. Weldon, Inc., 221 Va. 81, 85 (1980). Thus there is no exception for "unclean hands," nor for waiver (absent a written tolling agreement). See Fox v. Deese, 234 Va. 412 (1987) (waiver requires the "voluntary, intentional abandonment of a known legal right").

As for equitable estoppel, the Boykins Corp. case demonstrates how very narrow this exception actually is. The court observed that "[c]onstructive fraud is not such as will toll the running of the statute of limitations," 221 Va. at 86, quoting Housing Authority v. Laburnum Corp., 195 Va. 827 (1954), and that "mere silence [is] insufficient," 221 Va. at 86, quoting Culpeper Nat'l Bank v. Tidewater Imp. Co., 119 Va. 73 (1916); rather, the fraud "must consist of affirmative acts of misrepresentation" which "involve[] moral turpitude." Id. Moreover, the motion for judgment must actually *allege* that the plaintiff was fraudulently induced to refrain from filing suit. See Boykins Corp., 221 Va. at 87 (affirming circuit court's conclusion "that the plaintiff's motion and amended motions failed to allege that defendant made any representation, or committed any affirmative act, which was reasonably calculated to induce, or which did in fact induce, Boykins to refrain from filing

¹ In addition to the arguments set forth herein, PHC incorporates by reference the arguments set forth in its Consolidated Reply filed on May 8, 2000 in support of its initial demurrers and pleas in bar.

suit against Weldon within the statutory limitation period”). These standards also apply to § 8.01-229(D)’s even narrower exception where a defendant “obstruct[s] the filing of an action.” See Horn v. Abernathy, 231 Va. 228, 233-34 (1986); Housing Authority, 195 Va. at 838-43.

Plaintiffs’ AMFJ is clearly lacks any factual allegations which would fit them within this exception. Their Actual Fraud count against PHC pertains only to the inducement of the sales contract; it contains no contention that Plaintiffs *would have* filed suit, but were fraudulently and affirmatively induced into refraining from doing so. See, e.g., Berger AMFJ, ¶¶ 45-49. Even if the AMFJ could be read as containing vague allegations of an intent to conceal, it would still be insufficient. See, e.g., Patterson v. Bob Wade Lincoln-Mercury, Inc., 48 Va. Cir. 471 (Charlottesville 1999) (sustaining plea where the “Motion for Judgment contains only ‘vague allegations’ that these [allegedly fraudulent] acts were committed with an intent to conceal a cause of action”). Plaintiffs have had their chance to amend, but still their pleadings are deficient. See Boykins Corp., 221 Va. at 86-87; Westminster Investing, 237 Va. at 545 (landlord’s “continued assurances that it would take appropriate measures” to correct breaches of lease were insufficient to create estoppel); accord Powers v. Cherin, 249 Va. 33, 35 (1995) (facts must be alleged in pleadings, not in brief). Accordingly, given the lack of any genuine factual disputes, PHC’s pleas must be sustained as a matter of law.

II. DEMURRER

A. Negligence Per Se

With respect to PHC’s disclaimer of any liability in negligence in its Purchase Agreement, Plaintiffs continue to ignore the binding Virginia precedent cited by PHC and instead rely on cases from other jurisdictions. Further, even if these out-of-state cases were applicable, it is difficult to see how PHC’s plain, capitalized, boldfaced disclaimer could fall short of the “unmistakable language” standard relied on by Plaintiffs. Finally, despite Plaintiffs’ protestations to the contrary, the PPP Warranty is part of the pleadings for the reasons stated previously, though reference thereto is unnecessary insofar as the Court may simply rule that negligence liability has been validly disclaimed and Plaintiffs are contractually limited to the remedy provided by the warranty (whatever it may say).

Plaintiffs next seek to escape the rule of Foreign Mission Board v. Wade, 242 Va. 234 (1991) by arguing that negligence *per se* “is based upon a duty imposed by statute, and not upon the expectations of the parties entering into a contractual agreement.” Plaintiffs miss the point. Negligence *per se* is still a tort, and just as in Foreign Mission Board and Richmond Metro. Auth. v. McDevitt Street Bovis, Inc., 256 Va. 553 (1998), PHC would not have this tort duty had it not entered into the sales contract. Moreover, given that Plaintiffs specifically allege in their breach of contract

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count that “[t]he contract between plaintiffs and Pulte required Pulte to construct a home in accordance with . . . applicable building codes,” see, e.g., Berger AMFJ ¶ 46, it is difficult to see how their negligence *per se* count could be anything other than a prohibited claim for negligent breach of a construction contract. See Foreign Mission Board, 242 Va. at 241.

In any event, the specific negligence *per se* violations catalogued in the AMFJ are inapplicable to PHC for the reasons stated previously, and Plaintiffs have not disputed this fact.

B. Breach of Express Warranty

Plaintiffs’ defense to its breach of express warranty count is incomprehensible. Though the heading of their argument states that “Plaintiffs have not waived” this count, the subsequent text offers no reason whatsoever as to why their oral representation before this court should not be binding. Additionally, Plaintiffs do not dispute that their AMFJ alleges that only the PPP Warranty was breached, nor do they dispute that, in any event, the PPP Warranty expressly disclaims all other express warranties. Instead, Plaintiffs offer arguments and banal accusations that would be relevant, if at all, only in defending their fraud counts (i.e., “fraudulent contract-inducing misrepresentations” are actionable; “Pulte must now answer for its fraud”; etc.).

Plaintiffs also seek to avoid the PPP Warranty’s binding arbitration clause by claiming that this clause “merely disputes the facts Plaintiffs allege in their [AMFJ], which must be taken as true.” This is false. “[A] court considering a demurrer may ignore a party’s factual allegations contradicted by the terms of authentic, unambiguous documents that properly are part of the pleadings,” see Ward’s Equipment, Inc. v. New Holland North America, Inc., 254 Va. 379 (1997), and doing so here reveals that Plaintiffs could not possibly have filed this suit without violating the arbitration provisions.

C. Breach of Implied Warranty

In brazen disregard of PHC’s demurrer and memorandum, Plaintiffs assert that “Pulte admits that the statutory warranty for all but four of the cases before the court were not properly waived.” As Plaintiffs are obviously aware, this was true on the first round of demurrers, but not since Plaintiffs restarted the process by filing their AMFJs.² A close reading of Va. Code Ann. § 55-70.1(C) reveals that the larger font type is required only where the property is being sold “as is,” and this is not the case here. Plaintiffs’ unwillingness to address this fact evidences their inability to refute it.

The remainder of Plaintiffs’ argument on this count pertains only to the implied warranty disclaimers contained in the other four Purchase Agreements, and is simply a rehash of the same

² The exhibit attached to PHC’s opening brief is simply an unredacted photocopy of the one which was attached to PHC’s brief on the first round of demurrers, which is why the column on implied warranty disclaimers is unchanged.

unsupported assertions which this Court rightly rejected in the May 25, 2000 hearing. PHC's demurrer should be sustained once again.

D. Breach of Contract

Plaintiffs again offer not a single Virginia case which supports their contention that "Pulte's disclaimer of liability in the contract is invalid," nor do they attempt to refute any of the cases cited by PHC. See PHC's Brief at 2, 5 and cases cited therein; accord George Robberecht Seafood, Inc. v. Maitland Bros. Co., Inc., 220 Va. 109, 112 (1979) ("contracting parties may waive their contractual rights," though claims for actual fraud in the inducement may survive). Plaintiffs' reliance on Judge Thatcher's ruling in Blanchette v. Toll Brothers, Inc., 48 Va. Cir. 386 (Fairfax 1999) for the proposition that PHC's argument "is appropriate for summary judgment but not demurrer" is likewise inappropriate, since Blanchette involved a limitation on contractual damages (specifically, a contractual exclusion of consequential damages) while PHC's Purchase Agreement contains an outright disclaimer of all contractual liability.

Plaintiffs also make no effort to rebut PHC's alternative argument that Plaintiffs failed to allege satisfaction of the Purchase Agreement's 10-day notice requirement, nor do Plaintiffs attempt to explain why the contractual obligations they rely upon cannot be found anywhere in the Purchase Agreement.

E. Constructive Fraud

Plaintiffs do not address, and thus have effectively conceded, PHC's argument that Plaintiffs cannot prove reasonable reliance as a matter of law based on the Purchase Agreement's "No Oral Representations" clause, coupled with the lack of any other alleged pre-contract misrepresentations.

Regarding PHC's contention that the AMFJs consist only of unactionable allegations of opinions, trade talk, puffery, and/or promises as to future events, Plaintiffs have no basis to rely on Tate v. Colony House Builders, Inc., 257 Va. 78 (1999). The allegations of fraud which were deemed sufficient in that case are simply not present in the AMFJ fraud counts. Instead, Plaintiffs generally allege they were told that their stucco was a "superior" and "low maintenance" product, which is closer to the "25-year roof" and "a good roof" puffery which was deemed insufficient as a matter of law in Watson v. Avon Street Bus. Ctr., Inc., 226 Va. 614 (1984).

Plaintiffs next contend that they fall within the "fraud in the inducement" exception of Foreign Mission Board without addressing the Supreme Court's most recent treatment of this issue in McDevitt Street Bovis, 256 Va. at 557-60. In that case, the Supreme Court found that fraud claims can fall within this rule, and in affirming the dismissal of constructive and actual fraud counts on this basis, the

Supreme Court suggested that the "fraud in the inducement" exception applies only where the defendant "did not intend to fulfill its contractual duties at the time it entered into the [contract]." 256 Va. at 560. The absence of such allegations in the AMFJ against PHC is therefore fatal.

F. Constructive Fraud

Plaintiffs also fail to address the defenses that are uniquely applicable to the constructive fraud count given the Supreme Court's recognition that "[t]he essence of constructive fraud is negligent misrepresentation." McDevitt Street Bovis, 256 Va. at 559 (emphasis added). This means that the constructive fraud claim, which could otherwise be founded on negligent or even innocent statements, cannot fall within the "fraud in the inducement" exception of McDevitt Street Bovis, and is vulnerable to the negligence disclaimer in the Purchase Agreement notwithstanding George Robberecht Seafood.

G. Virginia Consumer Protection Act and Va. Code Ann. § 18.2-216

Following the May 25, 2000 hearing, PHC's demurrer as to these two counts was sustained, and in the Order Plaintiffs were "directed to set forth, with specificity, the particular fraudulent facts supporting this claim." Despite this Order, the AMFJ's VCPA and § 18.2-216 counts continue to do nothing more than incorporate prior paragraphs by reference. Plaintiffs make no effort to justify this insufficiency. Additionally, the VCPA and § 18.2-216 counts lack the requisite allegations of reliance.

III CONCLUSION

For the reasons discussed herein, together with PHC's opening Brief and previously-filed memoranda, PHC submits that its demurrer and pleas should be sustained with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2000, a copy of Defendant Pulte Home Corporation's Consolidated Reply Brief in Support of its Demurrer and Pleas in Bar was served, via facsimile and first-class mail, on:

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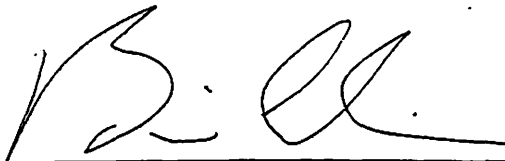
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Page 1	Page 3
<p>1 VIRGINIA: 2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY 3 4 PAUL ANDERSON, et al.) 5 Plaintiffs,) 6 vs.) At Law Nos. 7 PULTE HOMES CORPORATION,) 183665, et al. 8 et al.,) 9 Defendants.) 10 * * * * * 11 12 13 14 15 The above-entitled matter came on for 16 motion hearing, pursuant to notice, on Thursday, 17 September 28, 2000, commencing at 10:06 a.m., at 18 Fairfax County Circuit Court, Fairfax, Virginia, 19 before Stella R. Christian, Notary Public. 20 21 BEFORE: 22 THE HONORABLE R. TERRENCE NEY</p>	<p>1 APPEARANCES (continued): 2 3 ON BEHALF OF THE DEFENDANT PULTE HOMES: 4 BRIAN A. COLEMAN, ESQUIRE 5 Drinker, Biddle & Reath LLP 6 1500 K Street, N.W. 7 Suite 1100 8 Washington, D.C. 20005-1209 9 (202) 842-8800 10 11 ON BEHALF OF THE DEFENDANT PAREX: 12 TIMOTHY R. HUGHES, ESQUIRE 13 Hughes & Associates, LLC 14 307 Annandale Road 15 Suite 101 16 Falls Church, Virginia 22046 17 (703) 536-8233 18 19 20 21 22 (Appearances continued on the next page.)</p>
Page 2	Page 4
<p>1 A P P E A R A N C E S 2 3 ON BEHALF OF THE PLAINTIFFS: 4 DAVID HILTON WISE, ESQUIRE 5 Fullerton & Wise 6 4021 University Drive 7 Suite 204 8 Fairfax, Virginia 22030 9 (703) 934-6377 10 11 DANIEL K. BRYSON, ESQUIRE 12 Lewis & Roberts 13 1305 Navaho Drive 14 Suite 400 15 Raleigh, North Carolina 27609-7482 16 (919) 981-0191 17 18 19 20 21 22 (Appearances continued on the next page.)</p>	<p>1 APPEARANCES (continued): 2 3 ON BEHALF OF THE DEFENDANT CORONADO: 4 ROBERT R. SPARKS, JR. ESQUIRE 5 Herge, Sparks & Christopher, LLP 6 Suite 360 7 6862 Elm Street 8 McLean, Virginia 22101 9 (703) 848-4700 10 11 ON BEHALF OF THE DEFENDANT CSS: 12 HEATHER DEANE, ESQUIRE 13 Gilberg & Kiernan 14 1250 I Street, N.W. 15 Washington, D.C. 20005 16 (202) 712-7000 17 18 19 20 21 22 (Appearances continued on the next page.)</p>

<p style="text-align: right;">Page 5</p> <p>1 APPEARANCES (continued):</p> <p>2</p> <p>3 ON BEHALF OF THE CROSS-DEFENDANT AMERICAN EIFS:</p> <p>4 RALPH D. RINALDI, ESQUIRE</p> <p>5 Cowles, Rinaldi, Judkins & Korjus, Ltd.</p> <p>6 Suite 204, Courthouse Square</p> <p>7 10521 Judicial Drive</p> <p>8 Fairfax, Virginia 22030</p> <p>9 (703) 385-9060</p> <p>10</p> <p>11 ON BEHALF OF THE CROSS-DEFENDANT AMERICAN STUCCO:</p> <p>12 DAVID P. CORRIGAN, ESQUIRE</p> <p>13 Harman, Claytor, Corrigan & Wellman, P.C.</p> <p>14 Innsbrook Corporate Center</p> <p>15 Waterfront Plaza, Suite 200</p> <p>16 4401 Waterfront Drive</p> <p>17 Glen Allen, Virginia 23060</p> <p>18 (804) 747-5200</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p style="text-align: right;">Page 7</p> <p>1 manufacturer of Parex.</p> <p>2 Pulte has filed cross-claims against</p> <p>3 Parex, as well as Coronado -- I am sorry, as well</p> <p>4 as CSS, as well as third-party motions for judgment</p> <p>5 against the other applicator, Coronado's two</p> <p>6 suppliers, which I will be referring to as American</p> <p>7 EIFS and American Stucco. Their names are actually</p> <p>8 a little bit longer than that.</p> <p>9 Finally, against two principals, father</p> <p>10 and son, Bernard and Benjamin Franks. We allege,</p> <p>11 in any event, that they have some relations with</p> <p>12 both applicators as well as both suppliers.</p> <p>13 We will proceed in whatever manner,</p> <p>14 obviously, suits you. What I would propose,</p> <p>15 perhaps, if we start first with the demurs and</p> <p>16 pleas to the amended judgment; and in that regard,</p> <p>17 I can go ahead.</p> <p>18 What I thought, I would take it -- take it</p> <p>19 on a count-by-count basis. In other words, there</p> <p>20 are eight counts alleged by Pulte, go through each</p> <p>21 of them, essentially, summarize my arguments</p> <p>22 including both demurs and plea arguments.</p>
<p style="text-align: right;">Page 6</p> <p>1 PROCEEDINGS</p> <p>2 - - - - -</p> <p>3 THE COURT: In the matter of Paul Anderson</p> <p>4 versus Pulte Homes.</p> <p>5 MR. COLEMAN: Again, just by way of</p> <p>6 orientation, if I may, Your Honor, just to set up</p> <p>7 where all the parties are and exactly what's before</p> <p>8 this Court, there are quite a number of things --</p> <p>9 again, I am Brian Coleman on behalf of Pulte Homes</p> <p>10 Corporation.</p> <p>11 Pulte Homes is both a defendant and</p> <p>12 cross-complainant in this matter. There are, what</p> <p>13 I would describe as, two sets of matters before the</p> <p>14 Court here today.</p> <p>15 First, demur and pleas in bar in</p> <p>16 connection with the amended motion for judgment</p> <p>17 filed by the plaintiffs in this matter.</p> <p>18 The direct defendants in the amended</p> <p>19 motion or judgment are Pulte, the builder of the</p> <p>20 homes, as well as two applicators: Coronado</p> <p>21 Corporation and Coronado Stucco & Stone or CSS.</p> <p>22 And finally, the manufacturer -- or alleged</p>	<p style="text-align: right;">Page 8</p> <p>1 THE COURT: Okay. I think that would be</p> <p>2 most sufficient. Then I will hear from --</p> <p>3 actually, why don't we have Pulte's arguments,</p> <p>4 response; Parex and then your arguments, response;</p> <p>5 and then, I guess, Coronado and CSS. That would be</p> <p>6 the correct responses and we can keep the arguments</p> <p>7 fairly tight. We been through the memoranda.</p> <p>8 MR. COLEMAN: Appreciate it, Your Honor.</p> <p>9 THE COURT: Everything else, it's a lot of</p> <p>10 stuff.</p> <p>11 MR. COLEMAN: I will attempt to keep it</p> <p>12 brief then. First count that I would like to</p> <p>13 address is negligence, per se. I am going to</p> <p>14 essentially address them in the way they are</p> <p>15 addressed in the amended motion of judgment. We</p> <p>16 have essentially four arguments we contend, four</p> <p>17 independent grounds upon which the demur to this</p> <p>18 count should be sustained -- or I should say three</p> <p>19 demur counts, and plea in bar should also be</p> <p>20 sustained with respect to all 15.</p> <p>21 First, with respect to our first demur</p> <p>22 argument, there is a disclaimer of liability for</p>

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<p>1 the negligence count in the contract of sale; and 2 it specifically disclaims to, "disclaims all 3 liability" whether in contract, in tort, under any 4 warranty or otherwise. 5 THE COURT: Is the contract before me? 6 Was that a statutory -- 7 MR. COLEMAN: The contract is before Your 8 Honor by consent. 9 THE COURT: No. 10 MR. WISE: There is a contract attached. 11 What Pulte is relying on is a Pulte Protection Plan 12 which they tried on several occasions to attach. 13 One of the reasons Judge Williams originally denied 14 their first demur, they tried to do a new matter. 15 Denied again. They tried to carve it over. We had 16 a ruling on that. 17 The argument that he is relying on is 18 really more suited for motion for summary judgment, 19 not on demur, Your Honor. 20 THE COURT: That's what I thought. I 21 thought we are using the -- not exactly the 22 acronym, D-P-P for the warranty?</p>	<p>1 under the contract and that liability is limited to 2 the warranty, whatever it may say. So in that 3 respect I am relying exclusively on the sales 4 contract. 5 The second point I would like to raise -- 6 there are other arguments I will be raising today, 7 which are dependent to some extent on the language 8 in the PPP and, in that respect, there has been 9 some back and forth on this issue. I won't belabor 10 the point. I would submit that the fact that we 11 attached the PPP to our demur ought to be 12 sufficient to make it part of the pleadings. 13 THE COURT: I mean, it may be somewhere, 14 but not under -- 15 MR. COLEMAN: I can cite Your Honor to a 16 case that stands for that very proposition. 17 THE COURT: Okay. Let me hear that case. 18 MR. COLEMAN: Sure. It's -- 19 THE COURT: Supreme Court of Virginia? 20 MR. COLEMAN: It's a Circuit Court case. 21 THE COURT: No. From which circuit? 22 MR. COLEMAN: Rockingham County.</p>
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<p>1 MR. COLEMAN: Correct, Your Honor. 2 THE COURT: That is not before me. I 3 really can't look to it in order to address issues 4 of waiver for abrogation of liability, et cetera. 5 MR. COLEMAN: I would respond to the Court 6 in two matters. First, with respect to this 7 specific argument, the negligence per se argument, 8 distinguishing between the agreement for sale; that 9 is, the purchase agreement on one hand, and the 10 PPP, if you will, on the other hand. There is -- 11 the language in the count is, by itself, 12 sufficient, I believe, for this Court to resolve 13 the issue. 14 The language I am relying on is "no 15 liability whether in tort or contract, any 16 warranties or otherwise is in the contract." 17 Now, that language goes on to say that 18 liability is limited to that which is provided in 19 the warranty, but whether or not it's part of the 20 record, it would seem to me that the Court -- what 21 I would hope the Court's ruling would be is that -- 22 is that it's correct, that there is no liability</p>	<p>1 THE COURT: No. With all great respect 2 for the Circuit Court of Rockingham County -- well, 3 I will read the case. I take it back. I will read 4 the case, take a look at it. 5 I believe that on demur, we can only -- we 6 have to -- we can only look at the pleadings relied 7 upon by the plaintiff or the complainant and not as 8 to any other exhibits furnished by any other period 9 unless otherwise agreed to. 10 I will be happy to look at that opinion, 11 but I don't believe that that's the -- I don't 12 believe that the Supreme Court of Virginia has yet 13 permitted us to view the exhibits which are 14 attached to pleadings other than the moving parties 15 for purposes of demur, but I will read it. 16 MR. COLEMAN: I won't belabor the point 17 then. 18 THE COURT: Yes, sir. 19 MR. COLEMAN: Again, with respect to my 20 first point on that, the language I am taking is 21 from the sales contract right here. Under an 22 agreement that our liability, whether in contract</p>

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1 or tort, under any warranty or otherwise is limited
2 to the agreement in the limited warranty. The
3 limited warranty being, of course, the PPP. And we
4 have cited a number of cases which demonstrate that
5 waivers of this nature are effective.

6 I would submit that the warranty need not
7 be part of the record for the Court simply to rule
8 that there is no liability and negligence based on
9 the contract which one has -- by consent order, has
10 agreed is, in fact, part of the record.

11 THE COURT: But Mr. Wise is quarreling
12 with you. He is saying that's not before it right
13 now, and if I -- is Mr. Wise going to tell me if I
14 take a look at the Pulte Protection Plan, it could
15 possibly say we guarantee you against everything,
16 no matter what it is? And I don't have that,
17 obviously.

18 MR. COLEMAN: If that were the case, that
19 would be a remedy under the warranty.

20 THE COURT: Right. What I am saying, I
21 have blinders on. I can't see it to see -- what
22 you are telling me, Mr. Coleman, is that it closes

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1 all these doors for what Mr. Wise might tell me. I
2 don't know. May actually open all these doors. I
3 just don't have the benefit of the warranty, and I
4 think it would certainly short-circuit things if I
5 did, but I don't.

6 That's the way we are required to decide
7 these cases, namely, on a pleading, on a demur. So
8 I understand your argument. I don't know how -- if
9 I'm not able to look at the PPP, I can't decide
10 what's covered and not covered, okay.

11 MR. COLEMAN: Okay. The next point I like
12 to raise, I refer to it in the brief. The rule is
13 not initially set forth. It's set forth in the
14 case of Foreign Mission Board vs. Wade, 242
15 Va. 234, the most recent case on this subject being
16 the McDevitt Street, Bogust case, 256 Va. 553.

17 This is an issue particular to Pulte, as
18 opposed to some of the other direct defendants in
19 this case. The issue is really in what -- under
20 what circumstances a plaintiff can allege both a
21 negligence and a breach of contract cause of
22 action.

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1 Now, there are counts -- there are some
2 circumstances under which it can be done, but it
3 cannot be done in circumstances where the duty
4 alleged to have been violated in the tort
5 essentially arises out of the contract as a duty
6 existing by virtue of the contract.

7 THE COURT: Right. You are not making
8 this argument with regard to the negligence per se
9 issue, are you?

10 MR. COLEMAN: I am, Your Honor.

11 THE COURT: Aren't these cases in
12 opposite -- weren't those cases in an effort to
13 carve a new tort out of an agreement; whereas, in
14 the matter of Richmond Redevelopment against
15 McDevitt for each of the contracts, does not amount
16 to a tort, whereas the tort alleged here is
17 standing alone? In other words, not growing out of
18 the contract, carved out of the contract, but
19 consists rather of allegations that the defendant
20 Pulte failed to comply with, indeed, a second
21 requirement; namely, the local code or the
22 requirements for safe construction, and that's what

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1 negligence says, per se?

2 MR. COLEMAN: That is what negligence
3 per se certainly is, Your Honor, but that duty
4 would not exist absent this particular breach of
5 contract count. If Pulte hadn't contracted to
6 build this house, then they wouldn't have a
7 negligence per se allegation.

8 And I would refer the Court to the
9 allegations in the amended motion for judgment.

10 And I believe all 15 say this. The opening
11 paragraph of the breach of contract count, the
12 contracts between plaintiff and Pulte required
13 Pulte to construct a house in accordance with its
14 plans and specifications, applicable business code,
15 manufacturer's specifications, free from
16 construction and structural defects.

17 They've specifically alleged that this
18 contract required Pulte to construct a house in
19 accordance with applicable building codes.

20 THE COURT: Right.

21 MR. COLEMAN: Now, they are essentially
22 seeking to allege what amounts to a breach of

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1 construction contract, that negligence per se
2 contract. This is precisely what Judge Thacher
3 ruled in one of the Toll Brothers cases. This is
4 the Blandchut case, 48 Va. Circuit, 386.
5 Plaintiff alleged negligence per se; defendants are
6 correct in citing the rule.
7 Foreign Mission Board, in this case -- for
8 full disclosure -- the court went on to overrule
9 that demur, but for specific reason that the remedy
10 sought was -- it was a rescission remedy. And the
11 court reasoned that if the contract is rescinded,
12 then it no longer -- a tort duty no longer arises
13 out of the contract.
14 This is not the case here. They are out
15 legal damages. I believe this is right on point.
16 This is precisely what this tort -- what this rule
17 is designed to cover, especially in virtue of the
18 manner in which they pled their amended motion?
19 THE COURT: I understand your argument.
20 MR. COLEMAN: Third point I would like to
21 raise, I am going to, I think, hold off for the
22 time being if I may on it. I have also demurred in

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1 the specific allegations of -- of violations of the
2 building code, and I can go through that with, Your
3 Honor now.
4 This is on page 3 of our opening brief,
5 but that would be fairly extensive, and I am
6 certainly prepared to do that if need be.
7 THE COURT: That I don't think is
8 necessary. I want to move on to the express
9 warranty claim.
10 MR. COLEMAN: Okay.
11 If I may briefly inquire, would you like
12 me to address the plea in bar negligence issue as
13 well or hold off on that?
14 THE COURT: May as well do the plea in
15 bar.
16 MR. COLEMAN: We contend there is a
17 two-year statute of limitations applicable to this
18 negligence per se count and, in that respect, that
19 would effectively knock out all but three of these
20 cases. And that's only if you use the date of the
21 agreement, as I think Parex will tell you later on
22 today, they brought with them the certificate of

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1 occupancy dates which are actually a little bit
2 earlier which strikes me as the more appropriate
3 date to use. Even by using the earlier date,
4 knocks out the remaining three.
5 As to the remaining three, all three of
6 those have a contract in the sales contract that
7 specifically provides for a one-year statute of
8 limitations, and all three of those cases would,
9 therefore, be barred under that one-year statute of
10 limitations. So, effectively, all 15 of these are
11 out of time.
12 THE COURT: Where is that found in the
13 contract?
14 MR. COLEMAN: This -- again, there is only
15 four of the 15 contracts that have this language,
16 but this is depending on which contract -- which
17 contract Your Honor has. I can walk one up if you
18 don't, but it's --
19 THE COURT: I have got Hawxhurst, Michael
20 Malchow --
21 MR. COLEMAN: I don't believe that that's
22 one of them. I could be mistaken. It's Anderson,

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1 Berger, Jarmas and, I believe, Weaver.
2 THE COURT: That has the one-year?
3 MR. COLEMAN: That has the one-year. If
4 it would be easier, I can walk up one of those
5 contracts to Your Honor.
6 THE COURT: All right.
7 MR. COLEMAN: Your Honor, you will see in
8 the enlarged bold case capitalized language in the
9 very last sentence.
10 THE COURT: Okay. Which four of those
11 four? Which contracts are they?
12 MR. COLEMAN: Yes, sir, Your Honor. I
13 want to make sure I get this exactly right.
14 Anderson, Berger, Jarmas and Weaver. I can give
15 you the law numbers for those as well.
16 THE DEFENDANT: That's okay.
17 MR. COLEMAN: We have cited several cases
18 which hold that the statute of limitations is
19 enforceable even in fraud counts.
20 THE COURT: Okay.
21 MR. COLEMAN: Shall I move on to express
22 warranty?

Page 21

Page 23

1 THE COURT: Yes, sir.

2 MR. COLEMAN: Our first contention when we
3 were in this Court before Judge Williams on a
4 motion craving oyer. We craved oyer for the
5 protection plans -- for reasons which are now
6 obvious to the Court -- and counsel for plaintiffs
7 expressly disclaimed any reliance on the Pulte
8 Protection Plan and stated before the Court that
9 they were not relying on the Pulte Protection Plan.

10 Now, based on that and the fact that the
11 breach of warranty count as alleged in the amended
12 motion relies solely upon the Pulte Protection
13 Plan, we submit that this count has been waived.

14 THE COURT: Where is the arbitration
15 provision?

16 MR. COLEMAN: The arbitration provision, I
17 believe, it's in both the warranty -- actually, let
18 me take that out. It's in all 15 of the
19 warranties, and it's in four of the contracts. The
20 same four which I call to Your Honor's attention.

21 THE COURT: When you say "the warranty,"
22 you mean the PPP?

1 express warranty and proceeds to recite the terms
2 of that. I don't think that there is anything left
3 of this count.

4 THE COURT: Okay.

5 MR. COLEMAN: If I may move on to breach
6 of implied warranty.

7 THE COURT: Yes, sir.

8 MR. COLEMAN: Again, we have an issue with
9 respect to the fact that we have 11 purchase
10 agreements of one nature and four of another
11 nature.

12 Judge Williams essentially ruled at the
13 previous hearing, or the initial demurs and pleas,
14 that the implied warranty disclaimer were effective
15 with respect to those four, the four which I
16 referenced Your Honor briefly, Anderson, Berger,
17 Jarmas and Weaver. We withdraw our demur as to the
18 other four. I would like to place it before your
19 Honor today. It raises, I think, an interesting
20 issue of statutory construction.

21 If I may take a moment to pull the
22 statute.

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1 MR. COLEMAN: Yes.

2 THE COURT: So it's not in any of the
3 contracts?

4 MR. COLEMAN: It's in four of the
5 contracts.

6 THE COURT: Anderson, Berger --

7 MR. COLEMAN: Yes, Your Honor.

8 THE COURT: So only those four would be
9 subject to arbitration.

10 MR. COLEMAN: Based on Your Honor's reason
11 that PPP --

12 THE COURT: We have to get to the PPP.

13 MR. COLEMAN: Correct. As to those four,
14 I would concede that, Your Honor, based on the
15 prior ruling -- and, again, we have three arguments
16 in the breach of warranty. Conceivably, two of
17 them based on the argument of the Pulte Protection
18 Plan. One, it waives all express warranties and
19 the arbitration language.

20 But, frankly, based on plaintiffs' prior
21 disclaimer, the fact that the breach of warranty
22 count specifically alleges that Pulte provided an

1 Here is our concern earlier the disclaimer
2 on page 2 of these 11 sales contracts conforms
3 precisely to the waiver disclaimer requirement of
4 section 55-70.1, subsection C, with one exception:
5 That warranty disclaimer subsection C provides that
6 the letters should be at least two points larger
7 than the other type in the contract.

8 I am not going to pull out a magnifying
9 glass. We have to concede that this language is
10 not two points larger than the other language. And
11 it's arguable that this subsection C is a
12 substantial compliance statute; and to the extent
13 that it is, I will submit that this is well
14 sufficient, but if we construe it according to its
15 strict language, a reading of subsection C
16 indicates that it applies only when the home is to
17 be sold as is.

18 That is what I will refer to as the
19 heightened disclaimer requirement. I call them
20 heighten because absent subsection C, certainly
21 under Virginia common law, the manner in which this
22 disclaimer -- these warranties have been disclaimed

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<p>1 would certainly be effective.</p> <p>2 But the heightened requirement of</p> <p>3 subsection C, to quote, it says, "If all warranties</p> <p>4 are waived or excluded, a contract must</p> <p>5 specifically set forth in capital letters which are</p> <p>6 at least two points larger than the other type in</p> <p>7 the contract that the dwelling is being sold as</p> <p>8 is."</p> <p>9 We are not waiving all warranties. We are</p> <p>10 providing them with a warranty -- a ten-year</p> <p>11 warranty at that. We are not selling this house as</p> <p>12 is, we are selling it with the warranty.</p> <p>13 So I would submit that the plan language</p> <p>14 of this -- of this subsection of the statute</p> <p>15 applies only in that set of circumstances.</p> <p>16 And from a common sense perspective, that</p> <p>17 makes sense that's affording the buyer the fewest</p> <p>18 options undertaking the greater risk, taking a</p> <p>19 house with nothing, with no protection. So</p> <p>20 presumably, the general assembly concluded that</p> <p>21 they ought to heighten the waiver requirements.</p> <p>22 That's just simply not the case here.</p>	<p>1 establish a maximum of a three year's period from</p> <p>2 the date of closing.</p> <p>3 That's assuming, taking the pleadings as</p> <p>4 they are, that notice is given on the very last</p> <p>5 day. I submit that if we had an evidentiary</p> <p>6 hearing on that, I think we would find that most,</p> <p>7 if not all, fall on that ground. But based purely</p> <p>8 on the plain language, I can list you five which</p> <p>9 are time barred in their face and those are</p> <p>10 plaintiffs Gang, Hawxhurst, Malchow, Rogers and</p> <p>11 Peckinpough.</p> <p>12 THE COURT: All right.</p> <p>13 MR. WISE: Excuse me. Just for the</p> <p>14 record, Peckinpough is the one that was settled and</p> <p>15 is not before the Court.</p> <p>16 MR. COLEMAN: I should say for the record,</p> <p>17 with respect to Peckinpough, there has been some</p> <p>18 conversation and agreement. I'm not aware of any</p> <p>19 signed agreement today. For the purpose of</p> <p>20 preserving Pulte's rights, we are not prepared to</p> <p>21 concede the issue.</p> <p>22 As of breach of contract, I go back to an</p>
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<p>1 What we have -- what we are left here with</p> <p>2 is a warranty in capital letters, bold face,</p> <p>3 specifically references section 55-70.1,</p> <p>4 specifically identifies the warranties being</p> <p>5 disclaimed and is conspicuous as defined in the</p> <p>6 Uniform Commercial Code.</p> <p>7 THE COURT: Okay.</p> <p>8 MR. COLEMAN: So I would submit that those</p> <p>9 waivers are effective as well.</p> <p>10 THE COURT: Breach of contract.</p> <p>11 MR. COLEMAN: As an aside, Your Honor, we</p> <p>12 also have a plea in bar with respect to the breach</p> <p>13 of implied warranties which applies to some but not</p> <p>14 others. I can go to that. Cut breach of contract,</p> <p>15 depending on your preference.</p> <p>16 THE COURT: Oh, you may mention plea in</p> <p>17 bar.</p> <p>18 MR. COLEMAN: Okay. The timing</p> <p>19 requirements of section 55-70.1 require that notice</p> <p>20 of a breach be given within one year, and that the</p> <p>21 suit, based on that, on the breach of that notice</p> <p>22 be brought within two years thereafter. That would</p>	<p>1 issue I raised earlier, whether or not we need to</p> <p>2 use the Pulte Protection Plan to rely on the</p> <p>3 disclaimer in the contract.</p> <p>4 Again, I would submit we don't, and refer</p> <p>5 to the language, we disclaim all liability in the</p> <p>6 contract, and that that language is enforceable</p> <p>7 under Virginia law.</p> <p>8 Secondly, refer the Court to a ten-day</p> <p>9 notice requirement set forth in the contract.</p> <p>10 Specifically, the notice requirement -- this is at</p> <p>11 pages 4 and 5, depending on which agreement of sale</p> <p>12 one has, it says, "In the event we have not</p> <p>13 complied with our obligations under this agreement,</p> <p>14 you will send us notice setting forth the default</p> <p>15 in detail. We will have ten days after receiving</p> <p>16 the notice within which to fulfill our</p> <p>17 obligations."</p> <p>18 I would cite the Cinder Burner case for</p> <p>19 the proposition there are conditions precedent to</p> <p>20 the contract that you must have alleged and prove</p> <p>21 performance of that pre-condition. That hasn't</p> <p>22 been alleged here, Your Honor.</p>

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1 And, finally, since the agreement of sale
2 is part of the contract, I submit that it is, on
3 its face, insufficient to sustain a breach of
4 contract count. The grounds for breach of contract
5 is set forth in each of the amended motions for
6 judgment that Pulte, quote, failed to perform the
7 necessary remedial activities to correct a defect
8 in plaintiffs' house. I go through the contract,
9 can't find anything that submits that there is an
10 obligation of anything of that nature.

11 Finally, referring on to the fraud counts,
12 plural, both actual and constructive fraud --

13 THE COURT: Yes.

14 MR. COLEMAN: -- I first rely on the -- I
15 will refer to the no oral representation clause of
16 the sales contract. This is on the last page of
17 the entire agreement slash oral representations,
18 and it says -- I won't read the whole thing.
19 Actually, fairly lengthy. "By signing this
20 agreement, you are alleging you are not relying on
21 any promises, agreements or representations made by
22 us, our sales representative, agent, subcontractor

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1 or other employee concerning the home." And
2 it's -- actually, I won't read all of this into the
3 record. It's fairly extensive.

4 Now, I believe Virginia law is that you
5 can't contractually disclaim fraud. That's not
6 what we are arguing. But what we are arguing is
7 that under Virginia law if there is a disclaimer,
8 which is specific to the type of representations
9 which the opposing party is relying upon, then it
10 is effective and cited a couple of cases for that
11 proposition. There is one which is fairly on
12 point. The Bank of Montreal case, the Fourth
13 Circuit case of 1999. And there is also a
14 subsection of the restatement of agency, which
15 stands for this proposition as well.

16 It does need to be specific to the type of
17 representations alleged, and it is allegations,
18 representations made by sales representatives, and
19 that's what these fraud counts are premised upon,
20 including other statements which would include
21 documents to the extent that they relied upon
22 those.

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1 THE COURT: Okay.

2 MR. COLEMAN: And, finally, I would call
3 the McDevitt Street Bogust case to Your Honor's
4 attention. I think you heard enough about it to be
5 familiar with it, and we submit that that case,
6 again, following up on the Foreign Missions Board
7 rule stands for the proposition where there is a
8 contract, even under some circumstances, fraud and
9 constructive fraud claims, can be barred to the
10 extent they arise out of the contract.

11 There is a fraud in the inducement section
12 as applies to actual fraud, as I read that case,
13 but even there, it appears from my reading of the
14 case that it construes it narrowly, that particular
15 exception applying only where the party did not
16 intend to fulfill its contractual duties at the
17 time it entered into the contract. I don't think
18 there has been any allegation to that effect here.

19 We also have a plea in bar as to just one
20 of them, plaintiff Gang. Gang specifically alleges
21 in his amended motion for judgment that on
22 April 1st and 8th, 1997 -- here, I am referring to

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1 page 9 of our opening brief -- inspections were
2 performed on his home which, "Indicated that the
3 synthetic stucco was installed improperly, that
4 excess moisture was entering the home."

5 As a result of this inspection, in
6 addition to reports to the media, plaintiff became
7 concerned that his house was and is experiencing
8 severe moisture intrusion problems, that being
9 April 1st and 8th, 1997, conceding the discovery
10 rule applies to fraud. That would make the -- both
11 the active and constructive count time barred
12 since, I believe, his motion for judgment was
13 originally filed in March of 2000. I may be
14 getting that date wrong. I do believe it's before
15 two years.

16 THE COURT: Yes.

17 MR. COLEMAN: Finally, I would like to
18 address VCPA, Virginia Consumer Protection Act, and
19 Pulte demurs on these counts was sustained the
20 first time around; and the order required the
21 claims to allege those counts with particularity.
22 As I look at the amended motion for judgment, it

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1 differs only in that it includes one sort of half
2 sentence clause where it cross-references other
3 paragraphs, and I would submit that that's
4 insufficient. More -- to the more substantively in
5 neither count did they rely on the defective
6 advertising statute, nor did they rely on any
7 misrepresentation in connection with the VCPA
8 count. I submit that reliances are required to
9 recover under both of those statutes. That seems
10 fairly self-evident to me.

11 And I would also submit that both of those
12 counts are fully time barred for the same reason
13 that the negligence per se counts are time barred;
14 and with that, I believe that 11 of the -- I am
15 sorry. 12 of the 15 were filed more than two years
16 after the date of the contract. And with respect
17 to the other three, they are subject to the one-
18 year statute of limitations.

19 THE COURT: Even if the time of discovery
20 date is used under the Consumer Protection Act or
21 deceptive advertising?

22 MR. COLEMAN: If the date --

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1 THE COURT: I know there is a conflict on
2 this one, but if the date of discovery is used, are
3 they not time-barred?

4 MR. COLEMAN: Based purely on the
5 pleadings, Your Honor, that would appear to be
6 true, except with respect to plaintiff Gang --
7 although, actually, I may be misspeaking, Your
8 Honor.

9 THE COURT: I think you are right about
10 that. Just a minute.

11 MR. COLEMAN: I would, Your Honor -- as I
12 am sure you are fully aware, there has been a
13 couple of different rulings in this regard. If
14 Your Honor's mind is made up on this, I won't waste
15 the Court's time. I argue very strongly that this
16 is -- that a date of injury rule ought to apply.

17 THE COURT: Well, my mind is not certainly
18 made up, Mr. Coleman. We are trying to, obviously,
19 be consistent, not only within the Circuit, but
20 within the three judges who have been assigned this
21 particular aspect of all of these cases.

22 And I know that there is a difference of

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1 opinion with regard to this, and it's not fully
2 resolved as yet, but I am leading toward the date
3 of discovery because it seems to me to make more
4 sense.

5 How can you have a clock ticking against
6 you when you don't know that something has
7 occurred? Probably is a simplistic explanation for
8 that reasoning as one would hear, but I still think
9 it's the more correct analysis.

10 MR. COLEMAN: Well, Your Honor, hear me
11 out.

12 THE COURT: Absolutely.

13 MR. COLEMAN: A slightly different
14 analysis applies to the VCPA and the 216 counts
15 because, one, the deceptive advertising statute is
16 silent, where the VCPA count identifies a statute
17 of limitations. Taking the VCPA count first -- I
18 kind of searched and researched this a few times,
19 and 59.1-207, if memory serves, that's the VCPA
20 section which says that the date of accrual of
21 section 8.01-230 shall apply.

22 Now, that is what I believe practitioners

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1 generally refer to as the date of injury statute.

2 THE COURT: Correct.

3 MR. COLEMAN: Now, I believe I do
4 understand how one can read that statute to get to
5 the constructive fraud, but it seems counter to the
6 plain language of the statute, as well as any
7 legislative intent. You have to go to 8.01-230,
8 read the general rule that the date of injury
9 applies, then go to the last clause, which lists
10 three or four statutory exceptions to that. Pick
11 out 832.09. Go there. Pick out subsection 1,
12 which happens to be fraud.

13 Seems to me when one interprets statutes
14 to the plain languages, as the Virginia Supreme
15 Court would have the courts do that, I can't
16 imagine why that statute would refer to 8.01-230 if
17 they didn't want the date of injury to apply. Why
18 wouldn't they have referred to 801 -- 8.01-239,
19 subsection 1? That, to me, based on the plain
20 language of the issue -- to me, ought to end the
21 inquiry.

22 If one concedes -- if one finds that it's

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1 not plain and that there is some measure of
2 ambiguity, we go to rules of construction. I would
3 refer the Court to a case of Lamps Unlimited vs.
4 Westminster Investing. This is -- oh, dear,
5 unfortunately, I have the lower court's decision
6 opinion on that with me.

7 If the Court will indulge me while I go
8 through this, I can briefly summarize the case. It
9 provides that there's specific canons of
10 construction that apply when dealing with -- when
11 construing statutes that govern statutes of
12 limitation.

13 I did find the case here, and the case
14 goes through and generally discusses Virginia's
15 policy favoring enforcement of statutes of
16 limitations and the policy benefits that are
17 gleaned from that.

18 THE COURT: Yes.

19 MR. COLEMAN: And if I quote from the
20 case, it says, "in light of the policy that
21 surrounds statutes of limitation, the bar of such
22 statutes shouldn't be lifted unless the legislature

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1 makes it unmistakably clear that such is to occur.
2 In a given case where there exist any doubt, it
3 should be resolved in favor of the operation of the
4 statute of limitations. Thus, courts are obligated
5 to enforce statutes of limitations strictly and to
6 construe any exception thereto narrowly."

7 THE COURT: That's not the issue here.
8 The issue is which statute, whether it be 149 or
9 240.

10 MR. COLEMAN: I know. This section
11 construes 8.01-230. Seems to me what we are
12 construing here is 59.1-207, and we are saying okay
13 this is a statute.

14 THE COURT: Yes.

15 MR. COLEMAN: If it's not clear from its
16 plain language, as I would argue, and it is
17 ambiguous, does that not take us into a rule that
18 has to be unmistakably clear? Does it not take us
19 into the rule that says, if there is any doubt, has
20 to be resolved in favor of the operation of the
21 statute of limitations, and that exceptions, as set
22 forth in the last line of 8.01-230, they should be

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1 construed narrowly?

2 I fully appreciate that there are
3 differences of opinion on this issue, and I would
4 also note that this is -- these cases are in a
5 particularly unusual posture, and that they were
6 before Judge Williams whose prior rulings on these
7 issues -- I don't know if he ruled on these VCPA
8 counts. I know he ruled on the 218 counts. I know
9 that a date of injury applies as to the Toll
10 Brothers cases.

11 THE COURT: Well, actually, I ruled on
12 them, these precise issues in a series of cases
13 some months ago, and I am trying to think which
14 ones they were. The Toll Brothers cases, and there
15 were 21 of them. And my analysis was that because
16 the statute specifically uses the word fraud and
17 misrepresentation, that will get you -- and you
18 have got to go step by step to 249, and 249 gets
19 you to the discovery rule, and that gets you to the
20 later date. That may not be correct, but that was
21 my analysis. I think Judge Thacher has followed
22 the same analysis and that's just the way I am

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1 leading on that, Mr. Coleman. Okay?

2 MR. COLEMAN: Okay. I appreciate Your
3 Honor hearing me out on that.

4 THE COURT: Oh, I am happy to.

5 MR. COLEMAN: I think that concludes my
6 argument.

7 THE COURT: Let me hear Mr. Wise. I
8 appreciate your argument. Very well briefed as
9 well.

10 MR. WISE: Thank you, Your Honor. Again,
11 Dave Wise for plaintiffs.

12 THE COURT: Yes, sir.

13 MR. WISE: We are here on behalf,
14 unfortunately, of 14 plaintiffs, not 15 today. I
15 have always been dealing with my settlement
16 discussions with Pulte with Jordan Samuel who, even
17 as recently as the first part of this week, we do
18 have a settlement with Peckinpough. That is not
19 before the court today.

20 THE COURT: That was communicated to us.
21 However the paperwork goes, if it falls through,
22 everything we rule will apply to Peckinpough.

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1 MR. COLEMAN: That is correct, Your Honor.
2 It appears that I am just loathed to concede
3 matters.

4 MR. WISE: Mr. Coleman is very tenacious,
5 trying to go through point by point by point. Your
6 Honor, as a way of background, if I can explain,
7 these 14 homes, 15 with Peckinpaugh -- all the
8 homes are in Nolty Wheaton Farms, and was developed
9 by two builders: Renaissance Housing Corporation
10 and Pulte. We also represent the Renaissance
11 neighbors.

12 Those demurs and special pleadings are the
13 same issues that Pulte is raising in here. Already
14 been fully briefed, fully argued by Judge Wooldrige
15 and, in fact, all of the same claims that we are
16 asserting against Pulte, even though they are
17 factually specific, are going to trial. The demurs
18 being overruled.

19 THE COURT: As to each and every count?

20 MR. WISE: As to each and every count.

21 THE COURT: What about the time bars?

22 MR. WISE: On the time bars, Your Honor, I

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1 also had the opportunity to argue a particular case
2 in the Dakovich vs. Renaissance.

3 THE COURT: I heard that before.

4 MR. WISE: We have been in front of you a
5 few times on that same issue. Renaissance had a
6 one-year statute of limitations in the contract
7 itself. And what Pulte is asking this Court to
8 do -- and I believe you had even said that the
9 clock is ticking and when you don't know, just
10 doesn't seem fair.

11 What we have here with Pulte, the clock
12 was ticking, but Pulte knew about the EIFS. That's
13 what we pled in the motion for summary judgment.
14 Pulte knew that EIFS was defective. Pulte knew
15 that EIFS was not stucco. Pulte knew that if we
16 sit tight, kind of lead our homeowners thinking
17 there is not a problem, they will not file an
18 action. That is exactly what they are trying to
19 do. That is a doctrine under equitable estoppel,
20 waiver of unclean hands. These are all issues of
21 affirmative defense they are raising an issue for
22 trial.

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1 I never conceded that we win. This is
2 something we are going to have to prove at trial to
3 show that Pulte cannot rely on those particular
4 statute of limitations.

5 Same arguments in Dakovich. Same issue
6 that we were prepared to put on in front of the
7 jury. And, in fact, it's the same argument, Your
8 Honor, that Judge Alden is hearing today in the
9 Toll Brothers because Pulte's counsel here were the
10 counsel in the Toll Brothers cases. And, in fact,
11 they went through these, and there was a decision
12 by Judge Thacher, which said that these issues are
13 not issues to be resolved at a demur.

14 You have to remember what is a standard on
15 a demur. You don't take inferences and put it on
16 their favor, inferences on our favor, because at
17 this point, we do not have the opportunity to go
18 through discovery and --

19 THE COURT: What about the time
20 considerations? What about the one-year statutes
21 for Anderson, Berger -- I can't remember -- Jarmas
22 and Weaver?

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1 MR. WISE: Again, the same thing. The
2 doctrine of equitable estoppel, can't do it by way
3 of demur. Were trying to get to it by way of a
4 special pleading. They asked for an evidentiary
5 hearing.

6 Your Honor, that's what the plaintiff
7 wants. We want a special hearing with the jury.
8 We want to be able to prove that the EIFS, not
9 stucco, that this EIFS was defective. What they
10 told my clients when they bought the homes, they
11 said, if you buy this, it's not the same problem
12 that they have down in North Carolina. We have
13 even had an expert from Pulte tell us that the
14 climate down in North Carolina is different than
15 here in Virginia.

16 THE COURT: Are you saying the one-year
17 limitation as to those four plaintiffs shouldn't be
18 enforced because Pulte knew what was going on and
19 it's --

20 MR. WISE: It's estopped.

21 THE COURT: -- it's estopped?

22 What case do you rely upon for that?

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1 MR. WISE: I believe it's in my original
2 brief.
3 THE COURT: Just slipped my mind.
4 MR. WISE: Give me a second. I can find
5 that.
6 THE COURT: Maybe your colleague can grab
7 it while --
8 MR. WISE: I will be happy to when I sit
9 down. I will give you that case. It's the same
10 decision I gave you in the Dakovich.
11 THE COURT: I can't think of it right now.
12 I don't have my Dakovich memorandum in front of me.
13 MR. WISE: Actually, there is a number.
14 THE COURT: I walked in the courtroom
15 without it. What about the two-year limitations
16 for negligence per se?
17 MR. WISE: Negligence statute of
18 limitation is five years, not two years, Your
19 Honor, and it's also the same thing that applies to
20 negligence per se. The Court is right that we are
21 not -- we have specifically pled a duty that arises
22 outside of the contract. A duty imposed by law by

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1 the building code. We have alleged specifically --
2 THE COURT: I understand that argument,
3 and we are all of one mind on that. We are either
4 all right or we are all wrong, but we think there
5 is sound authority for that argument. Going back
6 to the Spotsylvania County School Board, Seaboard
7 Surety, et al.
8 MR. WISE: Your Honor, the argument,
9 though, on the statute of limitations, again, if --
10 you cannot rule on a statute of limitations on a
11 demur. We have pled that. We have alleged all --
12 THE COURT: I understand that. What about
13 Mr. Gang?
14 MR. WISE: Unfortunately, I was not able
15 to bring all of my pleading files for all 14 cases.
16 I just called back to the office. Gang is
17 apparently a typo. The actual inspection report is
18 July 3rd, 1999. The suit was filed March 1st.
19 THE COURT: So it's not 1997?
20 MR. WISE: Correct. Even if it was, Your
21 Honor, the whole argument here is that in 1997
22 Pulte is still selling these homes. Renaissance is

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1 still selling these homes to homeowners in Northern
2 Virginia saying, This is better than brick. It
3 will last for -- it will last forever.
4 They knew consistently about the problem.
5 They consistently told the clients this is just
6 some small problem we have to patch here.
7 Come to know, Your Honor, you can't patch
8 a wall. Pretty soon, it's going to come through.
9 If you wait long enough, the statute of limitations
10 has run. You have no rights. Homeowner have a
11 half million dollars into a home and they have to
12 reclad their home.
13 At trial, if we ever get to put this on
14 trial, as Toll Brothers is doing down the hall --
15 THE COURT: Why wouldn't you?
16 MR. WISE: We are coming time and time
17 again for these motions to demur. I have to
18 applaud all counsel's efforts to exchanging
19 discovery back and forth. We still have yet to
20 look at Pulte documents, not because we haven't
21 asked for it. Every time, the plaintiff requires
22 an extra extension of time to answer discovery

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1 request. They put off Pulte's discovery of
2 documents. I would like to see those documents. I
3 certainly would like to see those documents before
4 there is some ruling what Pulte knew and didn't
5 know.
6 What we do know, CSS produced its contract
7 to us last summer. CSS' contract, they don't talk
8 about stucco. Their contract is EIFS, E-I-F-S.
9 There are a number of homeowners that didn't know
10 what EIFS was or stucco. Pulte didn't tell them we
11 are going to sell you fake stucco. They told them
12 we are going to sell you stucco. Some of these
13 homeowners really thought they were getting stucco
14 that's been around for years. Pulte never told
15 them that it was EIFS. They certainly knew when
16 they contracted with their subcontractor.
17 Finally, Your Honor, there is one point
18 they talk about an arbitration clause --
19 THE COURT: What's going to happen to
20 that? What that pops up is PPP final services.
21 MR. WISE: What he says, there is an
22 arbitration clause -- I think arbitration clause in

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<p>1 the Berger contract.</p> <p>2 THE COURT: Four contracts.</p> <p>3 MR. WISE: I -- Your Honor, I do happen to</p> <p>4 have Berger's contract.</p> <p>5 THE COURT: I don't think it's in the</p> <p>6 contract. I think it's in the PPP; is that</p> <p>7 correct?</p> <p>8 MR. COLEMAN: I will take a look at it</p> <p>9 here. If I misspoke, I apologize.</p> <p>10 THE COURT: I could be incorrect. I'm not</p> <p>11 certain.</p> <p>12 MR. WISE: At some point when it comes up,</p> <p>13 Your Honor, this is, you know, Pulte, it's the same</p> <p>14 thing. Jordan Samuel at the first motion, he</p> <p>15 advised us they are not going to rely on the</p> <p>16 arbitration clause. They want to litigate, want --</p> <p>17 want the benefit of discovery too. They want to</p> <p>18 bring in at least five other parties over there.</p> <p>19 They have taken benefit of the court's resources.</p> <p>20 They have waived the right to rely on the</p> <p>21 arbitration clause. There is cases out there --</p> <p>22 THE COURT: Why don't you turn it around</p>	<p>1 cases. Either consistently right, consistently</p> <p>2 wrong, but we are trying to be consistent in those</p> <p>3 cases, and -- and the negligence per se, we believe</p> <p>4 it's a valid claim. The demur is overruled.</p> <p>5 Express warranty, I think that the</p> <p>6 defendants make a good point, that simple</p> <p>7 conclusionary allegation, the conditions present</p> <p>8 have been satisfied, may very well be insufficient,</p> <p>9 but for demur, it's probably sufficient. That's</p> <p>10 overruled.</p> <p>11 As to implied warranty, breach of</p> <p>12 contract, demur overruled. Those counts may go on.</p> <p>13 Similarly, with regard to constructive</p> <p>14 fraud, demur overruled. Similarly, with regard to</p> <p>15 Virginia Consumer Protection Act and deceptive</p> <p>16 advertising act, demur is overruled. The exception</p> <p>17 of the counsel is noted.</p> <p>18 The statute of limitations as to plaintiff</p> <p>19 Gang is -- based upon the representation of</p> <p>20 counsel, it was a typographical error, is</p> <p>21 overruled.</p> <p>22 The plea in bar as to the two-year statute</p>
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<p>1 and arbitrate, take away all those outstanding</p> <p>2 lawyers sitting against the wall?</p> <p>3 MR. WISE: Your Honor --</p> <p>4 THE COURT: Get rid of all this discovery</p> <p>5 and paper, get right down to it?</p> <p>6 MR. WISE: Your Honor, I believe some of</p> <p>7 the issues -- first of all, some of the issues are</p> <p>8 beyond arbitration.</p> <p>9 THE COURT: I am --</p> <p>10 MR. WISE: I realize that. First, we</p> <p>11 would like to present it to the jury. We want the</p> <p>12 same opportunity that the Toll Brothers homeowners</p> <p>13 are having. And if there is a specific question</p> <p>14 you have, Your Honor, I have argued this --</p> <p>15 THE COURT: I really do understand all the</p> <p>16 issues and whatnot -- that's not necessarily true.</p> <p>17 I have considered all the issues, gone through all</p> <p>18 the memoranda very carefully and these arguments</p> <p>19 with regard to what, I will say, is the first of</p> <p>20 the demurs filed by Pulte.</p> <p>21 Again, the motions for judgment are</p> <p>22 similar to those that we have heard in numerous</p>	<p>1 asserted by the defendant for negligence per se is</p> <p>2 overruled. And do you have that -- oh, and as for</p> <p>3 deceptive advertising, it's the ruling of this</p> <p>4 Court that the discovery rule controls and that</p> <p>5 provides the later date. And the plea in bar is</p> <p>6 overruled.</p> <p>7 Do you have that case as to estoppel, as</p> <p>8 to the one-year statute?</p> <p>9 MR. WISE: I can get that. In fact, go to</p> <p>10 the next --</p> <p>11 THE COURT: You can do that. I think now</p> <p>12 I would like to hear the Parex demurs.</p> <p>13 MR. WISE: Thank you, Your Honor.</p> <p>14 MR. COLEMAN: Your Honor, may I make a</p> <p>15 brief inquiry?</p> <p>16 THE COURT: Yes, sir.</p> <p>17 MR. COLEMAN: With respect to the implied</p> <p>18 warranty disclaimer, is that overruled with respect</p> <p>19 to all 15, or just 11 through 15?</p> <p>20 THE COURT: No, to all 15.</p> <p>21 MR. COLEMAN: To all 15?</p> <p>22 THE COURT: Yes, sir.</p>

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1 MR. COLEMAN: And with respect to the
2 equitable estoppel issue, I didn't argue when I was
3 up here, and I won't --
4 THE COURT: Do you know the case?
5 MR. COLEMAN: I am, actually, candidly not
6 sure. If I may, I briefed this issue fairly
7 extensively in our reply brief. I will refer the
8 court to Boykins, B-O-Y-K-I-N-S, Corp., C-O-R-P,
9 which I believe definitively stands for the
10 proposition not enough to simply allege that one
11 was defrauded. You have to say -- you have to
12 specifically allege that you are -- that you are
13 induced into that. You were, specifically,
14 prevented from filing a cause of action in a timely
15 manner.
16 THE COURT: I am troubled by that. I want
17 to hear from Mr. Wise on that as to which case law.
18 It only applies to four plaintiffs; isn't that
19 correct, Anderson, Berger, Jarmas and Weaver?
20 MR. WISE: On which issue?
21 THE COURT: The one-year statute.
22 MR. COLEMAN: Perhaps I was talking about

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1 two different things. I was endeavoring to talk
2 about that equitable estoppel hadn't been pled to
3 any of them. That argument is equally applicable
4 to our one-year argument statute.
5 MR. WISE: Your Honor, the case you asked
6 for equitable estoppel, a number of cases all cited
7 on pages 18 and 19 in our original brief that was
8 filed in this case on April 24. The cites are
9 Berry vs. Donally, first of Virginia Code
10 section 8.11-229, subpart B-1 of Brown's; as well
11 as Berry vs. Donally, 781 Fed. 2d. 1040 at
12 page 1042.
13 THE COURT: I am sorry, what was the
14 citation?
15 MR. WISE: I can just hand it up if you
16 like.
17 At the bottom of the page. It was the
18 same issue, Your Honor, that was specifically ruled
19 on by Judge Hudson in Dakovich, and Judge
20 Wooldridge in the Renaissance cases -- at least the
21 cases I was involved in.
22 THE COURT: Okay. Thank you, Mr. Wise.

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1 All right. Mr. Hughes.
2 MR. HUGHES: Timothy Hughes for Parex.
3 Before we start, I guess, on the rulings we might
4 be able to save some time. I got some pleas in
5 bars that are similar to those filed by Pulte. I
6 might have a slightly different take on these
7 limitations arguments.
8 THE COURT: All right.
9 MR. HUGHES: On the negligence per se
10 statutes of limitation, is the Court applying the
11 two-year statute or five-year statute? I am
12 wondering what the grounds are. I might have some
13 responses on that.
14 THE COURT: Five years.
15 MR. HUGHES: I guess if the five-year
16 statute is deemed powerful by the Court, also going
17 to knock out -- our plea in bar argument is knocked
18 out. We note our objection for the record.
19 THE COURT: Your plea in bar as to
20 negligence per se?
21 MR. HUGHES: Correct.
22 THE COURT: You still have a demur?

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1 MR. HUGHES: Still have a demur.
2 THE COURT: The demur is sustained. You
3 need to get to the plea in bar.
4 MR. HUGHES: That's true as to the demur
5 and negligence per se. I stand in a different
6 position than Pulte did. Pulte is clearly the
7 builder, the developer, going out, pulling permits,
8 clearly under the building code responsibility
9 that's placed on the builder to construct the home
10 in accordance with the building codes. Unlike
11 them, a manufacturer is remote to the situation.
12 There are different building codes in
13 every state. There are different requirements in
14 every state. Essentially, the plaintiffs say, in
15 opposition to our demur, you have to test -- you
16 have to comply with everything, everywhere. The
17 key there is, does question of duty --
18 THE COURT: I think I misspoke. I think
19 we are applying the two-year statute on negligence
20 per se, not the five-year.
21 MR. HUGHES: Maybe we should finish with
22 the demur, then we will get on with the plea.

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1 The question of existence of duty is a
2 legal question now at the outset, doubled by the
3 negligence per se claim. I think this is the type
4 of claim that is going to eviscerate the economic
5 lost rules and construction project. I understand
6 the reason.

7 If you look at the Cinder Burner case,
8 there is some language that Justice Russer
9 indicated that no other duty is alleged that's
10 imposed by law, only looking at duties that have
11 been imposed by contract only, economic law. So
12 you have privity of contract.

13 The problem here is you open the door up
14 on a construction project, every single potential
15 contract duty opens up into the building code. The
16 in-contract rule is dead as to this argument
17 working as to manufacturer. A little different and
18 remote to the transaction, not even discussed in
19 the building code.

20 THE COURT: Let me hear you with regard to
21 the Virginia Consumer Protection Act. I think I
22 will hear from Mr. Wise on this. I think

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1 negligence per se, fraud and advertising and
2 deceptive advertising as to the manufacturer are
3 far stretched.

4 MR. HUGHES: I think they are very far
5 stretched.

6 THE COURT: I am leading toward sustaining
7 the demurs as to those three counts. I want to
8 hear from Mr. Wise on that first. I want to hear
9 from you on the Virginia Consumer Protection Act.

10 MR. HUGHES: Which aspects, Your Honor?

11 THE COURT: The demur aspect.

12 MR. HUGHES: I have to start from what's
13 alleged in the pleadings.

14 THE COURT: Okay.

15 MR. HUGHES: Obviously, take what's in the
16 pleadings as true, but if you go through the
17 pleadings in this case, almost most all of the
18 cases they were told it was stucco, thought it was
19 stucco, had no idea it was EIFS.

20 I think Mr. Wise just said most of these
21 people had no idea what EIFS is. If you start from
22 that issue, I don't see how you can get to fraud,

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1 constructive fraud or Consumer Protection Act. All
2 of those claims require misrepresentation.

3 These people didn't know what they were
4 getting, had never received brochures,
5 representation from Parex, had no idea what they
6 were getting on their house. How could there be a
7 misrepresentation under Virginia law?

8 Secondly, if they had never seen it, how
9 could they rely on it in this transaction?

10 Clearly, that knocks out fraud and constructive
11 fraud.

12 THE COURT: Okay. Go ahead.

13 MR. HUGHES: There is another layer of
14 this thing. You get into the false advertising,
15 Consumer Protection Act statute. The statute did
16 not say you have to have reliance. That's not an
17 express requirement. What they both say, the
18 damages have to result from the alleged improper
19 activity.

20 We contend that that language is saying it
21 has to result -- that the activity -- to me, there
22 has to be some kind of review of material, some

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1 kind of reliance upon that material. It has to fit
2 into the traditional fraud requirements of
3 reliance.

4 Now, on an additional note, Your Honor, I
5 have been scrambling kind of hard to find out
6 whether anybody ever ruled on the question of
7 whether these types of brochures can be fraud. And
8 if I could approach the bench or -- I have already
9 provided this case to Mr. Wise. This is a case now
10 in the second judicial circuit down in Virginia
11 Beach involving Stahl (phonetic).

12 The question dealt with a brochure that,
13 to me, had -- it's the same kind of representations
14 alleged there; maintenance goes on grade,
15 et cetera, et cetera.

16 This Court has found, though, those types
17 of allegations don't represent actionable fraud,
18 those statements of future promises, sales talks.
19 They're not a misrepresentation of an existing
20 fact.

21 Now, if we go through all of the 15 cases
22 that we have got before us the Berger, Burdin,

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1 Gang, Jarmas, Lincoln, Malchow and Weaver cases all
2 involve situations where the plaintiffs were told
3 they were getting stucco.

4 There are a couple -- in the Anderson
5 case, the plaintiff was told they were getting
6 high-cut stucco with diamond dust. No memos were
7 provided by Parex. No representation on their
8 reliance.

9 In the Jarmas case there is an indication
10 that they were told stucco. They were given data
11 sheets on EIFS after the closing. Because that's
12 after the closing, it can't be reliance.

13 In the Hawxhurst case, it was at the
14 settlement table before they signed the document.

15 Again, I don't see where there would be
16 any reliance with Colombi, Rogers and Rowen. There
17 was allegations they were given brochures, no
18 mention in the amended implied contracts in those
19 cases if they had gotten brochures.

20 The question is whether there can be
21 actionable fraud and misrepresentation based on
22 statements of future performance. And our argument

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1 is there is no misstatement of a pre-existing fact
2 like there would be in the state case. Instead,
3 the court shall follow what happened in Virginia
4 Beach as to Stahl.

5 So I think the Stahl argument apply to the
6 Consumer Protection Act of false advertising, as
7 would apply to fraud. You still need to prove a
8 misrepresentation because the damages have to
9 result from that allegedly improper activity, and
10 still have to prove reliance and same holding would
11 apply to those points as well.

12 THE COURT: Okay.

13 MR. HUGHES: There is one other waiver
14 they mentioned -- perhaps, where I was going on
15 constructive fraud -- the McDevitt Street cases
16 says the Supreme Court views that as negligent
17 misrepresentation. To have negligent
18 misrepresentation, you have to have a duty and
19 tort. To have a duty and tort under loss, you need
20 to have contract. Negligence has already been
21 dismissed in this case. I demur on the first
22 pleadings, and as a result, we think that that

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1 should be sustained as to constructive fraud, too,
2 because you can't show that there is a duty.

3 Would you like for me to go into the pleas
4 in bar?

5 THE COURT: I want to hear from Mr. Wise
6 with regard to Parex. Let me do that first. Thank
7 you, Mr. Hughes.

8 Yes, sir.

9 MR. WISE: Thank you, your Honor. As far
10 as a negligence per se, again, same argument
11 applies equally to Parex as it does to Pulte.

12 THE COURT: Isn't it completely different,
13 though? Parex selling a product to a
14 subcontractor, Pulte putting it into this house?
15 Isn't that different than someone building this
16 house?

17 Commonwealth of Virginia pursuant to these
18 statutes, virtually anyone that submits any product
19 used for any construction product in Virginia is
20 subject to a negligence per se for being violative
21 of the building code?

22 The answers is yes to my question, isn't

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1 it?

2 MR. WISE: It is yes if the manufacturer
3 is producing something that they know will not
4 comply with the building code, yes, Your Honor.
5 And I don't believe it's unfair to hold a
6 manufacturer to that standard because otherwise it
7 is the manufacturers who have known about this EIFS
8 problem, I think, since early 1980s. And they
9 knew.

10 And given the chance, again, to go to
11 trial we will be able to show that Parex knew about
12 this problem, yet failed to disclose it. They
13 misrepresented it, both the quality, the
14 characteristics, and specifically whether it was
15 free from defects.

16 THE COURT: Wasn't that misrepresentation,
17 if made, made to the subcontractor or perhaps to
18 Pulte, not to the ultimate consumer?

19 MR. WISE: We do have to be careful here,
20 Your Honor, because I represent a group. Everyone
21 is different.

22 THE COURT: Now, not a single one of them

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1 is going to say they had a conversation with
2 Mr. Parex.
3 MR. WISE: I don't believe that any of
4 them had a specific conversation with Parex. They
5 looked at the brochures. The brochures don't say
6 that Parex knew when they put those brochures
7 together, that if you place this synthetic stucco,
8 fake stucco -- Parex called it EIFS. They don't
9 call it stucco. They call it a synthetic stucco or
10 EIFS. Parex knew at the time they prepared those
11 pictures, all these, pretty, glossy pictures, they
12 knew at that time it may work if you put it on a
13 masonry wall.
14 If you put it on a wall with wood behind
15 it, it moves. Water is going to seep into it.
16 Where does that water go once it's trapped in
17 between the wall? It doesn't go anywhere, Your
18 Honor, slowly rotting out the structural frame.
19 THE COURT: I understand those
20 allegations. It's affecting the plaintiff directly
21 with the manufacturer.
22 MR. WISE: Your Honor, in Virginia the

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1 omission of a material fact is misrepresentation.
2 In essence, that really is what our claim against
3 Parex is all about. They knew that these
4 representations were false. They knew that their
5 system was defective, yet, they held it out as
6 being the best thing since sliced bread that can be
7 used for exterior sidings. And, again --
8 THE COURT: Isn't there a difference of
9 opinion whether it can be used more successfully in
10 North Carolina and Georgia and Virginia than New
11 Hampshire?
12 MR. WISE: Your Honor, with the weather we
13 are having here, no difference between the climate
14 in North Carolina and here.
15 THE COURT: This year.
16 MR. WISE: I suppose there is a difference
17 if we were in a desert where it doesn't rain.
18 THE COURT: Maybe that's what Parex was
19 thinking when they sold the product.
20 MR. WISE: Then they wouldn't have had a
21 representative up here in Virginia selling to
22 homeowners or Pulte or --

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1 THE COURT: Pulte may have a direct
2 memory, as do these homeowners, because they
3 weren't selling it to them.
4 MR. WISE: In Virginia, are we going to
5 hold manufacturers liable for misrepresentation
6 under the Virginia Consumer Protection Act? We do
7 have a direct cause -- under the deceptive
8 advertising, we do have a direct cause of action in
9 fraud. They have a misrepresentation in omitting
10 their key knowledge about how this system would
11 work on residential wood construction homes.
12 And if you -- there is talk about a case
13 down in Virginia Beach, my co-counsel Dan Bryson
14 had a decision down there. I don't know if the
15 Court would allow him to briefly touch on the
16 deceptive advertising section statute.
17 THE COURT: Sure. Different admission
18 than in the McCanty case?
19 MR. WISE: Yes.
20 MR. BRYSON: Very briefly.
21 THE COURT: You might address Winchester
22 Homes as well. That was relied on in the McCanty

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1 case stating this product goes into a house, not
2 the type of product would ordinarily be expected.
3 MR. BRYSON: Your Honor, certainly,
4 deceptive advertising, quite simply -- be happy to
5 submit that order to the court -- Judge Leaf down
6 in Virginia Beach overruled the demurs of
7 advertising under the Deceptive Advertising Act.
8 I believe the statute says the advertising
9 can be direct or indirect. The issue becomes what
10 is an indirect advertisement that our clients would
11 have relied upon about which they can maintain a
12 Deceptive Advertising Act.
13 Of course, our argument would be that
14 Parex had a lot of material that they gave to
15 people in the building industry who relied upon it
16 themselves. They incorporated it into their sales
17 documents about it being low maintenance, better
18 than brick, super duper. Then they sold the house
19 to, say, our clients, such that we do have their
20 indirect reliance upon their sales documents.
21 That's what the Deceptive Advertising Act says.
22 And, again, this is what Judge Leaf talks

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1 about in his decision. Quite frankly, he sustains
2 enough demurs about some of the Dryvits --

3 THE COURT: Do you have a copy of that?

4 MR. BRYSON: It's a 20-page decision. I
5 don't have it with me, Your Honor. I can call my
6 office when we get a break. I can have them fax it
7 to you if Your Honor would like it.

8 With regard to the Winchester case, Judge,
9 we think there is a huge difference between the
10 Winchester case and these cases. In Winchester,
11 you have fire-retardant firewood which was
12 incorporated into the house. It was a piece of
13 plywood that was put in the house, a building
14 component. The manufacturer made that piece of
15 plywood.

16 Basically here, the builder nails it up,
17 synthetic stucco, Your Honor, in EIFS -- EIFS,
18 E-I-F-S, stands for exterior insulation and finish
19 system. It's a much different thing. It's a wall
20 cladding system. It's a much more different
21 component.

22 For example, there are extensive

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1 maintenance requirements that the manufacturer has
2 on how to maintain these systems that these
3 homeowners must do periodically. Check the
4 caulking -- there is all kinds of things. I could
5 bore the Court for hours about the maintenance
6 requirements for synthetic stucco.

7 They are brawled in detailed
8 specifications on how you put up EIFS and all the
9 various components of EIFS. How you put in the
10 integrated flashing and caulking components. These
11 systematic flashing of EIFS, and our clients having
12 to do maintenance, the building specifications, how
13 to put it up make it completely different than
14 Winchester homes where you have a piece of plywood.

15 That's what makes a Consumer Protection
16 Act claim viable, we think, against the
17 manufacturer, and that's what makes it different
18 from Winchester Homes. As I understand, that's
19 what Judge Wooldridge, I think, in seeking
20 consistency, Judge, overruled cynicism in that
21 regard.

22 THE COURT: Deceptive advertising; is that

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1 correct?

2 MR. BRYSON: I think deceptive advertising
3 was overruled as well. I'm not positive. I think.

4 MR. WISE: Yes.

5 MR. BRYSON: Seeking consistency with
6 Judge Wooldridge, the motion of negligence per se,
7 you heard our argument. I think the Court
8 disagrees with us on that. He overruled the fraud
9 claim. We went back, added in a lot more
10 allegations as to the fraud, and I do think the
11 fraud is a tougher claim for us to prove than the
12 deceptive advertising, than the Consumer Protection
13 Act. Fraud is fraud. You got to prove this intent
14 to deceive. You get into fraud by omission, then
15 there is this duty has to be -- I won't lapse into
16 that.

17 THE COURT: Yes. No, I understand that.
18 I would like to see Judge Leaf's opinion. I would
19 like to compare it to Judge McCanty -- not Judge
20 McCanty, Judge Smackley's opinion in McCanty
21 against F-J Mart Designs.

22 MR. BRYSON: This decision, is this the

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1 one saying the brochures --

2 THE COURT: Well, it covers a number of
3 these issues. But Mr. Hughes in Parex are relying
4 upon it as to not only the fraud issues, but also
5 the Virginia Consumer Protection Act, I think, or
6 deceptive advertising or both.

7 MR. HUGHES: I think it touches on the
8 Consumer Protection Act, we talked about so far as
9 to the aspects of whether you can maintain fraud
10 based on the allegations in the brochure that are
11 very similar to the allegations in the memorandum.

12 MR. BRYSON: Certainly, our allegations
13 are much, much broader as to the fraud than just a
14 brochure. They are venomous, and also go to many
15 of the plaintiffs very specific allegations of
16 representation that were made in pamphlets,
17 brochures and various --

18 THE COURT: Maybe that will be sufficient
19 under the act, but I don't think it's sufficient
20 under either direct allegations of fraud,
21 constructive fraud. I understand your argument,
22 Mr. Bryson, and appreciate them.

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<p>1 The demur of Parex as to negligence</p> <p>2 per se, as to fraud, as to constructive fraud are</p> <p>3 sustained. With the exception of counsel for the</p> <p>4 plaintiffs have noted, the demur as to the Virginia</p> <p>5 Consumer Protection Act as to deceptive advertising</p> <p>6 are taken under advisement.</p> <p>7 I have to read McCanty against F-J Mart</p> <p>8 Designs, and the case to be submitted by Mr. Bryson</p> <p>9 from Judge Leaf, and I will have a decision on</p> <p>10 those two counts later this afternoon.</p> <p>11 MR. HUGHES: Your Honor, would you like to</p> <p>12 hear about the negligence per se limitations or not</p> <p>13 rule on that because --</p> <p>14 THE COURT: I don't really need to. I</p> <p>15 think it's done.</p> <p>16 MR. HUGHES: I think it's done. Always</p> <p>17 good to have a full a record as possible.</p> <p>18 THE COURT: Yes. Thank you, Mr. Hughes.</p> <p>19 MR. WISE: Your Honor, if I might clarify</p> <p>20 something. I had the opportunity -- I brought over</p> <p>21 the copy of the amended motion of judgment for</p> <p>22 Gang, and I wanted to make sure -- I believe I</p>	<p>1 client, Your Honor, and there was a home inspection</p> <p>2 done at the end of the year, and in 1997 it's not a</p> <p>3 problem.</p> <p>4 And that's what Pulte told us, and that's</p> <p>5 the whole reason why the equitable estoppel is not</p> <p>6 unfair. Wasn't until July 1999 that we find out</p> <p>7 everything Pulte is telling us all along just not</p> <p>8 right, not true. So he filed an action within six</p> <p>9 months thereafter or thereabouts; July 3rd I think</p> <p>10 this was filed in the amended motion for judgment.</p> <p>11 I believe is filed certainly within a year.</p> <p>12 Anyway, just wanted to clarify that for</p> <p>13 the record because I believe I said there is a</p> <p>14 simple typo. It's not. The analysis applied is</p> <p>15 the same.</p> <p>16 THE COURT: Okay.</p> <p>17 MR. WISE: Thank you.</p> <p>18 THE COURT: Thank you, Mr. Wise. With</p> <p>19 regard to the negligence per se, again, I didn't</p> <p>20 misspeak. I want to make sure it's clear, it's the</p> <p>21 two-year statute we are applying. I'm not getting</p> <p>22 to the issue of plea in bar because the demur has</p>
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<p>1 might have misspoke myself. I apologize.</p> <p>2 The allegations that he is referring to is</p> <p>3 in paragraph 17 which says, "In April of 1997,"</p> <p>4 which is what he was relying on, "a home</p> <p>5 inspection" -- part of the one-year home inspection</p> <p>6 for his home, a problem was discovered, but it</p> <p>7 wasn't until July 3rd in the same paragraph,</p> <p>8 "July 3rd of 1999," which was when there was</p> <p>9 another inspection performed again and everything</p> <p>10 that Pulte had told them from --</p> <p>11 THE COURT: That's when the people came</p> <p>12 out to the house?</p> <p>13 MR. WISE: Correct.</p> <p>14 THE COURT: Subcontractor as well from</p> <p>15 Coronado?</p> <p>16 MR. WISE: July 3, 1999 -- no, that was an</p> <p>17 inspector not associated with Coronado.</p> <p>18 THE COURT: I see.</p> <p>19 MR. WISE: My point is, I believe what I</p> <p>20 told you before about there was a typo, actually is</p> <p>21 not a typo. The allegations does say -- we tried</p> <p>22 to be as specific as we could for each particular</p>	<p>1 been sustained.</p> <p>2 MR. COLEMAN: I guess two matters. First,</p> <p>3 with respect to the clarification of the negligence</p> <p>4 per se issue, does that affect Your Honor's ruling</p> <p>5 in connection with Pulte plea in bar, and the</p> <p>6 negligence per se issue, the two-year statute of</p> <p>7 limitations applies?</p> <p>8 THE COURT: You know, you have to walk me</p> <p>9 through that. Are there some that fit within, some</p> <p>10 that fit without? Do they all fit without?</p> <p>11 MR. COLEMAN: Unless my count is off, I</p> <p>12 believe it's 12 of the 15 would all fall -- would</p> <p>13 all be barred if one applies a two-year statute of</p> <p>14 limitations, and the remaining three we submit</p> <p>15 would be barred under the statutory one-year</p> <p>16 statute of limitations.</p> <p>17 THE COURT: How is that?</p> <p>18 MR. WISE: No, Your Honor. The same</p> <p>19 argument. They can't rely on a statute of</p> <p>20 limitations on the demur stage.</p> <p>21 THE COURT: That's right.</p> <p>22 MR. COLEMAN: A plea.</p>

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1 THE COURT: No, no. This is a plea in
2 bar.

3 MR. WISE: Again, where is my jury? We
4 asked for a jury. Everything they bring up --

5 THE COURT: Were these suits filed more
6 than two years from the time the inspector made her
7 visit or his visit?

8 MR. WISE: No. The inspection was all
9 done last year, 1999. That's why we were hired,
10 you know, as soon as they found out everything they
11 been told all along just wasn't --

12 THE COURT: Haven't we been doing this
13 consistently when the inspector comes out?

14 MR. COLEMAN: Actually, Your Honor, I want
15 to make sure I get this clear on the record.

16 Concerning the Toll Brothers case, for
17 example, there have been no application of
18 discovery rule for negligence per se counts. I
19 understand counsel is asserting equitable estoppel.
20 I don't know if Your Honor has ruled on that or
21 taking it under advisement. In the Toll Brothers
22 cases, it was sustained based on -- I'm not sure if

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1 it was date of contract that was used or I think it
2 was date of purchase agreement of the contract.

3 In fact, I have a copy of Your Honor's
4 ruling here on that, if you like me to dig it up,
5 but it's based on -- I believe it's based on the
6 date of contract. Here, if we use the date of
7 certificate of occupancy, can walk through it
8 again? I believe it's 12 of 15.

9 THE COURT: Okay. I need to take a look
10 at that. I think Mr. Coleman is correct on that.
11 We did overrule the demurs on the Granny Cottage
12 case. The case turns out to be an opposite. I
13 think he is correct about that.

14 MR. COLEMAN: If, Your Honor, wishes I
15 have a copy, I believe, of the transcript where
16 Granny's Cottage was discussed.

17 THE COURT: On the second --

18 MR. COLEMAN: On the second go back.

19 THE COURT: No. I would like to see that.
20 I am going to take under advisement the plea in bar
21 as to negligence per se as to 12 of 15.

22 MR. COLEMAN: 12 of 15. On that issue, I

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1 also ask you take under advisement the remaining
2 13. Same analysis, except applying a one-year
3 statute of limitations.

4 THE COURT: Okay.

5 MR. COLEMAN: I would submit that that
6 same issue would apply equally to, number 1, the
7 implied warranty claims -- not as many. I think
8 it's about five. But perhaps, to my own, I am
9 trying to obtain some clarity with respect to the
10 Court's ruling on the equitable estoppel issue.

11 THE COURT: I want to take a look at those
12 cases. I need to take a look at Berry Bedford, T
13 against T, and section 8.01-229, subsection D, but
14 I'm not taking that under advisement but I am going
15 to take a look at those cases.

16 MR. HUGHES: Your Honor, just to make a
17 record here, I would like to note a couple of
18 issues.

19 THE COURT: I don't think Mr. Coleman is
20 finished yet.

21 MR. HUGHES: I am sorry.

22 MR. COLEMAN: Please, speak.

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1 MR. HUGHES: I might have a little bit
2 different take on negligence per se. I don't think
3 that cause of action relates to the original filing
4 date on these lawsuits. I think a new and
5 different cause of action, got a different source
6 of duties, got a different element of proof so that
7 it's not going to tie into the original negligence
8 counts which would mean that the statute of
9 limitations for negligence per se is going to keep
10 running until the date of the filing of the amended
11 motion for judgment which ties us into June 2000.

12 The question then is what's the accrual
13 date for this negligence per se claim? If you look
14 at the case law, the question is whether it
15 suffered injury, no matter how slight. I think if
16 you tie that back into the Winchester Home case,
17 you've got to run the certificate of occupancy.
18 That's when they got this defective material.

19 THE COURT: That's what we did. That's
20 what we did in the reconsideration under Granny's
21 Cottage. We said the violation of the code
22 occurred actually when the house was completed and

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<p>1 delivered.</p> <p>2 MR. HUGHES: If you tie into the</p> <p>3 certificate of occupancy dates, the point I am</p> <p>4 raising, new matters have to be given a chance to</p> <p>5 respond. If you even tie into the date the</p> <p>6 manufacturer is alleging foreclosing on every</p> <p>7 single one of these homes, that was more than two</p> <p>8 years out from June of 2000.</p> <p>9 If the two-year statute of limitations</p> <p>10 applied, all of the statute of limitations should</p> <p>11 be barred. The only question, whether these claims</p> <p>12 should be -- if time barred, whether the equitable</p> <p>13 estoppel is going to change the arguments.</p> <p>14 THE COURT: Why are you concerned about</p> <p>15 that, because of the cross-claim?</p> <p>16 MR. HUGHES: I am concerned of it for the</p> <p>17 cross-claim. I am also concerned to have a clear</p> <p>18 record on this issue. It's only the demur since</p> <p>19 going on an appeal. It's also going to create a</p> <p>20 limitations record for the plea.</p> <p>21 THE COURT: I appreciate that.</p> <p>22 MR. WISE: If I may, Your Honor,</p>	<p>1 THE COURT: It's Granny's Cottage,</p> <p>2 Incorporated, against Town of Occoquan, 352 S.E.</p> <p>3 2d. 10; 3 Va. Appeal 587, 1987. I don't think you</p> <p>4 are going to find it helpful.</p> <p>5 MR. WISE: Finally, it's the same thing.</p> <p>6 Equitable estoppel applies to that as well. Here,</p> <p>7 we have allegations Pulte knew about this problem.</p> <p>8 It will be unfair to allow the clock to tick.</p> <p>9 THE COURT: I am going to look at the</p> <p>10 equitable estoppel issue. I am taking under</p> <p>11 advisement the Virginia -- I am taking under</p> <p>12 advisement the negligence per se as to the two-year</p> <p>13 statute.</p> <p>14 Are we ready for third parties?</p> <p>15 MR. WISE: Plaintiffs are, Your Honor.</p> <p>16 THE COURT: Okay. Why don't we take a</p> <p>17 ten-minute recess.</p> <p>18 MR. WISE: Thank you.</p> <p>19 (A recess was taken.)</p> <p>20 THE COURT: Back on record.</p> <p>21 You are going to give me the portion of</p> <p>22 the transcript when you get a chance?</p>
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<p>1 specifically on that.</p> <p>2 THE COURT: Yes, sir.</p> <p>3 MR. WISE: The original motion of judgment</p> <p>4 alleged a violation of the building code. We were</p> <p>5 just required -- instead of calling our count</p> <p>6 negligence, we had to call it negligence per se.</p> <p>7 It included all the same factual allegations, but</p> <p>8 went through and added specific building code</p> <p>9 sections, so it really does relate back.</p> <p>10 As far as what the statute of limitations</p> <p>11 is, we still believe it's five years. I understand</p> <p>12 you have a different --</p> <p>13 THE COURT: There were two aspects to it.</p> <p>14 The first, which I was mainly incorrect, two years</p> <p>15 as opposed to five years -- I misspoke when I said</p> <p>16 five years. And the second is accrual, and</p> <p>17 Granny's Cottage was what we relied upon,</p> <p>18 initially, for the date the building inspector came</p> <p>19 out. That turned out to be an incorrect</p> <p>20 statement -- well, it's been changed.</p> <p>21 MR. WISE: I don't believe I have a copy</p> <p>22 of that particular case, if I could get that.</p>	<p>1 MR. COLEMAN: I have part of it here.</p> <p>2 THE COURT: Oh, great. That would be</p> <p>3 great.</p> <p>4 MR. WISE: Is this a case?</p> <p>5 THE COURT: Granny's Cottage.</p> <p>6 MR. WISE: If I could get a copy of it.</p> <p>7 MR. COLEMAN: Sure. Sure. If Your Honor</p> <p>8 is interested, I have the order from the earlier</p> <p>9 Toll Brothers cases. I think we are about to go to</p> <p>10 third party. I think we forgot Coronado.</p> <p>11 MR. WISE: Yes, Your Honor, if I may</p> <p>12 before we move to Coronado.</p> <p>13 THE COURT: Yes, sir.</p> <p>14 MR. WISE: I do not want to go backwards.</p> <p>15 I just want to make sure I put this on the record</p> <p>16 concerning the fraud allegations. Again, I am</p> <p>17 representing a whole group. What was represented</p> <p>18 to one was not necessarily what was represented to</p> <p>19 another and there were homeowners that were given</p> <p>20 brochures from Parex -- specific brochures from</p> <p>21 Parex that were glossy, pretty, that they relied on</p> <p>22 in making the decision to go with EIFS instead of</p>

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1 stucco or instead of brick.

2 By a show of hands, if I could, how many
3 of you homeowners saw articles specifically from
4 Parex?

5 See, Your Honor, there are some.

6 THE COURT: But out of those people that
7 raised their hands, who got those brochures from
8 Parex directly? Not one will come up.

9 MR. WISE: I don't know that, Your Honor.
10 Who comes up with these brochures? The brochures
11 themselves are what is false and misleading.

12 THE COURT: You may -- these individuals
13 may fall under the protection of the Virginia
14 Consumer Protection Act or deceptive advertising,
15 but as to the fraud claims, I just don't think -- I
16 just think it's too far -- well, I don't know

17 whether it will touch on that. I am going to read
18 the case Mr. Bryson has for me, Judge Leaf's case,
19 and I am also going to read the one from Judge
20 Smackley in the McCanty case. That's my ruling.

21 I guess from what you said, Judge
22 Wooldridge and I have parted paths.

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1 MR. WISE: That is Senergy. In the
2 Renaissance cases, four of the Senergy cases have
3 settled, two have not. The fraud have not. The
4 consumer protection have not. The unfair trade
5 practices is going to trial, I can't say as well.
6 We didn't have them in that case. I understand the
7 Court's ruling on it.

8 You know, if a manufacturer puts together
9 a nice, pretty, glossy, brochure and puts it on the
10 table for a perspective homeowner to purchase it, I
11 don't think that is right. And I think that that
12 meets the definition of fraud in Virginia.

13 THE COURT: I understand your argument.
14 This is a good car, going to run real well. And it
15 may not be such a good car. I understand your
16 position.

17 MR. WISE: Thank you, Your Honor.

18 THE COURT: All right. Let's hear from
19 Coronados.

20 MS. DEANE: Your Honor, Heather Deane on
21 behalf of CSS.

22 THE COURT: Yes.

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1 MS. DEANE: Mr. Sparks represents
2 Coronado. I come up with the simplest issue. All
3 that remains in the plaintiffs' case is a
4 negligence per se count against us. And as you may
5 have read in the brief I submitted to the Court on
6 behalf of CSS, our analysis to that is much more
7 elementary and simple than what's been discussed
8 this morning.

9 Based on the Court's ruling, my argument
10 in the Court, we are in a much similar position to
11 Parex. We are the applicator. We are the people
12 that put the stucco on. Pulte is the company
13 building this house, inspecting this house, turning
14 the house over to the consumers, in this case, the
15 plaintiffs.

16 We are in a much similar position to Parex
17 in that we are far removed from the final
18 inspection from making sure that everything in the
19 house complies with the building codes, and from
20 making representations to the plaintiffs based upon
21 those building codes, and based upon those
22 violations.

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1 Therefore, I would ask the Court to rule
2 similar as it did to Parex and sustain our demurs
3 with regard to negligence per se. There will still
4 be counts remaining to us with Pulte because Pulte
5 has third-party claims against us. That will take
6 us out of the case with the plaintiffs.

7 THE COURT: Thank you.

8 MR. SPARKS: Your Honor, may I be heard,
9 sir?

10 THE COURT: Yes, sir.

11 MR. SPARKS: Robert Sparks on behalf of
12 Coronado Corporation, which is alleged a
13 predecessor of CSS by Ms. Deane.

14 THE COURT: Yes, Mr. Sparks.

15 MR. SPARKS: As to 14 of the cases, we are
16 named in the plaintiffs' amended motion of judgment
17 on a single count of negligence per se. Our
18 argument echoes that of Ms. Deane: There is no
19 privity. On the 15th case, Your Honor, by
20 coincidence is the Peckinpugh case, about which we
21 have heard so much.

22 There are four counts alleged against

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1 Coronado Corporation in the Peckinpaugh case, three
2 of them found in tort: Negligence per se, fraud
3 and constructive fraud. As to those, we have
4 alleged absent privity that they may not be
5 properly pled or recovered because of the economic
6 lost rule.

7 The fourth count under the Virginia
8 Consumer Protection Act, we are alleging -- we are
9 not covered by. We are neither a supplier, nor is
10 the stucco product a consumer good.

11 Now, we pled all that. The other side has
12 not responded. In fairness, there is an awful lot
13 of paper. He may simply have overlooked it. He
14 may not care because Peckinpaugh has been settled.

15 THE COURT: Thank you, Mr. Sparks.
16 You want to address these issues?

17 MR. BRYSON: Very briefly. Not only has
18 the Court rendered some rulings on the negligence
19 per se, the only fear that the plaintiff has is to
20 go back to McCoy. It was a builder and
21 electrician. The house burned down. The homeowner
22 sued the builder and electrician. The result of

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1 the case was the builder was not held liable
2 because he was able to say that the electrician is
3 an independent contractor. I wasn't responsible
4 for how he did his work. He is an independent
5 contractor. I didn't have control over his
6 activities, et cetera, so forth.

7 The Court talked about that, then the
8 Court, pursuant to our reading, said that you can
9 have negligence per se claim against the
10 electrician.

11 This Court and Judge Wooldrige have agreed
12 with our ruling on that, but the concern, again, we
13 have is that if the applicator is let out of this
14 case, the first thing we hear from Pulte in trial
15 is the applicator is an independently trained
16 contractor of the manufacturer. They went to
17 manufacturing school to be trained how to put on
18 this stucco. We relied upon them to put it back.
19 They will argue -- we disagree. They will argue
20 that they fall precisely into this McCoy case.

21 What's going to happen is the Court is
22 going to have left the applicator out as to us,

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1 then that's the argument that we are going to hear.
2 Certainly, we don't have a dog and a fight. We
3 certainly don't think the applicator should be
4 allowed -- their demur should be sustained as to
5 Pulte.

6 THE COURT: What is the application in
7 McCoy?

8 MR. BRYSON: In McCoy -- we have it in our
9 brief, Your Honor, 294 S.E. 2d. 811.

10 THE COURT: Thank you, Mr. Bryson.

11 MR. WISE: Your Honor, just briefly.

12 Certainly, Judge Wooldrige has ruled
13 against us. I realize on this particular issue as
14 against the applicators; however, Jennings sitting
15 over in Alexandria, we had the same argument with
16 Coronado over there. He overruled the demur. I
17 guess, suffice it to say, it's undecided even in
18 Northern Virginia.

19 THE COURT: All right. The demurs of
20 Coronado and CSS with regard to negligence per se
21 fraud, constructive fraud and the Virginia Consumer
22 Protection Act are sustained. Exception of counsel

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1 of the plaintiffs is noted.

2 Okay. Now, the cross -- third-party
3 defendant actions. Yes, sir.

4 MR. HUGHES: Your Honor, if I might
5 propose that we might get through this portion
6 quickly. I think that they all pretty much got the
7 same argument. Maybe the third-party defendants,
8 cross-defendants can respond as one, and Pulte can
9 respond to the arguments raised then get it wrapped
10 up. I think we've got the same claim for Pulte.

11 THE COURT: Do you want to be heard on
12 these things?

13 MR. WISE: No. We are going to give them
14 our seat.

15 MR. BRYSON: You just heard that we
16 support Pulte's position in not letting the
17 applicator or other parties out of case.

18 THE COURT: Thank you, very much,
19 Mr. Bryson.

20 Thank you very much, Mr. Wise.

21 MR. WISE: Yes, Your Honor.

22 MR. HUGHES: From Pulte in this case, we

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1 got four separate claims: Breach of express
2 warranty, breach of implied warranty,
3 indemnification and contribution. Taking those in
4 order, as I try to figure out what this express
5 warranty is, we have actually craved over for the
6 warranty. The response we have gotten back, "We
7 don't really have a warranty. We think you are a
8 third-party beneficiary based on your agreement
9 with Coronado at the outset."

10 I understand that this is outside the
11 scope of the pleading, Your Honor, but there is no
12 purview to have Coronado.

13 The way that this works in practice is,
14 the contractor hires a sub, the sub purchases the
15 material from the suppliers, the supplier has an
16 agreement for distribution of the materials with
17 the manufacturer. So there is actually an
18 intervening element in the chain.

19 If you look through the pleadings as a
20 whole in this case, I think that's clear because it
21 brought in American EIFS Stone & Stucco and
22 American Stucco & Stone supplier. I hope I got

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1 those names right. They brought those in as the
2 supplier, distribution outside of these. There is
3 some question as to whether all of those entities
4 are separated. I don't think I am in a position to
5 say one way or the other. They're not my clients.
6 I can tell you our contract would be with the
7 supplier.

8 Now, where do we get this claim from? I
9 asked, okay, Where is the contract? They say we
10 are a third-party beneficiary, but they never seen
11 the contract. They can't produce it. I question
12 how, in good faith, they can say that they're a
13 third-party beneficiary of an agreement that they
14 have never seen.

15 The case law dealing with third-party
16 beneficiary status says you have to be a clear
17 definite beneficiary from the face of the contract.
18 And in the case of what they have done, in terms of
19 the response of Craig Waryer, we think subject to
20 demur, the opposition, the source of our basis is
21 we have a contract with Coronado.

22 Coronado is contractually obligated to get

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1 these warranties. If there is a question on that
2 warranty, it seems like it's an issue between
3 Coronado, CSS and Pulte as opposed to an express
4 warranty claim when they can't provide a warranty
5 with respect to Parex.

6 THE COURT: Have we had in the history yet
7 with third-party claims or cross-claims in any of
8 the prior cases?

9 MR. HUGHES: As far as I know, this is the
10 first go round I have been in for Parex.

11 THE COURT: Me, too. I was just
12 wondering. If somebody else -- have we addressed
13 these substantive issues in any of the other cases?

14 MR. BRYSON: Yes, Your Honor, Judge
15 Wooldridge denied the applicator's cross-claim; the
16 demur that was filed by Renaissance for an
17 applicator.

18 THE COURT: He denied the applicator's
19 cross-claim?

20 MR. BRYSON: He denied the demur of the
21 applicator as the cross-claim of Renaissance
22 against the applicator.

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1 THE COURT: That's the only bit of history
2 we have.

3 MR. BRYSON: It was implied indemnity
4 argument, not as to the manufacturer.

5 MR. RINALDI: Your Honor, for
6 clarification, Ralph Rinaldi for EIFS, the
7 applicator, which is not before you, the applicator
8 for the distributor.

9 The applicator is not raising any kind of
10 objection to the claims filed by Pulte. Pulte is
11 not dealing with the applicator, but dealing with
12 parties further downstream than that. I'm not sure
13 that ruling would have any bearing.

14 THE COURT: In other words, Coronado has
15 not --

16 MR. SPARKS: That's correct, Your Honor,
17 we simply answered Pulte's third-party motion for
18 judgment. We are not here.

19 THE COURT: It's the suppliers, the
20 Franks, who are seeking to avoid the third party
21 being brought into this litigation?

22 MR. COLEMAN: That is essentially correct,

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1 subject to a caveat, which I wouldn't waste the
2 Court's time with until I get up here; that is,
3 that we have allegations that there is no privity
4 between the applicators and the suppliers which
5 would put the suppliers, essentially, in the shoes
6 of the applicator.
7 THE COURT: Okay. And the cross-claim
8 against the applier, that's what Mr. Bryson has
9 alluded to today, that Judge Wooldridge overruled
10 in the Renaissance case?
11 MR. BRYSON: The applicator, Your Honor,
12 not the supplier.
13 THE COURT: I said the applier. That's
14 the applicator.
15 MR. BRYSON: I am sorry.
16 THE COURT: And a cross-claim against
17 Parex, which you represent?
18 MR. HUGHES: Correct, Your Honor.
19 THE COURT: Mr. Hughes, of course. Parex.
20 There is no third-party claim against Parex; is
21 that correct?
22 MR. HUGHES: I believe we estopped. At

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1 that time, there was a co-defendant directly.
2 MR. COLEMAN: There is a cross-claim?
3 MR. HUGHES: I think a third-party claim
4 in nature. They are seeking damages against Pulte.
5 THE COURT: Negligence per se is
6 sustained. The two issues under advisement are the
7 Consumer Protection Act and the deceptive
8 advertising. Then it would have to be a
9 third-party claim as opposed to a cross-claim.
10 MR. HUGHES: I think that's correct. I
11 think the pleading would have to be changed to
12 conform to the current procedural posture of the
13 case.
14 THE COURT: Okay.
15 MR. HUGHES: The only experience I have
16 with a cross-claim from a builder, I've got one
17 case where I got a cross-claim besides this one,
18 and that was the Walker case. That went in front
19 of Judge Williams.
20 We had a number of demurs, and pleas in
21 bar. I believe that that case was resolved purely
22 on limitations grounds as to the cross-claim of the

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1 builder, and that there was never a resolution of
2 the issue whether this claim could be maintained in
3 the absence of the privity because there was a
4 cross-claim.
5 The only cross-claim that was expressed, a
6 bridge express warranty case. It was purely
7 outside the four-year UCC limitations period.
8 In turning to implied warranty claims,
9 there was an implied warranty claim already being
10 asserted against Parex in this case by the
11 plaintiffs. Parex demurred to that count, Judge
12 Wooldridge sustained that complaint without leave
13 to amended. Essentially, Pulte is raising the same
14 claims that was raised by the plaintiffs. We
15 believe the same ruling holds true, should apply to
16 the cross- or third-party claim, whatever it is in
17 this case that's filed by Pulte.
18 Turning to indemnity and contribution --
19 THE COURT: Wait a minute.
20 The demurs of Parex as to negligence
21 per se, to fraud is under advisement. Consumer
22 Protection and deceptive advertising, I don't

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1 recall an implied warranty.
2 MR. HUGHES: Taking a step back, the
3 original motion for judgment raised a claim by the
4 plaintiffs against Parex for breach of implied
5 warranty. Parex filed a demur. That was sustained
6 without leave to amend.
7 Essentially, this is the same claim ruled
8 on by Judge Williams. We got the same arguments
9 briefed before. There is no purview of contracts.
10 This claim should not be permitted to survive
11 demur.
12 As to the other claims, it still doesn't
13 have privity. Look at the Vepco vs. Wilson case.
14 Clearly, some type of relationship, some type of
15 contractual tie between the indemnity -- or
16 indemnitor is required.
17 In this case, we are -- there is no
18 contractual relationship, directly or otherwise,
19 between us and Pulte. So they shouldn't be allowed
20 to seek contractual or implied indemnification from
21 Parex in this case.
22 There is some question as to exactly what

<p style="text-align: right;">Page 101</p> <p>1 implied indemnity is. Under Virginia law, it seems 2 to be an act in evolution. 3 THE COURT: When you say Vepco against 4 Wilson, since Parex shouldn't be liable to the 5 original manufacturers for the reasons argued in 6 the ruling of the Court, it cannot be derivatively 7 liable as a third-party manufacturer? 8 MR. HUGHES: I think that's the first 9 layer. The second layer of Vepco vs. Wilson, the 10 indemnity must arise from a relationship. 11 THE COURT: Right. 12 MR. HUGHES: In this case, we don't have a 13 contract with Pulte. They shouldn't be able to 14 seek indemnity from us. I know this is an evolving 15 case law. 16 If you got -- say I am an employer, got an 17 employee, the employee goes out driving my pizza 18 truck plows into somebody and kills them. I am 19 held liable purely by sitting in the position of 20 supplier. I am vicariously liable. 21 If it's in the service of the employment, 22 there is still a contractual relationship. It's a</p>	<p style="text-align: right;">Page 103</p> <p>1 relationship between the two parties. 2 Similarly with contribution, you need to 3 have some joint obligations to the underlying 4 plaintiff. I think this is where Your Honor was 5 discussing before, Vepco vs. Wilson, has to be a 6 joint liability. 7 Also, if you look at the contribution 8 statute, it discusses that you can't seek 9 contribution for an act of malfeasance. 10 We will contend that anything that's fraud 11 or constructive fraud or false advertising or 12 Consumer Protection Act, each party's sort of lives 13 or dies on its own with that type of claim. 14 It shouldn't be contribution if it's 15 negligence, and there is a joint liability in 16 negligence, then there might be an availability of 17 contribution. But the demurs already been 18 sustained to that particular count, so we can't 19 have a joint liability for plaintiff. 20 For those reasons, we think that that 21 demur should be sustained as to the cross-claim, 22 what may be a third-party claim shortly.</p>
<p style="text-align: right;">Page 102</p> <p>1 situation where somebody been held liable purely 2 because of a relationship between the two parties. 3 Here, no such relationship, no vicarious liability. 4 And, additionally, if you look at the 5 allegations of the amended motion for judgment, 6 there is very clear indications of acts and 7 failures on the part of Pulte: Failure to install 8 flashing, failure to properly maintain their subs, 9 failure to install sealant and caulking, on and on, 10 and on about how the water is getting in around the 11 synthetic stucco of this house. That would clearly 12 show an act of active negligence that would bar the 13 indemnity counts. 14 The nearest state that I can think of that 15 allows implied indemnity clearly based on active 16 negligence is Maryland. There is a case called 17 Pyramid -- I don't have the cite -- the Pyramid 18 case says if you have active allegations of 19 negligence in the complaint, you can't do this 20 implied indemnity count. 21 I think it's pretty clear that implied 22 indemnity doesn't exist because of the lack of</p>	<p style="text-align: right;">Page 104</p> <p>1 Any questions, Your Honor? 2 THE COURT: Do these arguments apply 3 equally or do you contend that they do to Coronado, 4 American Stone & Stucco, American EIFS, E-I-F-S, 5 and I guess for the heck of it, the Franks, even 6 though they did have contractual relationships -- 7 let's see about that. It had contractual 8 relationship with Pulte, American, but not with 9 Coronado and the Franks; is that correct? 10 MR. HUGHES: I think we start to get very 11 parsed in detail. 12 THE COURT: There is no contractual 13 relationship -- Parex had no contractual 14 relationship with Pulte? 15 MR. HUGHES: Correct. 16 THE COURT: Okay. 17 MR. HUGHES: One thought I have with all 18 of these cases -- the problem I have with all of 19 them, trying to convert what essentially are 20 financial problems, economic expectation into a 21 myriad of tort claims. The way it should go, the 22 plaintiffs should have a remedy: Bought a house,</p>

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1 not what they bargained for, sue their builder.
2 If the builder doesn't get sued or their
3 subs for breach of contract, the subs, in turn, if
4 the builder is defective, sue who they bought it
5 from. The supplier, if the supplier agrees, thinks
6 it's defective material, they can sue the
7 manufacturer.
8 THE COURT: Right. I understand that they
9 are trying to side-step it as to Parex, as to a
10 third-party beneficiary.
11 MR. HUGHES: Correct.
12 THE COURT: Do they need to try to
13 side-step it with regard to Coronado, American and
14 the Franks? Do they fall within the contract
15 claim?
16 MR. HUGHES: I would say that you are into
17 a question of this whole question of separation of
18 corporation and individual.
19 THE COURT: Let's forget about the Franks.
20 Did Coronado or American contract directly
21 with Pulte?
22 MR. CORRIGAN: Your Honor, I may be better

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1 to speak to that. You're getting into my argument.
2 THE COURT: All right. That might be
3 unfair.
4 MR. HUGHES: I can answer it.
5 MR. CORRIGAN: I trust him to know the
6 law. I'm not sure I trust him to represent my
7 clients.
8 THE COURT: His arguments are fine
9 arguments. There may be a distinction between
10 those in a contractual relationship with Pulte,
11 whether Pulte is more easily able to sue, and those
12 who are not, such as Parex, whom Pulte is not
13 easily able to sue.
14 MR. HUGHES: Yes, sir.
15 MR. CORRIGAN: Your Honor, I am David
16 Corrigan. I am from the firm of Harman, Claytor,
17 Corrigan & Wellman representing American Stucco &
18 Stone, LLC.
19 One of the companies alleged to have
20 supplied these materials -- that's in paragraph 6
21 of the party's motion for judgment -- is American
22 Stucco & Stone, which I am going to refer to as

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1 American Stucco, American EIFS, a certain entity
2 represented by Mr. Rinaldi -- American Stucco is
3 one of the companies supplying synthetic stucco.
4 THE COURT: Directly to Pulte.
5 MR. CORRIGAN: No, sir, Coronado or CSS.
6 Very, very important. Goes to the issue of all the
7 homeowners. You have Pulte, then you have Coronado
8 or CSS. They were the applicators. That's with
9 whom Pulte contracted. And they have not filed
10 these demurs because of those relationships.
11 Whether these claims are valid or not, should not
12 be decided another day.
13 Coronado and CSS then received the
14 materials, the bucket of EIFS. I receive it from
15 American Stucco, my client, or from American EIFS,
16 Mr. Rinaldi's client. American EIFS and American
17 Stucco receive the material in buckets or however
18 it comes from Parex.
19 So when -- this is the essence of our
20 argument -- when Pulte tries to sue American
21 Stucco, they try to sue American EIFS going outside
22 of the privity. They're skipping somebody in the

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1 privity chain and trying to go around it and get to
2 us for whatever reason, we don't know.
3 Whatever rights they need to have, they
4 have against Coronado and CSS. For some reason
5 they feel like they want to go around them and come
6 after us, too. That really is the essence of the
7 argument.
8 The first count that applies to us is
9 count 4. That's the breach of contract claim
10 Again, as was just discussed by Mr. Hughes
11 what they attempt to assert is a third-party
12 beneficiary theory because they do not have a
13 contract. There is no contract between Pulte and
14 American Stucco. They can't even allege it,
15 because there is none. There is no privity of
16 contract there.
17 They can't point to a piece of paper.
18 They can't point to a document and say this is a
19 contract. What they're trying to do is skip past
20 Coronado and CSS and get to American.
21 The position is not logical. American
22 Stucco's agreement to provide synthetic stucco to

<p style="text-align: right;">Page 109</p> <p>1 Coronado and CSS was not intended to -- did not 2 incur any benefits on Pulte. Pulte was already 3 entitled to receive the materials under its 4 contract with Coronado. 5 In other words, the Coronado, American 6 contract did not give Pulte anything to which it 7 was not already entitled. They got what rights 8 they had -- they have against Coronado. 9 The second claim that is asserted is 10 breach of express warranty claim. Again, there is 11 no written or expressed warranty of which American 12 Stucco is aware that was passed on through American 13 Stucco. And Pulte has not identified one. 14 In addition, 8.1-218 does not eliminate 15 the privity in economic loss cases like these. 16 This is an economic loss case. There is no privity 17 of contract between Pulte and my clients and, 18 therefore, the express warranty claim fails as 19 well. 20 We get to implied warranty. We go back to 21 the argument that was made by Mr. Hughes and to the 22 prior ruling, apparently, by -- I have to say out</p>	<p style="text-align: right;">Page 111</p> <p>1 that decision, would support that. 2 Indemnification. There is no contract, so 3 there is no contractual indemnification. We get 4 into, what I understand from their brief, equitable 5 indemnification. 6 We are back into the same argument you 7 just had with Mr. Hughes, which is Pulte are trying 8 to say that they are somehow passive, secondary, 9 derivatively liable. 10 In fact, we know from allegations in the 11 lawsuit and everything we heard this morning, the 12 claim they submitted is fraud. The claim they 13 breached the building code, bad advertising, 14 Consumer Protection Act violations, all these 15 non-negligent type claims, including the derivative 16 type claims that they have allegedly made. 17 When they are in that posture, they cannot 18 turn to my client and say, You are actively 19 responsible and we are passively responsible. 20 That's what I understand to be their 21 equitable indemnification argument that is not 22 viable under these circumstances. It's bad faith</p>
<p style="text-align: right;">Page 110</p> <p>1 of all the people here, I am probably the newest to 2 this litigation. I am learning things everyday 3 when I sit in here and hear people talking about 4 this case, and that case. This is my first EIFS 5 case that I been up here on. 6 THE COURT: That's what makes your 7 argument so clear. It's not cluttered up yet. 8 MR. CORRIGAN: The implied warranty has 9 already been ruled upon by Judge Williams. He 10 ruled that the plaintiffs did not have an implied 11 warranty claim against Parex. For purposes of this 12 case, we stand in those apart. 13 We simply got something in a bucket. We 14 keep sending on the bucket. We are in the chain, 15 but we are in the same position. 16 So the plaintiffs do not have an implied 17 warranty claim against my client. By the same 18 token, neither does Pulte, because Pulte is not in 19 privity of contract with me. We do not have a 20 direct relationship with Pulte and, therefore, the 21 implied warranty claim must fail as well. 22 All this case, Judge Williams having made</p>	<p style="text-align: right;">Page 112</p> <p>1 for those circumstances. 2 The circumstance which it works is the 3 circumstance where you are talking about the 4 supplier and the employee, something like that. 5 The supplier clearly has done nothing wrong other 6 than have this employee come out there and commit a 7 tort. 8 Of course, not really talking about tort 9 actions here anyway, talking primarily contract. 10 And these fraud-type claims, which leads into the 11 contribution count, which is count 12 -- the 12 reasonable contribution that exist in Virginia 13 under 8.01-34 -- and that requires joint tort 14feasance -- requires negligence, requires there be 15 a negligence claim against both the indemnity -- 16 excuse me, the contribution plaintiff and the 17 contribution defendant. 18 Well, there is no negligence claim from 19 these plaintiffs against American Stucco, my 20 client. And the reason there isn't is because 21 there cannot be. There is no privity. The 22 economic lost rule bars it. There is no other</p>

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1 basis by these plaintiffs against my client
2 American Stucco.

3 In addition, I would point out, getting
4 into a dangerous area saying that, these
5 plaintiffs -- as to my client, we are talking about
6 a product, the EIFS, which was passed through our
7 office. That would not be a good, so the
8 plaintiffs could not sue us directly even on a
9 warranty theory because this would not be a good.

10 Having said all that, the real point is
11 Pulte cannot allege contribution under these
12 circumstances because we are not joint tort
13 feorsors. That is not the circumstances under this
14 particular case.

15 So for all those reasons, Your Honor, we
16 would ask the Court to grant the demurs to all five
17 of these counts by Pulte on behalf of American
18 Stucco. Thank you.

19 THE COURT: Thank you very much,
20 Mr. Corrigan.

21 Mr. Rinaldi, do you have anything to add?

22 MR. RINALDI: No, Your Honor. I have

1 find instructive in this regard.

2 And the second item that I just want to
3 address just as a general matter -- I am going
4 outside the pleadings here a little bit. I almost
5 feel compelled to because of the arguments of
6 American Stucco, American EIFS which, frankly,
7 ignore our pleadings. There is a reason that there
8 is as many entities involved as they are.

9 What American EIFS and American Stucco
10 would have you believe, that the privity chain, if
11 you will, goes from Parex selling to American EIFS
12 and/or American Stucco who then, in turn, sells to
13 CSS and Coronado, who then, in turn, sells to Pulte
14 and then to the homeowner.

15 THE COURT: Right. Isn't that correct?

16 MR. COLEMAN: No. While it's -- facially,
17 that's how it's presented, but that's not what we
18 allege.

19 THE COURT: You mean Parex sold to
20 Coronado?

21 MR. COLEMAN: What we are alleging is that
22 there is no arm's length transaction between the

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1 nothing to add. American EIFS is similarly
2 situated. The rules would apply to both
3 Mr. Corrigan and American EIFS.

4 THE COURT: Okay. Thank you.
5 Okay, Mr. Coleman.

6 MR. COLEMAN: Thank you, your Honor.
7 Before I address these count by count, just a few
8 preliminary observations.

9 First, while I am not aware of any rulings
10 in the synthetic stucco cases cross-claim
11 third-party claims of builders against
12 manufacturers. The best cross-reference I would
13 suggest, some of the Winchester Home cases.

14 There is a number of reported opinions
15 here in this county, as well as the Providence
16 Village Townhouse cases. Those were out in Loudoun
17 County, two different circuit court cases there.
18 One is Virginia Circuit -- I am sorry, 33 Va.
19 Circuit 165, a 1994 case.

20 Also a follow-up case in 1995, which I
21 don't have the cite with me, but there is a total
22 of five or six cases there, which I think we will

1 suppliers and the applicators. That's why
2 additional defendants here are Bernard and Benjamin
3 Franks.

4 What the evidence will ultimately show, if
5 this matter goes forward, is that Bernard and
6 Benjamin Franks are a father-and-son team, as it
7 were. Each of whom has a significant, if not
8 exclusive, interest in each of these entities,
9 Coronado and CSS. They kind of go through one
10 issue, becomes a shell entity.

11 One of these companies represented to me
12 are, in fact, what they tell us, shell companies.
13 What that effectively does is destroys the privity
14 chain.

15 THE COURT: If they are shell entities,
16 why aren't you satisfied with Coronado? If
17 Coronado is part of the shell, you got all the
18 money and assets of American EIFS, American Stucco
19 and the Franks.

20 MR. COLEMAN: Well, that's kind of exactly
21 where I am going with this.

22 THE COURT: Why should we have a piercing

<p style="text-align: right;">Page 117</p> <p>1 corporate veil trial as part of this? Do these 2 plaintiffs really want to be involved in all of 3 that? Rather, should they really have to be 4 involved?</p> <p>5 Should they have to be having their case 6 against Pulte, their builder, taken up with a side 7 case of Pulte's allegations that its supplier 8 really was one group of individuals who are using 9 all these shell companies? Isn't that Pulte's 10 problem?</p> <p>11 MR. COLEMAN: With all due respect --</p> <p>12 THE COURT: Why should that be these 13 plaintiffs' problem?</p> <p>14 MR. COLEMAN: I'm not --</p> <p>15 THE COURT: Why should Pulte be 16 contracting with people like this if it knows this 17 as its information?</p> <p>18 MR. COLEMAN: I would strenuously disagree 19 that Pulte is knowingly doing anything wrong in any 20 way whatsoever.</p> <p>21 THE COURT: I'm not suggesting it is, but 22 you are telling me this is a big shell group.</p>	<p style="text-align: right;">Page 119</p> <p>1 THE COURT: We can spend weeks trying 2 shell entities.</p> <p>3 MR. COLEMAN: -- prove their hand, say 4 nothing.</p> <p>5 THE COURT: Maybe they will, maybe they 6 won't. As far as Mr. Anderson and Mr. Berger is 7 concerned, maybe Pulte will show up its hand. That 8 can happen in any legal relationship with regard to 9 any legal or fictional entity.</p> <p>10 The issue here is not whether Coronado and 11 American EIFS are one in the same or different or 12 being manipulated. It's whether there is a 13 contractual relationship between these entities 14 that are part of the construction of this house 15 that can be reached by either of the plaintiffs. 16 In certain cases, we have ruled, no, they can't. 17 It's too far away. Whereby Pulte, in the next 18 instance, it seems to me, that it's similarly too 19 far away.</p> <p>20 MR. COLEMAN: Well, again, I should -- I 21 should move along in a moment to addressing these 22 count by count. I think as I do, I will hopefully</p>
<p style="text-align: right;">Page 118</p> <p>1 They're playing fast and loose with these entities 2 to their own advantage. If Pulte knows all of 3 that, they should have had another applicator with 4 Coronado.</p> <p>5 MR. COLEMAN: If Pulte was implicit that 6 will be an entity. We strongly dispute that.</p> <p>7 THE COURT: Why don't you do it this way. 8 Why don't you let the plaintiffs sue Pulte. Pulte 9 say, you know, it's really not our fault. It's 10 Coronado's fault. Coronado did this.</p> <p>11 And if Coronado said, We recognize that we 12 can be brought in this litigation; we deny the 13 allegations; here we are -- if it's going any 14 further than Coronado, that's up to Coronado to go 15 against American EIFS and American Stucco.</p> <p>16 If they want to say, actually, the stuff 17 that caused all this problem came from Parex, going 18 to get Parex, wouldn't that make more since?</p> <p>19 MR. COLEMAN: There are two serious 20 problems with that. Number one, if some of these 21 applicators are now shell entities after moving 22 them around --</p>	<p style="text-align: right;">Page 120</p> <p>1 be able to convince you.</p> <p>2 THE COURT: I think make it all in one 3 count. If we all agree there is no contract 4 between Pulte and American EIFS, American Stucco 5 and certainly Parex. Now you say, oh, they were 6 acting as a shell, all that -- I don't think that's 7 what this case is all about.</p> <p>8 If there is no contract, you have to get 9 them some other way, third-party beneficiary, 10 indemnification, contribution. Isn't that it? Or 11 express or implied warranty? Can't have an express 12 warranty without an agreement.</p> <p>13 MR. COLEMAN: I would disagree with that.</p> <p>14 THE COURT: Okay.</p> <p>15 MR. COLEMAN: There are other means of 16 getting an implied warranty.</p> <p>17 THE COURT: Talking about express 18 warranty.</p> <p>19 MR. COLEMAN: I am talking about express 20 warranty.</p> <p>21 THE COURT: Go on.</p> <p>22 MR. COLEMAN: Could be written or oral.</p>

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1 THE COURT: Yes, sir.

2 MR. COLEMAN: I guess, if I could just
3 make one final comment on that. If, in fact, we
4 are correct, let's say that we have got four
5 entities which are essentially acting as a single
6 unit, and we -- I appreciate Your Honor's -- I
7 appreciate that the plaintiffs have concerns here,
8 but Pulte has rights here as well. And if
9 Mr. Hughes, what he said before --

10 THE COURT: Pulte does have rights as
11 well. They're only rights that can be properly
12 enforced in a court of law.

13 I mean, the plaintiffs -- Mr. Wise said
14 those brochures were given to the plaintiffs by
15 Pare. They looked at them. Looked like good
16 stuff. Now they're having all these problems.

17 One cannot help but be sympathetic to
18 them, but unless they can assert a legally
19 cognizable claim against somebody way down the
20 contractual chain, they can't get to them. They
21 just can't. They have to look to Pulte.

22 I just don't understand why that same

1 both as a separate agreement as well as in

2 connection with each and every purchase order.

3 Now I understand that their position --

4 they're saying -- they're saying Pulte admits that
5 they don't have copies of these agreements. That's
6 correct. But it seems to me that ought to be a
7 matter for discovery and not a matter for a demur.
8 I mean, we allege that they're there --

9 THE COURT: Wait a minute, you are saying
10 that there are agreements whereby American EIFS and
11 American Stucco indemnify Pulte against Coronado's
12 actions?

13 MR. COLEMAN: That's exactly what's
14 required by the subcontractor.

15 THE COURT: Where are those agreements?

16 MR. COLEMAN: I would like to know. We
17 served discovery on everybody, working very much to
18 get these matters in.

19 THE COURT: Wait a minute. This is your
20 subcontractor, that should be pretty easy. I mean,
21 if you have a subcontractor, part of the
22 subcontract is a requirement that Coronado obtain

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1 reasoning doesn't apply here absent something that
2 says, Judge, you are overlooking Jones against
3 Smith that makes it so clear. I don't recollect
4 seeing that decision.

5 MR. COLEMAN: If I may take you through
6 these matters --

7 THE COURT: Yes, sir.

8 MR. COLEMAN: -- count by count.

9 THE COURT: Absolutely.

10 MR. COLEMAN: First to classify, there are
11 five counts, not four. There is breach of
12 contract, breach of express warranty, implied
13 warranty, indemnification and contribution. The
14 breach of contract, it is based on a third-party --
15 third-party beneficiary theory.

16 THE COURT: Right.

17 MR. COLEMAN: Now, we have -- we assert
18 that because we have in our subcontract with our
19 applicator, which is attached and made part of the
20 cross-claims and third-party claims.

21 It specifically requires those applicators
22 to procure indemnity agreements from the suppliers,

1 an indemnification from American EIFS and American
2 Stucco, you should have it in your file.

3 MR. COLEMAN: I wish we did.

4 THE COURT: The plaintiffs don't have it?

5 MR. COLEMAN: I'm not suggesting --

6 THE COURT: I bet American EIFS and
7 American Stucco haven't come forward with one.

8 MR. COLEMAN: I would like to know. I
9 have been trying to work very closely with them to
10 try to get copies of these things and conduct
11 discovery, Your Honor. If it turns out that there
12 is none, that Coronado and CSS breached their
13 contractual duties to procure these things, I
14 suppose we don't have a claim. I am speaking just
15 with respect to breach of contract. Either nonsuit
16 it or lose on summary judgment.

17 What I am suggesting, we have a good faith
18 reason to believe that these things ought to exist.
19 They are contractually required to exist.

20 THE COURT: What's your remedy against
21 Coronado? Coronado, you said, you provide these.
22 That's another claim you have. That's two claims.

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1 MR. COLEMAN: Two claims. One against
2 them not providing these things.
3 Second, if they did provide them, have a
4 remedy against that person who agreed to indemnify
5 us; that's what we are asserting now. We are
6 asserting both; that second one here on argument
7 before your Honor is the second.
8 THE COURT: Every single case, a person
9 looking down the contract chain, cannot get there
10 by any other means, the person can say the person
11 with whom I contracted, actually, believe it or
12 not, promised that they would provide to me an
13 indemnification agreement from their subcontractor
14 indemnifying me. We just roll right on through
15 every time.
16 MR. COLEMAN: We have got -- we have
17 specific language in this regard. There is -- even
18 the last page of the subcontract is a form document
19 of what it's supposed to look like, what these
20 indemnification agreements are supposed to look
21 like.
22 THE COURT: Right.

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1 MR. COLEMAN: Long. We want to have a
2 rule where a company like American Stucco and
3 American EIFS -- I'm not imputing any ill will to
4 either of them --
5 THE COURT: I understand.
6 MR. COLEMAN: What if they have it and we
7 don't, for whatever reason? That means that they
8 just need only stand up and say, well, we demur.
9 Your Honor, they don't have it as part of
10 it, they walk off scot-free, even though we might
11 have a perfectly binding document.
12 I mean, isn't the more prudent course, at
13 least, to allow us to conduct discovery to obtain
14 these things. Obviously, going to act in good
15 faith in this. If they don't exist, they don't
16 exist. We have a good faith reason to believe that
17 they do.
18 THE COURT: Okay.
19 MR. COLEMAN: On the breach of express
20 warranty, there is a number of issues raised on
21 there. First of all, some of the same arguments
22 that I just raised specific to a written warranty.

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1 The arguments that I just went through before would
2 apply here as well. Our subcontract requires that
3 the subcontractors, essentially, procure warranties
4 from the suppliers with whom they obtain the
5 products for the purpose of Pulte. And all we are
6 doing -- as far as the written express warranty
7 allegation, we want to see if they're there. They
8 ought to be; they are contractually required to be.
9 THE COURT: Isn't this really in
10 Coronado's interest to have these warranties, have
11 these indemnifications? Wouldn't that really help
12 them? Don't they have tremendous impetus to make
13 those indemnification agreements come forward if
14 they exist?
15 MR. COLEMAN: Under normal circumstances,
16 yes. We have unusual circumstances here, in that
17 it would essentially be Bernard Franks suing
18 Bernard Franks.
19 If he controls both the applicator and the
20 supplier, why would he do that? Wouldn't he rather
21 have a shell corporation, you know, a subcontractor
22 applicator who performs the works, then goes out of

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1 business, then obtains the benefit of a court
2 ruling that the only legitimate party is Coronado?
3 And then -- but you know, they folded up their tent
4 because they have no money.
5 Certainly they wouldn't assert a
6 contribution claim or indemnification claim against
7 the party with whom they are in privity because
8 they would be suing themselves and, again, that's
9 our concern here.
10 If, as Mr. Hughes said, the way these
11 things should quote/unquote work, plaintiffs sue
12 Pulte who sues the applicator, who sues suppliers,
13 who sues Parex. Then how can we get past that
14 chain of privity if, in fact, it's missing a link,
15 if, in fact, Coronado and American EIFS/American
16 Stucco is all the same people? There is no way
17 they are going to sue each other.
18 You will see in the record, common sense
19 might tell one that both Coronado and CSS would
20 assert contribution and indemnification claims
21 against American EIFS and American Stucco.
22 Wouldn't they do that? They haven't demurred to

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1 our claims. They can't. Wouldn't Coronado say, I
2 expect, We don't want to be stuck with the claims?
3 THE COURT: When -- if I grant your third
4 party -- overrule the demurs or third-party motion
5 judgment, but through sua sponte, sever those
6 claims so that you can go and litigate with
7 Mr. Coronado and Franks for the next few years, and
8 let these plaintiffs and the Pulte fight it out
9 directly, wouldn't that be fair?
10 MR. COLEMAN: Quite candidly, I'm not
11 fully prepared to go through that. We discussed
12 some of these issues before Judge Williams about
13 three months ago in June when we filed a motion for
14 leave to file these cross-claims and third-party
15 motions for judgment, and they argued at that time
16 that it shouldn't be allowed for this -- for the
17 reason that Your Honor is raising.
18 And the way that we responded is, it will
19 be more sensible to have all these matters
20 together. Without getting into all those issues
21 again now, I thought we kind of crossed that
22 bridge. Now, ultimately as we get closer to

1 plaintiffs. It's too much of a distraction.
2 How is a jury going to listen to arguments
3 about corporate veil and Franks and double-dealing
4 and absent indemnification agreement? They're
5 trying to find out whether these houses were
6 constructed properly or not.
7 MR. WISE: On behalf of the plaintiffs,
8 Your Honor -- we had the same argument in Dakovich
9 where the case was severed. The plaintiffs will
10 not agree to a sever in this case because we do not
11 want to get into a situation of McCoy vs. Colony
12 House -- no, McCoy vs. Tate, where the electrician,
13 the negligence issue and everything else.
14 I also, just on the Colony House, the case
15 progressed. And specifically in Dakovich, it was
16 not -- I don't think justice was necessarily served
17 by having them severed. It may be cumbersome.
18 THE COURT: Wasn't the consideration in
19 this case with regards to severance because of the
20 time of the trial. Doesn't that fall in a bad
21 crack?
22 MR. WISE: That was one of the first ones.

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1 trial --
2 THE COURT: You think there was a ruling
3 on it? Your motion to bring in third-party claims
4 was opposed, at least in part, on the grounds that
5 it would be perfect to pursue those matters
6 separately. That was argued before Judge Williams,
7 and I think because of some of these privity
8 issues -- I can't quite recall all of the different
9 considerations that may have gone into it -- the
10 idea -- the objection was overruled. We brought
11 them in.
12 I think there are different considerations
13 whether to permit one to bring a third-party motion
14 to judgment, as to whether to allow that
15 third-party motion to continue. Those are two
16 different levels of severing, different levels
17 altogether.
18 It just seems to me you all and Franks are
19 going to have a big argument. I am agreeing with
20 you. Go ahead, have a big argument. Don't clutter
21 up this case. It has enough clutter of its own.
22 With those arguments, it seems unfair to the

1 THE COURT: The plaintiffs wanted to go
2 forward.
3 MR. WISE: We did not want to lose our
4 trial date, that is correct, Your Honor.
5 THE COURT: As opposed to merits. In this
6 kind of situation, the severance would go beyond --
7 well, I don't know if it would go beyond Coronado
8 or not. That's a good question.
9 MR. WISE: Just as far as --
10 THE COURT: Do the plaintiffs want -- did
11 the plaintiffs want -- I shouldn't characterize
12 it -- the side litigation of the Franks and EIFS,
13 all that?
14 MR. WISE: Your Honor, what the Pulte is
15 alleging, that all these different third parties
16 told them what Pulte told us all these third-party
17 claims against Parex, breach of Consumer Protection
18 Act and everything else.
19 THE COURT: They can say all those things
20 without having to litigate the corporate viability
21 or structure of American EIFS, American Stucco,
22 Coronado and the Franks.

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1 MR. WISE: Granted, that is a little bit
2 unusual twist to this particular case, what we
3 don't want, though, is to get into a situation
4 where the applicator is not going to be there
5 answering to their own because as you already know,
6 the subcontractor -- although, we have objected to
7 this. You have sustained their demur -- the only
8 way we have the applicator at our trial is on
9 Pulte's cross-claim. On this, Pulte and the
10 plaintiffs will probably agree.

11 MR. HUGHES: Your Honor, they can be
12 subpoenaed as witnesses. It's not like they can't
13 come and testify to this issue.

14 Richmond vs. McCoy, this case that's
15 outside there sounds like a tort case dealing with
16 contracts. I don't know that that should be
17 effective merits in issue.

18 MR. WISE: Actually, Your Honor, you know
19 what that case was about: The home buyer, G-C, and
20 alleged subcontractor. During the construction of
21 the new home the subcontractor breached the
22 building code, didn't hot-wire the circuit box. It

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1 caught on fire and they were sued for both
2 negligence, breach of contract, everything else.

3 The contractor on the negligence series
4 specifically went to trial. The Supreme Court
5 said, No, you -- G-C, you are not liable because,
6 you know why -- you know whose negligence caused
7 this. It was the subcontractor. This is exactly
8 why, to the extent the Court is willing to
9 reconsider its negligence per se argument as
10 against Coronado and CSS, why we think it's
11 important and vital to our claims that they be
12 there.

13 THE COURT: What is the citation of that
14 case?

15 MR. BRYSON: McCoy, that was the one I
16 gave to Your Honor.

17 MR. WISE: McCoy vs. Colony House. McCoy
18 vs. Colony House, Your Honor.

19 THE COURT: This was Judge Leaf's?

20 MR. WISE: No.

21 MR. BRYSON: This is the Supreme Court of
22 Virginia.

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1 THE COURT: I know which one it is.

2 MR. BRYSON: Your Honor, you are correct.
3 We don't want to hear a lot of corporate shell
4 claims. I think it would confuse the jury. For
5 us, it's making sure the general contractor doesn't
6 avoid liability by arguing that an independent
7 contractor performed the work.

8 MR. COLEMAN: There is something to be
9 said for that particular point. There have been
10 pleas in bars filed. There may be a reason to have
11 an evidentiary hearing, but we didn't want to
12 clutter up the hearing today with those matters.

13 THE COURT: Okay. Yes, sir.

14 MR. WISE: I do have a cite, McCoy vs.
15 Colony House Builder, 239 Va. 64; it's a 1990 case,
16 Your Honor.

17 THE COURT: Okay. Thank you, Mr. Wise.
18 Forgive me, Mr. Coleman.

19 MR. COLEMAN: Quite all right. Again, on
20 the breach of express warranty, there is some -- I,
21 perhaps, have spoken a little bit too long without
22 getting to, perhaps, the single most important

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1 reason why privity is not required in these
2 circumstances.

3 That's because there is an anti-privity
4 statute which applies to us, which does not apply
5 to the homeowners' claim against these folks. And
6 I am referring to section 8.2-318. It's a section
7 of the Uniform Commercial Code. And it is
8 specifically applicable to warranty claims, brought
9 under the UCC.

10 The argument I am about to make here is
11 actually applicable both to express and implied
12 warranties here.

13 I can't emphasize this particular argument
14 enough. As far as I can tell, the law is 100
15 percent uniform in this regard. There is -- our
16 claims against the suppliers and Parex are UCC
17 claims. We are talking about exchanges of goods.

18 However, the homeowners claims against the
19 suppliers, and Parex, as Judge Williams apparently
20 ruled, are not UCC claims because standing in the
21 homeowners shoes, this synthetic stucco was
22 incorporated on to their property, and that's

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1 exactly what the Winchester case -- that's the
2 proposition that the Winchester case, as well as
3 the other case which I referenced before, the
4 Providence, the one in Loudoun County -- that's
5 exactly the proposition they stand for.
6 Some of those involve the builder
7 asserting claims, standing in the shoes of the
8 homeowners as well as assigned claims.
9 In those cases, this Court, Fairfax, as
10 well as the Judge in Loudoun County said you can't
11 assert these claims when you are standing in the
12 shoes of the homeowner because this is a product
13 that's part of your house. Now not a good anymore,
14 not subject to UCC.
15 THE COURT: I understand that.
16 MR. COLEMAN: However, in the subject of
17 the homeowner, if the homeowner does it, it's a
18 good. When we get it, it's a good. Therefore,
19 subject to the Uniform Commercial Code, this
20 anti-privity statute it -- I might pull it out
21 here. Perhaps I might just briefly read it: "Lack
22 of privity between plaintiff and defendant shall be

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1 no defense in any action brought against the
2 manufacturer and seller of goods who recover
3 damages for a breach of warranty, express or
4 implied."
5 That's exactly what we have here.
6 THE COURT: Don't they argue that that's
7 fine for a person -- or physical injuries don't
8 apply to economic loss?
9 MR. COLEMAN: I am glad you brought that
10 up, because the economic loss rule does not apply
11 to warranty claims, pure black letter law. No case
12 I could find anywhere which said that the economic
13 loss rule applies to warranty claims.
14 In fact, to do so stands on its head if
15 the economic loss rule is that a party who has
16 suffered only economic loss cannot seek recovery in
17 tort. That is the key argument here. The tort,
18 that's what's been argued up to now. Party seeking
19 economic loss for tort cannot recover if there is
20 no privity contracts.
21 Rather, they must assert rights arising
22 under contracts. That's what warranties are, claim

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1 sounding in contracts. This is exactly what the
2 economic loss rule was designed to preserve,
3 warranty claims. Claims sounding in contract. The
4 economic loss rule could not have any application
5 here. I can cite you several cases here which
6 stand for this proposition.
7 THE COURT: Don't they rely upon the
8 Richmond case, the Eastern District case.
9 MR. COLEMAN: I am sorry. I'm not sure.
10 THE COURT: Isn't that the case you rely
11 on?
12 MR. CORRIGAN: Your Honor, I know the
13 case, is Beard's Plumbing.
14 MR. COLEMAN: Beard Plumbing. The Supreme
15 Court has never really kind of hit this on the
16 head. They did earlier. Probably, the most on
17 point case I would suggest is W-J Rack Company, 22
18 Va. 80, a Supreme Court case which applied. It was
19 a claim for economic loss and --
20 THE COURT: 22 Virginia reports?
21 MR. COLEMAN: I am sorry, my mistake, 222
22 Va. 80.

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1 THE COURT: Okay.
2 MR. COLEMAN: That was a claim for
3 economic loss against a manufacturer. One case
4 which concurred with Beard on this very issue.
5 Circuit court case, 50 Va. circuit 71 said, "A
6 plaintiff can still recover direct economic damages
7 in a warranty case regardless of privity of
8 contract."
9 Even in Beard Plumbing -- Beard Plumbing,
10 just to refresh Your Honor's recollection, was a
11 certified question from the Fourth Circuit, went
12 back to the Fourth Circuit, the Fourth circuit
13 essentially said Cinder Burner requires economic --
14 requires privity for economic losses and tort not
15 necessarily for breach of warranty. That's what we
16 have here.
17 Again, if the idea of economic loss rule
18 is to prevent plaintiffs who suffer economic loss
19 from running around with various tort feasons,
20 various types of negligence theories, that's fine.
21 That's why we didn't assert a negligence claim
22 against these manufacturers, but warranty claims

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1 are warranty claims in contract.
2 THE COURT: Are these direct damages or
3 consequential? Wouldn't they be consequential?
4 MR. COLEMAN: If I could refer, Your
5 Honor, to the whereas clause here.
6 THE COURT: Just tell me.
7 MR. COLEMAN: The answer is, no, it's
8 direct damages. We are saying that we were
9 directly damaged by their --
10 THE COURT: That doesn't make it a direct
11 damage saying we are damaged by their consequential
12 damages.
13 MR. COLEMAN: Direct, consequential
14 damages would be lost. Those would fall under the
15 realm of what we are asserting. Consequential
16 damages --
17 THE COURT: Isn't it clearly consequential
18 damages?
19 MR. COLEMAN: If this was consequential
20 damages, I wouldn't know what direct damages would
21 be.
22 THE COURT: If you buy a product, put it

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1 on your Pulte building, it doesn't work, so you are
2 damaged. You buy a product, buy a nice house, the
3 house doesn't work, they claim it's your fault,
4 they sue you. I don't know.
5 MR. COLEMAN: If I may suggest, that may
6 be an issue to bring up later, but in our "whereas
7 clause," we said Pulte consequently -- I am sorry,
8 looking at the wrong one here.
9 "Pulte demands payment if" -- I am cutting
10 to the chase -- "any other loss Pulte may incur,
11 including direct damages under 8.2 of the Virginia
12 code together with consequential damages to the
13 extent provided by law."
14 We pled it that way because we, frankly,
15 realize that under Beard it says you can get it
16 under a direct. You can't get it under
17 consequential. We said, Fine. We will look to get
18 our direct damages if later on down the line a
19 court believes that we are seeking direct damages.
20 I suppose we are out of luck, but I submit
21 that, as pled, that this is sufficient and this
22 applies to both express and implied warranties.

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1 One additional point that I would raise on
2 the express warranty issue. This is what we
3 alluded to about ten minutes ago. Doesn't need to
4 be in writing. There is section 8.2-3 --
5 THE COURT: I didn't mean to say that. I
6 just meant express warranty, express agreement
7 contract, not written.
8 MR. COLEMAN: I apologize. I
9 misunderstood Your Honor.
10 THE COURT: That's all right.
11 MR. COLEMAN: It says "asserted their
12 affirmation of facts, promises, description,"
13 et cetera, "by these parties purveying these
14 products."
15 We are entitled to recover under that
16 theory, and the UCC specifically says privity is no
17 expense when you are talking about goods.
18 THE COURT: Okay. Anything else?
19 MR. COLEMAN: I can touch upon the
20 indemnification and contribution claims.
21 THE COURT: Okay. Touch briefly. Almost
22 1:00.

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1 MR. COLEMAN: I will. I apologize. I am
2 taking too much time here.
3 THE COURT: It's all right.
4 MR. COLEMAN: My very short point on the
5 indemnification, relying exclusively on Vepco vs.
6 Wilson, 1981 case. I tried to brief this issue
7 fairly extensively in the brief.
8 THE COURT: I am familiar with the case.
9 MR. COLEMAN: I won't belabor that point.
10 I submit that you don't need a contractual
11 relationship.
12 THE COURT: What you submit, the trend is
13 changing, moving away from Vepco vs. Wilson?
14 MR. COLEMAN: Yes, Your Honor. And with
15 respect to the contribution claim, we do concede --
16 we don't concede this on indemnification -- but on
17 contribution claims, it is required that for us to
18 recover against these third-party defendants, that
19 the plaintiff would have to have a cause of action
20 against them, and that's what they have been
21 arguing. I am simply conceding the point.
22 I do want to point out that that argument

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1 is not applicable to indemnification claims.
2 That's another throw back to Vepco vs. Wilson.
3 Subsequent cases, such as Winchester cases didn't
4 follow.
5 But as to that contribution issue, I do --
6 the one issue that I want to point out here -- this
7 may be a mute issue -- just based on my poor
8 recollection of the court's ruling with respect to
9 the plaintiffs' causes, claims against third-party
10 defendants. But the only case which I would direct
11 Your Honor to is the Gemco Ware case.
12 THE COURT: Yes.
13 MR. COLEMAN: That's 234 Va. 253. That
14 stands for the proposition that you can have
15 contribution so long as there is a cause of action
16 in the hands of plaintiff against the third
17 parties, or against the defendants, and the
18 emphasis being on cause of action rather than right
19 of action. And the ultimate point --
20 THE COURT: You mean a cause of action
21 that could not be successfully asserted?
22 MR. COLEMAN: Exactly.

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1 THE COURT: Anybody could have a cause of
2 action.
3 MR. COLEMAN: Here is my point to the
4 sustain, Your Honor.
5 To the extent that the third-party
6 defendants have -- are now out of this lawsuit
7 because of statutes of limitations issues. That's
8 not enough if Your Honor sustained demurs.
9 THE COURT: I see what you mean.
10 MR. COLEMAN: That's my only point.
11 Again, I just -- frankly, I can't quite recall
12 exactly what your rulings were. I know with
13 respect to Parex, I know there was an exchange
14 there where Mr. Hughes inquired what your ruling
15 was on the VCPA issue. You said, well, I don't
16 think you need -- we need to address it because had
17 I ruled on plea in bar.
18 THE COURT: That was plea in bar.
19 MR. COLEMAN: I apologize. My point is,
20 the only way they can get out on that basis, now
21 that they have been dismissed as direct defendants,
22 the only way they can get out now -- no cause of

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1 action statute of limitations or similar procedural
2 defenses simply aren't enough. It has to be no
3 substantive right.
4 THE COURT: All right. Thank you very
5 much, Mr. Coleman.
6 Do you all want to be heard?
7 Mr. Corrigan, last words. What about his
8 anti-privity?
9 MR. CORRIGAN: Your Honor, Beard Plumbing,
10 and I pulled it out --
11 THE COURT: Are these consequential or
12 direct damages?
13 MR. CORRIGAN: That's the question. The
14 question is not whether anti-privity does as far as
15 consequential damages is concerned. There is no
16 privity.
17 THE COURT: Right.
18 MR. CORRIGAN: My argument, this is a
19 consequential damages case exactly. What it is
20 not, a situation, as the court says -- I guess
21 really the question becomes for me, I seen this in
22 other context, he cites the Gemco Glen case.

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1 The issue in that case, what the court
2 came out with was, I am sustaining your demur on
3 third-party defendants as to anything that's
4 consequential damages, and I am denying it as to
5 direct damages.
6 The basis was if they can prove direct
7 damages, what it means in those cases was you can
8 get the price of what you sold, but you can't get
9 anything else. That's what that court defined as
10 direct damages. I'm not saying that's the right
11 rule or not. My position would be this is all
12 consequential damages.
13 THE COURT: Yes.
14 MR. CORRIGAN: And there are no direct
15 damages here. I think that's an important
16 distinction to make. Thank you.
17 THE COURT: Okay.
18 MR. HUGHES: Your Honor, I just have a
19 couple of brief notes for Parex.
20 THE COURT: Yes, sir.
21 MR. HUGHES: Mr. Coleman pointed to the
22 applicator having to get indemnity from the

<p style="text-align: right;">Page 149</p> <p>1 suppliers. There is nothing about Parex in that 2 indemnification chain. As a result, that argument 3 shouldn't hold for Parex. 4 In addition, we keep going back to express 5 warranty, express warranty. There is no 6 requirement for privity because any privity 7 statute -- we craved oyer -- there is no warranty. 8 There is no application for a warranty. No 9 contract. Nothing beyond a conclusionary 10 accusation, facts, affirmation, product samples, 11 yada, yada. 12 Clearly lifted off of -- UCC statutes 13 don't provide for any source what the warranty is. 14 What is it we warranted? What are the terms of the 15 warranty? What are the promises made? There is 16 absolutely nothing in terms of telling us what this 17 warranty allegedly consisted of. Telling us how we 18 allegedly breached it. I think that is, on its 19 face, a conclusionary accusation subject to demur, 20 Your Honor. 21 THE COURT: All right. Thank you 22 Mr. Hughes.</p>	<p style="text-align: right;">Page 151</p> <p>1 section 8.2-318 of the Virginia Code. And I think 2 the underlying issue to be determined there is 3 whether the damages claimed by Pulte against these 4 defendants are direct or consequential damages and 5 I will have an answer on that this afternoon. 6 MR. RINALDI: Your Honor, if I can clarify 7 on that point, the Beard case doesn't address 8 whether the anti-privity does apply to direct 9 damages. That will have to be part of your ruling. 10 THE COURT: You are right. Thank you, 11 Mr. Rinaldi. 12 MR. COLEMAN: You are reserving ruling on 13 the 8.2-318 with respect to all three defendants? 14 We are saying if it applies to one, it applies to 15 all. Either you need privity or you don't. 16 THE COURT: Yes. 17 MR. COLEMAN: Thank you, Your Honor. 18 THE COURT: Yes, sir. 19 MR. BRYSON: Your Honor, if I might 20 approach, I have the letter of opinion from Judge 21 Leaf. 22 THE COURT: Thank you.</p>
<p style="text-align: right;">Page 150</p> <p>1 MR. HUGHES: Thank you. 2 THE COURT: We are treating that as though 3 the action against Parex is a cross-claim in the 4 event the demur is sustained or as a cross-claim if 5 the demur is not sustained. I guess the same 6 difference between it. 7 MR. HUGHES: I think the same would apply, 8 Your Honor. 9 THE COURT: The demur of Parex to the 10 pending cross-claim are sustained 11 The demurs of the American EIFS and 12 American Stucco are also sustained as to the breach 13 of contract. 14 There is no contract as to the express 15 warranty. I find no express warranty. As to 16 implied warranty, I find no implied warranty. As 17 to indemnification and contribution, I don't think 18 the doctrine of equitable indemnification is 19 applicable here. 20 I am taking under advisement whether a 21 claim may be asserted under the sale of goods 22 provision or the anti-privity provision,</p>	<p style="text-align: right;">Page 152</p> <p>1 MR. BRYSON: Defective advertising 2 statute. Again, we would respectfully ask that the 3 Court be consistent with Judge Wooldridge on those 4 two counts. These neighbors all live on the same 5 street with each other. 6 THE COURT: Thank you, Mr. Bryson. 7 MR. HUGHES: Your Honor, I don't mean to 8 slow us down here. Two questions: I am a little 9 confused about the colloquy. Does that mean that 10 the demur as to the anti-privity statute is under 11 advisement? 12 THE COURT: Is that asserted against Parex 13 as well? 14 MR. COLEMAN: It is, Your Honor. 15 Specifically, sir. 16 THE COURT: I am going to hold that one 17 under advisement, too. 18 I am not going to be under advisement very 19 long. I just want to take a little bit more of a 20 look at that. 21 I mean, so there is no misunderstanding, I 22 think this is -- I don't think that the applicable</p>

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1 law in the Commonwealth of Virginia supports the
2 third-party claims asserted by the third-party
3 plaintiff, Pulte against American EIFS, American
4 Stucco and Parex for the various reasons that have
5 been stated -- generally stated because I don't
6 think that there is a sufficient relationship,
7 either by direct contract or implied contract by
8 contribution, by indemnification that would warrant
9 the assertion of those claims. Certainly, not by a
10 third-party contract. I don't think that's
11 warranted as well.

12 However, if these materials manufactured
13 by Parex, furnished to American EIFS or American
14 Stucco, then furnished to Coronado, then supplied
15 them on behalf of Pulte to Pulte Homes, to the
16 plaintiffs are treated as a sale of goods so that
17 there need be no contract between the -- in this
18 case the purchaser -- or rather between Pulte and
19 the supplier, between the manufacturer and
20 supplier, then perhaps those claims can be asserted
21 under that narrow window.

22 I am just not sure if that is correct.

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1 That's the sole issue taken under advisement with
2 regard to the third-party claims.

3 Insofar as the other demurs are concerned,
4 I have under advisement Parex's demur to the
5 Virginia Consumer Protection Act and to deceptive
6 advertising.

7 To the application of the plea in bar, as
8 to the negligence per se rulings of the Court, I'm
9 overruling Pulte's demur to the negligence per se
10 claim of the plaintiffs.

11 I am going to take a little bit of a
12 further look as to whether the two-year statute for
13 the assertion of the negligence per se. That's
14 also under advisement.

15 In that regard, plaintiffs assert that
16 there should be no statutory bar on that for any of
17 the statutory bases because of the doctrine of
18 equitable estoppel that Pulte, by its own acts,
19 with knowledge of its alleged wrongdoing, permitted
20 the time to pass to the detriment of the plaintiffs
21 and may not use that against them now.

22 I also have flagged McCoy vs. Colony

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1 House. I'm not sure why.

2 MR. WISE: Only to the extent we would
3 want you -- we would want to have you reconsider
4 the demur that was sustained against Coronado and
5 CSS.

6 THE COURT: Okay. I see. Coronado is in
7 by virtue of Pulte, but not in directly by virtue
8 of the plaintiffs?

9 MR. WISE: That is correct.

10 THE COURT: That's fine. I will take a
11 look at that.

12 MR. WISE: Judge, may I at least summarize
13 how that relates the ruling that -- do you want us
14 to submit this? Even reflects the ones that are
15 under advisement.

16 THE COURT: That would be great. That
17 would be terrific. You want to circulate it?

18 MR. WISE: That would be great, except
19 Mr. Coleman will be here all day.

20 Your Honor, one thing that the order does
21 not reflect: I have agreed with Coronado's counsel
22 to submit a separate order as it pertains to

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1 Peckinpaugh as to Coronado only.

2 THE COURT: Is that agreeable, Mr. Sparks?

3 MR. SPARKS: Yes, sir.

4 THE COURT: How did you get an order so
5 quickly?

6 MR. WISE: I had to mark it up. I made
7 some changes.

8 THE COURT: Okay. When that order is
9 received, I will enter it and I will decide these
10 remaining issues this afternoon. I will probably
11 give -- I will have Ms. Mulligan call you all
12 directly and let you know my decision. I will
13 prepare my own order, okay.

14 MR. WISE: Thank you, Your Honor.

15 THE COURT: Thank all you counsel for a
16 very well-briefed memoranda on these complicated
17 issues, and for very good argument made by
18 everyone. Thank you.

19 (Whereupon, the proceedings at 1:12 p.m.
20 were concluded.)

21
22

CERTIFICATE OF REPORTER

I, Stella R. Christian, do hereby certify
that the foregoing proceedings were taken by me in
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interested in the outcome of the action.

Stella R. Christian

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PAUL ANDERSON, ET AL.)
 DEAN BERGER, ET AL.)
 DOUGLAS S. BURDIN, ET AL.)
 PAOLO COLUMBI, ET AL.)
 HENRY FRANCIS EDEN, ET AL.)
 DAVID GANG,)
 JACK M. HAWXHURST, ET AL.)
 EDWARD P. JARMAS, ET AL.)
 MICHAEL R. LINCOLN, ET AL.)
 MICHAEL MALCHOW, ET AL.)
 TIM L. PECKINPAUGH, ET AL.)
 MICHAEL J. REBIBO, ET AL.)
 H. KENT RODGERS, ET AL.)
 MICHAEL J. ROWEN, ET AL.)
 JAMES R. WEAVER, ET AL.)

At Law Nos. 183665, 183428,
 184141, 184142, 183921, 186501,
 185075, 185073, 184015, 184008,
 184719, 183920, 185074, 184424,
 184107

Plaintiffs)
)
)

v.)
)
)

PULTE HOME CORPORATION, ET AL.)
 Defendants)
)
)

v.)
)
)

PAREX, INC., ET AL.)
 Cross-Defendants)
)
)

CORONADO CORPORATION, ET AL.)
 Third Party Defendants)

ORDER

This matter came to be heard on the 28th day of September, 2000 on demurrers and pleas in bar. Upon the matters presented to the Court at the hearing, it is hereby

ADJUDGED, ORDERED, and DECREED as follows:

1. Parex's demurrer as to the Virginia Consumer Protection Act claims is SUSTAINED based upon the rulings in Bay Point Condominium Association, Inc. v. RML Corp., et al., Law No. L99-475 (Norfolk Cir. Ct. July 18, 2000) and MacConkey v. F.J. Matter Design, Inc. et al., CL 98-2582 (Virginia Beach Cir. Ct. Feb. 8, 2000).

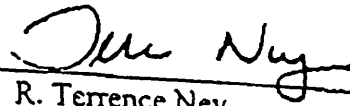
2. Parex's demurrer as to the Va. Code Ann. § 18.2-216 claims is OVERRULED based upon the ruling in Bay Point Condominium Association, Inc. v. RML Corp., et al., Law No. L99-475 (Norfolk Cir. Ct.

July 18, 2000).

3. Pulte Home Corporation's plea in bar of a two-year statute of limitations regarding the Plaintiffs' negligence *per se* counts is SUSTAINED as to the following Plaintiffs: Burdin, Colombi, Eden, Gang, Hawxhurst, Malchow, Rebibo, Rodgers, Rowen, and Peckinpugh.

4. The demurrers of Parex, American EIFS Stone & Stucco, and American Stucco & Stone are SUSTAINED against Pulte Home Corporation as to the implied warranty claims in the Cross-Claim and Third Party Motion for Judgment based upon the ruling in Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc., et al., 254 Va. 240, 491 S.E.2d 731 (1997).

Entered this 28th day of September, 2000.



R. Terrence Ney
Circuit Court Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

PAUL ANDERSON, <i>et al.</i> ,)	
)	
v.	)	At Law No. 183665
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
DEAN BERGER, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 183428
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
DOUGLAS S. BURDIN, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 184141
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
PAOLO COLOMBI, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 184142
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
HENRY FRANCIS EDEN, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 183921
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
DAVID GANG,)	
)	
v.	)	At Law No. 186501
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
JACK M. HAWXHURST, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185075
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
EDWARD P. JARMAS, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185073
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	

MICHAEL R. LINCOLN, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184015
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
MICHAEL MALCHOW, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184008
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
TIMOTHY L. PECKINPAUGH, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184719
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
MICHAEL J. REBIBO, <i>et al.</i> ,)	
)	
v.	)	At Law No. 183920
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
H. KENT RODGERS, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185074
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
MICHAEL J. ROWEN, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184424
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
JAMES R. WEAVER)	
)	
v.	)	At Law No. 184107
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	

**SEPTEMBER 28, 2000 ORDER REGARDING DEFENDANTS' DEMURRERS AND
SPECIAL PLEAS TO PLAINTIFFS' AMENDED MOTION OF JUDGMENT**

UPON CONSIDERATION of Pulte Home Corporation's ("Pulte") Demurrer and Special
Pleas, CSS, L.L.C.'s ("CSS") Demurrer and Special Plea, Coronado Corporation's Demurrer,
and Parex, Inc.'s ("Parex") Demurrer and Special Plea, the Opposition thereto submitted by the

Plaintiffs, Paul and Tiffini Anderson, Dean and Elaine Berger, Douglas and Dianna Burdin, Paolo and Mary Colombi, Henry Eden and Patricia McWethy, David Gang, Jack and Linda Hawxhurst, Edward and Rebecca Jarmas, Michael and Wendy Lincoln, Michael Malchow and Doreen Jakubcak, Tim and Pamela Peckinpaugh, Michael and Cynthia Rebibo, H. Kent and Christine Rodgers, Michael and Lori Rowen, and James and Susan Weaver, all of the memoranda and pleadings on file herein, and the arguments raised by counsel at the hearing on September 28, 2000, and for the reasons stated from the bench, it is therefore

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to **Count 1** for Negligence is denied and overruled, and it is further

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to **Count 2** for Breach of Express Warranty is denied and overruled, and it is further

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to **Count 3** for Breach of Implied Warranties is denied and overruled for all the above referenced consolidated cases ^{including} ~~except~~ Anderson, Berger, Jarmas, and Weaver, and it is further

~~ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to **Count 3** for Breach of Implied Warranties in the four cases, Anderson, Berger, Jarmas, and Weaver, is overruled and denied, and it is further~~

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to **Count 4** for Breach of Contract is overruled and denied, and it is further

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to **Count 5** for Actual Fraud is overruled and denied, and it is further

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to **Count 6** for

Constructive Fraud is overruled and denied, and it is further

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to Count 15 for Violation of Consumer Protection Act is overruled and denied, and it is further

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to Count 16 for Violation of Virginia Code §18.2-216 is overruled and denied, and it is further

ADJUDGED, ORDERED, and DECREED that CSS's and Coronado's Demurrer as to ^{sustained} Count 7 for Negligence *per se* is ~~overruled and denied~~, and it is further

ADJUDGED, ORDERED, and DECREED that Parex's Demurrers to Count 15 for Violation of Virginia Consumer Protection Act and Count 16 for Violation of Virginia Code ^{taken under advisement} §18.2-216 are ~~overruled and denied~~, and it is further

ADJUDGED, ORDERED, and DECREED that Parex's Demurrer as to Count 12 for Negligence *per se* is ^{sustained} ~~overruled and denied~~, and it is further

ADJUDGED, ORDERED, and DECREED that Parex's Demurrer as to Count 13 for Actual Fraud is ^{sustained} ~~overruled and denied~~, and it is further

ADJUDGED, ORDERED, and DECREED that Parex's Demurrers as to Count 14 for ^{is sustained, and as to} Constructive Fraud, Count 15 for Violation of Virginia Consumer Protection Act, and Count 16 ^{the demurrers are taken under advisement} for Violation of Virginia Code §18.2-216 are ~~overruled and denied~~ and it is further

ADJUDGED, ORDERED, and DECREED that ^{Pulte's} the various Special Pleas asserted by ^{to the} *Negligence per se claim is taken under advisement, but all remain* Defendants against the Plaintiffs' Amended Motion for Judgment are overruled without prejudice, the Court finding that the Special Pleas raise disputed facts ~~that shall be resolved at a trial by jury, and it is further~~

ADJUDGED, ORDERED, and DECREED that Plaintiffs shall have until _____,

SULLERTON & WISE
SUITE 204
621 UNIVERSITY DRIVE
URFAX, VIRGINIA 22030
(703) 934-6377
FAX (703) 934-6379

AN ANSWER AND GROUNDS OF DEFENSE TO THE
2000 to file and serve a ~~Second~~ Amended Motion For Judgment and that Defendants shall file
HEREOF, without prejudice
their responsive pleadings within fourteen (14) days of service thereof.
to any motions under advisement.

ENTERED ON THIS _____ DAY OF SEPTEMBER, 2000.

Judge Marcus Williams

SEEN AND ~~OBJECTED~~ FOR THE
REASONS STATED IN THE BRIEFS TO THE
EXTENT DEMURRERS ARE SUSTAINED.

R. TERRANCE NEY

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Counsel for Plaintiffs

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(703) 934-6377
FAX (703) 934-6379

SEEN AND agreed :



Christopher Hassell, Esq.

Heather Dean, Esq.

GILBERG & KIERNAN

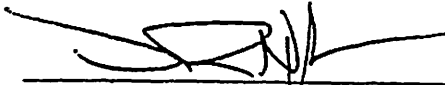
1250 Eye Street, N.W., 6th Floor

Washington, D.C. 20005

(202) 712-7000

Counsel for Defendant CSS, L.L.C. and Third Party Defendant Benjamin Franks

SEEN AND Agreed As To Damages; sustained, with rights reserved as to
matters under advisement.



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RUSSELL & RUSSELL

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Counsel for Defendant Parex, Inc.

SEEN AND Agreed :



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Herge, Sparks & Christopher, LLP

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McLean, VA 22101

(703) 848-4700

Counsel for Defendant Coronado Corporation and Third Party Defendant Bernard Franks

SEEN AND _____ :



Ralph Rinaldi, Esquire

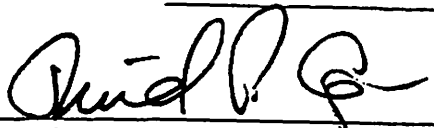
Cowles, Rinaldi, Judkins & Korjus

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Counsel for Third Party Defendant American EIFS Stucco and Stone, Inc.

SEEN AND _____:



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HARMAN, CLAYTOR, CORRIGAN & WELLMAN, P.C.

PO Box 70280

Richmond, Virginia 23255

Counsel for Third-Party Defendants American Stucco and Stone, L.L.C

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

PAUL ANDERSON, <i>et al.</i> ,)	
)	
v.	)	At Law No. 183665
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
DEAN BERGER, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 183428
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
DOUGLAS S. BURDIN, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 184141
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
PAOLO COLOMBI, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 184142
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
HENRY FRANCIS EDEN, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 183921
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
DAVID GANG,)	
)	
v.	)	At Law No. 186501
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
JACK M. HAWXHURST, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185075
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	

EDWARD P. JARMAS, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185073
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
MICHAEL R. LINCOLN, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184015
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
MICHAEL MALCHOW, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184008
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
TIM L. PECKINPAUGH, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184719
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
MICHAEL J. REBIBO, <i>et al.</i> ,)	
)	
v.	)	At Law No. 183920
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
H. KENT RODGERS, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185074
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
MICHAEL J. ROWEN, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184424
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
JAMES R. WEAVER, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184107
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	

**DEFENDANT PULTE HOME CORPORATION'S
CONSOLIDATED MOTION FOR RECONSIDERATION**

COMES NOW Defendant/Third-Party Plaintiff Pulte Home Corporation ("PHC"), by counsel, and respectfully requests reconsideration of certain aspects of this Court's rulings on PHC's demurrer and pleas in bar to the above-referenced Plaintiffs' Amended Motions for Judgment ("AMFJ"), and on the demurrers of certain third-party defendants to PHC's third-party claims.

A. Background

On September 28, 2000, this Court heard argument on the demurrer and pleas in bar filed by PHC, Coronado Corporation ("Coronado"), CSS, L.L.C. ("CSS") and Parex, Inc. ("Parex") to the Plaintiffs' AMFJ, as well as argument on the demurrers filed by American EIFS Stone & Stucco Supply, Inc. ("American EIFS"), American Stucco & Stone, L.L.C. ("American Stucco") and Parex to PHC's third-party claims. At the hearing's conclusion, the Court took certain matters under advisement, and as to all other matters, (1) overruled PHC's demurrer and pleas in bar to the Plaintiffs' AMFJ; (2) sustained the demurrers of the remaining defendants (Coronado, CSS and Parex) to the Plaintiffs' AMFJ; and (3) sustained the demurrers of American EIFS, American Stucco and Parex to PHC's third-party claims. See Order attached as Exhibit A.

Later that afternoon, the Court entered a second Order addressing the matters taken under advisement. In this Order, the Court (1) sustained PHC's plea of a two-year statute of limitations to Plaintiffs' negligence *per se* count as to 10 of the 15 cases; (2) overruled PHC's third-party implied warranty claims; and (3) sustained Parex's demurrer to the Plaintiffs' VCPA count, but overruled Parex's demurrer as to the Plaintiffs' deceptive advertising count under Va. Code § 18.2-216, thereby bringing Parex back into the suit. See Order attached as Exhibit B.

By this motion, PHC wishes to call the Court's attention to certain discrete issues that were not fully fleshed out at the hearing, and therefore perhaps not considered. Accordingly, PHC respectfully requests that this Court reconsider its rulings to the extent identified below.

B. PHC's Demurrers and Pleas to the Plaintiffs' AMFJ

1. *PHC's Demurrer to Plaintiffs' Implied Warranty Claims Should Be Sustained.*

The Court may recall that PHC's Purchase Agreements – which were made part of the pleadings for consideration on demurrer by Orders dated February 25, 2000 and July 28, 2000 – are of two slightly different styles. All contain disclaimers of the implied warranties otherwise applicable to builders under Va. Code § 55-70.1, but 4 contain the larger typeface arguably required by § 55-

70.1(C), and 11 do not. Compare Exhibit C (implied warranty disclaimer in Anderson, Berger, Jarmas and Weaver contracts) with Exhibit D (implied warranty disclaimer in other 11 contracts).

PHC's presentation at the hearing focused on the 11 with smaller typeface, which, PHC fears, may have diverted attention from the other 4, for which PHC submits that there can be no question regarding the sufficiency of the disclaimers under § 55-70.1(C). Judge Williams specifically sustained PHC's demurrer to these counts, see Exhibit E (5/25/00 Transcript at 119),¹ a fact which Plaintiffs' counsel apparently recognized by their inclusion of language sustaining PHC's demurrer as to these four cases in their draft Order. See Exhibit A, at 3.

With respect to the other 11 cases involving the smaller typeface, see Exhibit D, PHC urges that the larger typeface described by § 55-70.1, if required at all, is applicable only where a home is sold "as is." This is not the case here, as the Purchase Agreement clearly states that an express written warranty would be provided with the purchase of each home. This is consistent with this Court's prior rulings, inasmuch as this Court sustained the demurrers of Toll Brothers to the implied warranty counts in 21 similar EIFS cases where the disclaimer typeface was no larger or more extensive than that of the 11 disclaimers in these cases, but where the homes were sold with a written warranty, not "as is." See Exhibit F (4/5/00 Order of Ney, J., sustaining demurrer to implied warranty count); compare Exhibit G (Toll Brothers sales contract, at ¶ 10) with Exhibit D (PHC sales contract).

2. *PHC's Plea in Bar Based on the Contractual One-Year Statute of Limitations Should be Sustained.*

The Purchase Agreements applicable in the Anderson, Berger, Jarmas and Weaver cases contain a shortened one-year statute of limitations. See Exhibit C.² The Court never specifically opined on the enforceability of this contractual provision at the September 28, 2000 hearing, but PHC submits that it is plainly authorized under Virginia law. See, e.g., Board of Supervisors v. Samson, 235 Va. 516, 520 (1988); Southwood Builders, Inc. v. Peerless Ins., 235 Va. 164, 171 (1988); accord Blastos, et al. v. Pulte Home Corp., Law No. 141976 (Letter Opinion of Wooldridge, J., dated 12/12/95, attached as Exhibit H).

¹ After sustaining the demurrer, counsel for Plaintiffs requested leave to amend. Counsel for PHC stated: "I would object. How do you amend a statutory disclaimer?" Judge Williams responded "I don't know," but granted Plaintiffs' request nonetheless. In fact, the implied warranty count in Plaintiffs' AMFJ is completely unchanged from the original MFJ.

² Specifically, the Purchase Agreement provides: "NO MEDIATION, ARBITRATION OR ACTION, REGARDLESS OF FORM, ARISING OUT OF THIS TRANSACTION AND/OR ANY OBLIGATIONS BETWEEN THE PARTIES, MAY BE BROUGHT BY YOU MORE THAN ONE (1) YEAR AFTER THE CAUSE OF ACTION HAS ACCRUED."

Plaintiffs' counsel has suggested that the doctrine of equitable estoppel operates to preclude enforcement of this contractual limitation absent a jury trial. However, though Plaintiffs have alleged fraud in the inducement, their AMFJs seek only *legal* relief rather than *equitable* relief (i.e., rescission of the contract), the settled effect of which is to affirm the contract. See Wilson v. Hundley, 96 Va. 96, 101 (1898); Blastos, *supra*. In any event, Plaintiffs' reliance on PHC's alleged silence is insufficient under Virginia law to support an equitable estoppel or other defense to toll and otherwise expired limitation period, because "[m]ere silence or concealment . . . may not, without affirmative misrepresentation, toll the running of the statute" Culpeper Nat'l Bank, Inc. v. Tidewater Improvement Company, Inc., 119 Va. 73, 83-84 (1916); see Boykins Narrow Fabrics Corp. v. Weldon Roofing and Sheet Metal, Inc., 221 Va. 81 (1980) (same). Accordingly, the contract must be enforced, and application of a one-year rather than two-year statute of limitations operates to bar each count for which this Court applied a "date of injury" rule (rather than "discovery" rule) in these four cases – i.e., the negligence *per se*, breach of contract, and breach of express and implied warranty counts.

3. *Miscellaneous Other Pleas in Bar*

PHC submits that miscellaneous other pleas of statutes of limitation should have been sustained, but – perhaps due to inadvertence – were not. These are set forth below.

a. After taking the issue under advisement, this Court sustained PHC's plea of the applicable two-year statute of limitations to the negligence *per se* counts of 10 of the 15 sets of Plaintiffs, leaving only Lincoln, Anderson, Berger, Jarmas and Weaver. Lincoln should have been among them. The county issued its Residential Use Permit on October 17, 1997, see Exhibit I, which is more than two years before the Lincolns initially filed suit October 24, 1997.

b. Applying the three-year aggregate limitations period (one year to give notice, two years to file), the implied warranty claims of Plaintiffs Gang, Hawxhurst, Malchow, Rodgers and Peckinpugh are time-barred because they were filed more than three years after the date of transfer. See Exhibit J; see also Va. Code Ann. § 55-70.1(E); Davis v. Tazewell Place Assoc., 254 Va. 257 (1997).

c. Even when a discovery rule is applied, Plaintiff Gang's actual fraud, constructive fraud, VCPA and deceptive advertising (§ 18.2-216) counts are barred by the applicable two-year limitation period. This is because Gang, in his amended Motion for Judgment, specifically acknowledged that on April 1 and 7, 1997, more than two years prior to the commencement of his suit, a home inspection was performed on his home which "indicated that the synthetic stucco was installed improperly, and that excess moisture was still entering the house," and that "[a]s a result of this inspection and addi-

tional reports in the media, Plaintiff became concerned that his house was, and is, experiencing severe moisture intrusion problems.” Gang AMFJ ¶ 17; see also Gang MFJ ¶ 16. At the September 28 hearing, the Court initially overruled this plea based on Plaintiff’s counsel’s representation that the April 1997 date was a typographical error, but Plaintiff’s counsel later withdrew this representation. Thus, based on Gang’s clear admission of knowledge, these four counts should be dismissed as time-barred.

C. Demurrers of Parex, American EIFS and American Stucco to PHC’s Third-Party Claims

1. *Parex’s Demurrer to PHC’s Contribution Claim Should be Overruled.*

PHC conceded at the September 28 hearing that its contribution claims would not lie unless the Plaintiffs had a cause of action (though not necessarily a right of action) against the third-party defendants. See Gemco-Ware, Inc. v. Rongene Mold and Plastics Corp., 234 Va. 54, 58 (1987). When the Court sustained Parex’s demurrers to the Plaintiffs’ AMFJ, this appeared to resolve this question in Parex’s favor, and the Court so ruled. Later that day, however, the Court overruled Parex’s demurrer to the Plaintiffs’ deceptive advertising count. The necessary effect of this ruling was to revive PHC’s contribution claim against Parex, as it now appears that the Plaintiffs do have a cause of action against Parex. Id.; see Va. Code Ann. § 8.01-34. Thus Parex’s demurrer to this count must be overruled.

2. *The Demurrer of Parex, American EIFS and American Stucco to PHC’s Third-Party Express and Implied Warranty Claims Should Be Overruled.*

Parex, American EIFS and American Stucco demurred to PHC’s express and implied warranty claims under U.C.C. §§ 8.2-313, 8.2-314 and 8.2-315 based on an alleged lack of privity. PHC maintains that the anti-privity statute of § 8.2-318 specifically abolishes lack of privity as a defense in claims “for breach of warranty, express or implied,” and that PHC’s direct damages are recoverable under Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc., 254 Va. 240 (1997), even if its consequential damages are not. In taking the issue under advisement following the hearing, the Court stated that “the underlying issue to be determined there is whether the damages claimed by Pulte against these defendants are direct or consequential damages.” The Order issued later that day sustained the third-party defendants’ demurrer on this issue “based on the ruling in Beard Plumbing[.]”

The nature of PHC’s damages was not addressed in the parties’ initial briefs. PHC submits, however, that a review of the applicable authorities compels the conclusion that part or all of the damages sought by PHC are fairly characterized as direct damages. As pled, PHC’s cross and third-party warranty claims seek recovery of “direct damages under Section 8.2-714(2) of the Virginia Code, together with consequential damages to the extent available by law” See Cross-Claim at 12; Third-Party MFJ at 14. This statute states in pertinent part as follows:

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case, any incidental and consequential damages under the next section [§ 8.2-715] may also be recovered.

Va. Code Ann. § 8.2-714. As PHC's pleadings illustrate, one item of damage sought by PHC is seeking in the lost value of the stucco goods received from American EIFS, American Stucco and Parex under § 8.2-714(2). Such damages are clearly not consequential, as § 8.2-714 places consequential damages in an entirely different subsection. See § 8.2-714(3).

Beard Plumbing is also instructive. In concluding that consequential damages are not recoverable absent privity because § 8.2-715(2)(a) limits recovery of such damages to "the time of contracting," the Supreme Court was careful to distinguish between the different types of damages:

Consequential damages are not defined in the UCC, but "are used in the sense given them by the leading cases on the subject." § 8.1-106 cmt. 3. Whether damages are direct or consequential is a matter of law to be determined by the court. R.K. Chevrolet, Inc. v. Hayden, 253 Va. 50, 56, 480 S.E.2d 477, 481 (1997).

Beard Plumbing, 254 Va. at 544 n.5. As R.K. Chevrolet then demonstrates, most damages will be classified as direct damages unless "special circumstances" are present. 253 Va. at 56. And so here, PHC's warranty claims seek damages that flow naturally from the third-party defendants' failure to supply PHC with a good that is of the quality warranted. Thus, if Plaintiffs are entitled to an exterior recladding based on the defective quality of the EIFS, then PHC's third-party warranty claims should cover the cost of replacement. See Va. Code § 8.2-714(2); § 8.2-715(1).

To be sure, PHC may not be able to recover such consequential damages as loss of income, harm to reputation, or secondary damage caused by the EIFS. See § 8.2-715(2)(b); R.K. Chevrolet, 253 Va. at 56. However, because PHC's express and implied warranty counts seek non-consequential damages that are recoverable in the absence of privity, this demurrers should be overruled.

Respectfully submitted,

PULTE HOME CORPORATION

By: 

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Dated: October 18, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2000, a copy of Defendant Pulte Home Corporation's Consolidated Motion for Reconsideration was served, via first-class mail, on:

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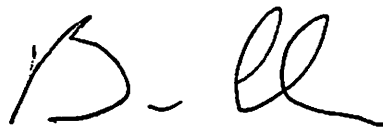
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Brian A. Coleman

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

PAUL ANDERSON, <i>et al.</i> ,)	
)	
v.	)	At Law No. 183665
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
DEAN BERGER, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 183428
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
DOUGLAS S. BURDIN, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 184141
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
PAOLO COLOMBI, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 184142
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
HENRY FRANCIS EDEN, <i>et. al.</i> ,)	
)	
v.	)	At Law No. 183921
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
DAVID GANG,)	
)	
v.	)	At Law No. 186501
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
JACK M. HAWXHURST, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185075
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	
EDWARD P. JARMAS, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185073
)	
<u>PULTE HOME CORPORATION, <i>et al.</i></u>)	

MICHAEL R. LINCOLN, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184015
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
MICHAEL MALCHOW, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184008
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
TIMOTHY L. PECKINPAUGH, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184719
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
MICHAEL J. REBIBO, <i>et al.</i> ,)	
)	
v.	)	At Law No. 183920
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
H. KENT RODGERS, <i>et al.</i> ,)	
)	
v.	)	At Law No. 185074
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
MICHAEL J. ROWEN, <i>et al.</i> ,)	
)	
v.	)	At Law No. 184424
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	
JAMES R. WEAVER)	
)	
v.	)	At Law No. 184107
)	
<u>PULTE HOME CORPORATION, <i>et al.</i>,</u>)	

**SEPTEMBER 28, 2000 ORDER REGARDING DEFENDANTS' DEMURRERS AND
SPECIAL PLEAS TO PLAINTIFFS' AMENDED MOTION OF JUDGMENT**

UPON CONSIDERATION of Pulte Home Corporation's ("Pulte") Demurrer and Special
Pleas, CSS, L.L.C.'s ("CSS") Demurrer ¹⁰and Special Plea, Coronado Corporation's Demurrer,
and Parex, Inc.'s ("Parex") Demurrer and Special Plea, the Opposition thereto submitted by the

Plaintiffs, Paul and Tiffini Anderson, Dean and Elaine Berger, Douglas and Dianna Burdin, Paolo and Mary Colombi, Henry Eden and Patricia McWethy, David Gang, Jack and Linda Hawxhurst, Edward and Rebecca Jarmas, Michael and Wendy Lincoln, Michael Malchow and Doreen Jakubcak, Tim and Pamela Peckinpaugh, Michael and Cynthia Rebibo, H. Kent and Christine Rodgers, Michael and Lori Rowen, and James and Susan Weaver, all of the memoranda and pleadings on file herein, and the arguments raised by counsel at the hearing on September 28, 2000, and for the reasons stated from the bench, it is therefore

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to Count 1 for Negligence is denied and overruled, and it is further

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to Count 2 for Breach of Express Warranty is denied and overruled, and it is further

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to Count 3 for Breach of Implied Warranties is denied and overruled for all the above referenced consolidated cases ^{including} ~~except~~ Anderson, Berger, Jarmas, and Weaver, and it is further

~~ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to Count 3 for Breach of Implied Warranties in the four cases, Anderson, Berger, Jarmas, and Weaver, is overruled and denied, and it is further~~

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to Count 4 for Breach of Contract is overruled and denied, and it is further

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to Count 5 for Actual Fraud is overruled and denied, and it is further

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to Count 6 for

Constructive Fraud is overruled and denied, and it is further

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to Count 15 for Violation of Consumer Protection Act is overruled and denied, and it is further

ADJUDGED, ORDERED, and DECREED that Pulte's Demurrer as to Count 16 for Violation of Virginia Code §18.2-216 is overruled and denied, and it is further

ADJUDGED, ORDERED, and DECREED that CSS's and Coronado's Demurrer as to Count 7 for Negligence *per se* is ~~overruled and denied~~ ^{sustained}, and it is further

ADJUDGED, ORDERED, and DECREED that Parex's Demurrers to Count 15 for Violation of Virginia Consumer Protection Act and Count 16 for Violation of Virginia Code §18.2-216 are ~~overruled and denied~~ ^{taken under advisement}, and it is further

ADJUDGED, ORDERED, and DECREED that Parex's Demurrer as to Count 12 for Negligence *per se* is ~~overruled and denied~~ ^{sustained}, and it is further

ADJUDGED, ORDERED, and DECREED that Parex's Demurrer as to Count 13 for Actual Fraud is ~~overruled and denied~~ ^{sustained}, and it is further

ADJUDGED, ORDERED, and DECREED that Parex's Demurrers as to Count 14 for Constructive Fraud, ~~Count 15 for Violation of Virginia Consumer Protection Act, and Count 16 for Violation of Virginia Code §18.2-216~~ ^{is sustained, and as to but the Demurrers to} ~~the demurrers~~ ^{are taken under advisement} and it is further

ADJUDGED, ORDERED, and DECREED that ^{Pulte's} ~~the various~~ Special Pleas asserted by ^{to the} ~~Negligence per se claim is taken under advisement, but all remain~~ ^{Special Pleas} Defendants against the Plaintiffs' Amended Motion for Judgment are overruled without prejudice, the Court finding that the Special Pleas raise disputed facts ~~that shall be resolved at a trial by jury, and it is further~~

ADJUDGED, ORDERED, and DECREED that Plaintiffs shall have until _____

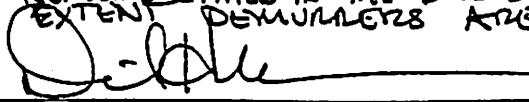
AN ANSWER AND GROUNDS OF DEFENSE TO THE
~~2000~~ to file and serve a ~~Second~~ Amended Motion For Judgment and that Defendants shall file
HEREOF, without prejudice
their responsive pleadings within fourteen (14) days of service thereof.
to any motions under advisement.

ENTERED ON THIS _____ DAY OF SEPTEMBER, 2000.

Judge ~~Marcus Williams~~

R. TERRANCE KEY

SEEN AND OBJECTED FOR THE
REASONS STATED IN THE BRIEFS TO THE
EXTENT DEMURRERS ARE SUSTAINED.


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SEEN AND agreed:



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Heather Dean, Esq.

GILBERG & KIERNAN

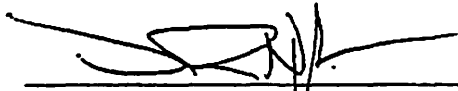
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Counsel for Defendant CSS, L.L.C. and Third Party Defendant Benjamin Franks

SEEN AND Agreed As To Demurrer; sustained, with rights reserved as to
matters under advisement.



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Herge, Sparks & Christopher, LLP

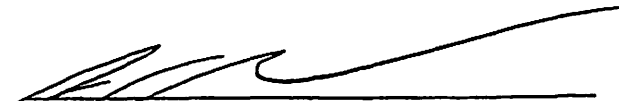
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Counsel for Defendant Coronado Corporation and Third Party Defendant Bernard Franks

SEEN AND _____:



Ralph Rinaldi, Esquire

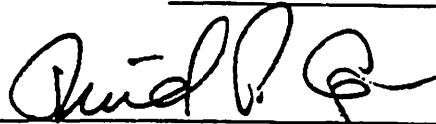
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SEEN AND _____:



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Counsel for Third-Party Defendants American Stucco and Stone, L.L.C

VIRGINIA:**IN THE CIRCUIT COURT OF FAIRFAX COUNTY**

PAUL ANDERSON, ET AL.)
 DEAN BERGER, ET AL.)
 DOUGLAS S. BURDIN, ET AL.)
 PAOLO COLUMBI, ET AL.)
 HENRY FRANCIS EDEN, ET AL.)
 DAVID GANG,)
 JACK M. HAWXHURST, ET AL.)
 EDWARD P. JARMAS, ET AL.)
 MICHAEL R. LINCOLN, ET AL.)
 MICHAEL MALCHOW, ET AL.)
 TIM L. PECKINPAUGH, ET AL.)
 MICHAEL J. REBIBO, ET AL.)
 H. KENT RODGERS, ET AL.)
 MICHAEL J. ROWEN, ET AL.)
 JAMES R. WEAVER, ET AL.)

At Law Nos. 183665, 183428,
 184141, 184142, 183921, 186501,
 185075, 185073, 184015, 184008,
 184719, 183920, 185074, 184424,
 184107

Plaintiffs)
)
 v.)
)
)

PULTE HOME CORPORATION, ET AL.)
 Defendants)
)
 v.)
)
)

PAREX, INC., ET AL.)
 Cross-Defendants)
)
)

CORONADO CORPORATION, ET AL.)
 Third Party Defendants)

ORDER

This matter came to be heard on the 28th day of September, 2000 on demurrers and pleas in bar. Upon the matters presented to the Court at the hearing, it is hereby

ADJUDGED, ORDERED, and DECREED as follows:

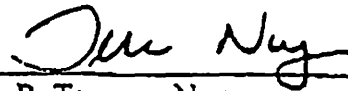
1. Parex's demurrer as to the Virginia Consumer Protection Act claims is **SUSTAINED** based upon the rulings in Bay Point Condominium Association, Inc. v. RML Corp., et al., Law No. L99-475 (Norfolk Cir. Ct. July 18, 2000) and MacConkey v. F.J. Matter Design, Inc. et al., CL 98-2582 (Virginia Beach Cir. Ct. Feb. 8, 2000).
2. Parex's demurrer as to the Va. Code Ann. § 18.2-216 claims is **OVERRULED** based upon the ruling in Bay Point Condominium Association, Inc. v. RML Corp., et al., Law No. L99-475 (Norfolk Cir. Ct.

July 18, 2000).

3. Pulte Home Corporation's plea in bar of a two-year statute of limitations regarding the Plaintiffs' negligence *per se* counts is SUSTAINED as to the following Plaintiffs: Burdin, Colombi, Eden, Gang, Hawxhurst, Malchow, Rebibo, Rodgers, Rowen, and Peckinpaugh.

4. The demurrers of Parex, American EIFS Stone & Stucco, and American Stucco & Stone are SUSTAINED against Pulte Home Corporation as to the implied warranty claims in the Cross-Claim and Third Party Motion for Judgment based upon the ruling in Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc., et al., 254 Va. 240, 491 S.E.2d 731 (1997).

Entered this 28th day of September, 2000.



R. Terrence Ney
Circuit Court Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.

the closing agent for this Agreement. Closing will take place even if some work needs to be completed so long as a certificate of occupancy (or equivalent), either temporary or final, has been issued.

We will repair or complete after Closing any "punchlist" items agreed to by us in writing, if any, following reasonable oral or written notice to you. The existence of such punchlist items shall not entitle you to cancel this Agreement, withhold funds at Closing or delay Closing. We will retain exclusive possession of the Home until we have received all monies due from you. Notwithstanding anything in this Agreement to the contrary, and assuming no defaults by you, we acknowledge an absolute obligation to deliver the Home no later than 24 months from the date you sign this Agreement and if we fail to do so, except for reasons outside of Our control as a result of the action or inaction of a third party whose actions are necessary to the performance of Our obligations, you may avail yourself of all available remedies.

CLOSING COSTS: If you obtain your mortgage loan through Pulte Mortgage Corporation or its assigns and allow Closing to take place at PHM Title Agency L.L.C., we agree to pay an amount equal to, but no greater than, \$ 2 towards the lender's and the company's allowable closing costs and/or discount points. These allowable closing costs expressly exclude owner's title insurance, credit report, appraisal, your first year hazard and/or mortgage insurance premiums, as well as any escrows and per diem interest charges. We are not obligated for any further adjustments if your allowable closing costs do not equal the above-referenced amount. You will pay all other costs in connection with the mortgage loan and Closing.

PRORATIONS: We will prorate all real estate taxes, assessments and other charges against the Home as of the date of Closing. After Closing, you will be responsible for all such charges.

TIME: Time is of the essence for your performance, including your attendance at Closing on the Closing Date, payment of the Purchase Price and closing costs, and other dates in this Agreement. In the event you fail to attend Closing on the Closing Date or perform any other obligation under this Agreement on the date required, you will be in default of this Agreement.

THE LIMITED WARRANTY YOU RECEIVE WITH YOUR HOME

WARRANTIES: We warrant the Home against defects in workmanship and materials in accordance with, and limited by, our limited warranty, the Pulte Protection Plan, issued by a third party warranty company (the "Limited Warranty"), a copy of which we have provided to you. As to items which are within the Home but which we did not manufacture, such as any air conditioner, water heater, range, dishwasher and other appliances, equipment or "consumer products," we provide no warranty on such items, but will refer to you the manufacturer's warranty.

LIMITATIONS OF LIABILITIES AND WARRANTIES: WE LIMIT OUR OBLIGATIONS UNDER THIS AGREEMENT TO THOSE CONTAINED IN THE LIMITED WARRANTY WHICH ARE FOR REPAIR AND REPLACEMENT. THE LIMITED WARRANTY IS THE ONLY WARRANTY

1 VIRGINIA: THE CIRCUIT COURT IN THE COUNTY OF
2 FAIRFAX

3
4 DEAN BERGER AND :
5 ELAINE BERGER, ET AL., :
6 Plaintiffs. : LAW NO. 183428
7 -vs- :
8 PULTE HOME CORPORATION, ET AL., :
9 Defendants. :
10
11

12 Before: The Honorable Marcus D. Williams,
13 Judge of the aforesaid court.

14 Date: May 25, 2000.

15 Place: Fairfax, Virginia.

16 APPEARANCES:

17 David Hilton Wise,
18 Counsel for the Plaintiffs.

19 LEWIS & ROBERTS
20 By: Mr. Daniel K. Bryson,
21 Counsel for the Plaintiffs.

22 RUSSEL & RUSSEL
23 By: Timothy R. Hughes,
24 Counsel for Parex, Inc.

25 GILBERG & KIERNAN
By: Christopher E. Hassell,
Counsel for CSS, L.L.C.

Jordan M. Samuel,
Counsel for Pulte Home Corp.

Reported by: Betsy L. Schuster, Shorthand Reporter

ACCURATE REPORTING, INC.
(703) 244-4567

1 pleading.

2 Let me take one moment.

3 MR. SAMUEL: We're left with breach
4 of implied warranty for Pulte.

5
6 (Pause in the proceedings.)

7
8 THE COURT: Back to this implied
9 warranty. Are you saying you're not relying on
10 the PPP, right?

11 MR. SAMUEL: It is solely on --

12 THE COURT: What are you relying upon
13 to say that they do not -- maybe I'm not clear.

14 MR. SAMUEL: In the contract itself,
15 Your Honor, there's a waiver of -- the only
16 implied warranties that exist under Virginia law
17 are those that are set forth 55-70.1. There are
18 no other implied warranties under Virginia law.
19 The statute sets forth in specificity --

20 THE COURT: You're saying there is no
21 other basis other than -- all right, I understand.

22 MR. SAMUEL: Right, as we set forth
23 the waiver required by subsection C with the
24 proper font, and his argument was -- that was the
25 "face of the contract" argument, it's not on the

1 face of the contract. That's where we were on
2 that.

3 THE COURT: I see. I remember now.
4 Sometimes we get so --

5 MR. SAMUEL: Right. That's where it
6 is only as to four, Anderson, Berger, Jarmas, and
7 Weaver.

8 MR. BRYSON: Your Honor, we have
9 other arguments in our brief other than just the
10 font and the face of the contract. The statute
11 was very specific on the number of things you need
12 to do and none of which we say that Pulte did. We
13 have to set forth the disclaimers with specificity
14 as to what you're disclaiming. There's some other
15 language that's set forth in our brief in addition
16 to the face. Those were just the two that
17 happened to come up here in our arguments.

18 MR. SAMUEL: If the Court would pull
19 the statute, you will see that we have verbatim
20 the implied warranties granted under 55-70.1, so
21 you can't be any more specific than verbatim
22 putting forth the implied warranties granted by
23 the statute. It can't be any more specific than
24 that.

25 MR. BRYSON: They are trying to

1 disclaim latent defects. We have a case right on
2 point that says if you're going to disclaim latent
3 defects, you need to say that.

4 MR. SAMUEL: Not in Virginia.

5 THE COURT: You give me a case on
6 that?

7 MR. BRYSON: There's no Virginia case
8 on that that's instructive, so we have a case for
9 another jurisdiction.

0 THE COURT: It says free from
1 structural defects.

2 MR. SAMUEL: Yet they still have the
3 Pulte Protection Plan. If the Court would take a
4 few seconds to pull the statute, or I can give the
5 Court the statute, it is very clear what needs to
6 be done and we have followed it to the letter on
7 these four.

8 MR. BRYSON: We have a copy of the
9 statute, Your Honor, if Your Honor would like it.

0 THE COURT: I have it.

1 MR. SAMUEL: Subsection C.

2 MR. WISE: Your Honor, if I may, just
3 briefly on that, reading straight from the statute
4 it says that if -- we've already talked about the
5 font size and the face of the contract, but it

says that if you want to waive, modify or exclude, it's only good besides being on the face of contract, besides being conspicuous, besides being two points larger than the other type of the contract, it's only effective if the words used to waive, modify, or exclude the warranty state with specificity the warranty or warranties that are being waived, modified, or excluded. That's exactly our point, Your Honor. We have latent defects here --

THE COURT: Latent defects and structural defects and they excluded that.

MR. WISE: Latent defects are, I think, different than just structural defects.

THE COURT: How would it be different here?

MR. WISE: Latent defects, Your Honor, you can't see them.

THE COURT: But -- it's not a question of seeing them, whether it's obvious or not, but it didn't change the nature of what your warranty or quality of it.

MR. WISE: I agree, Your Honor, but if you look -- you're looking at Subsection B to talk about what implied warranties there are, but

WORD
INDEX

1 then if you want waive implied warran s down
2 under Subsection C of that statute, it has to be
3 with specificity. You can't just hide behind --
4 make general -- hide the language on page 5 of the
5 contract and say that lo and behold we're going to
6 hold you responsible for all latent defects that
7 we have effectively hidden from you. That's
8 really what they want, Your Honor, before we have
9 a chance to conduct any discovery.

10 MR. SAMUEL: If I could briefly, Your
11 Honor. The statute is exceedingly clear what
12 needs to be done. We have followed it to the
13 letter. The statute sets forth what implied
14 warranty --

15 THE COURT: He's claiming you haven't
16 disclaimed a latent defect.

17 MR. SAMUEL: There's nothing in this
18 statute that grants them an implied warranty for a
19 latent defect, Your Honor, and if it's not in this
20 statute, if -- if it does not exist in this
21 statute, then there is no implied warranty under
22 Virginia law. The case law is clear. I,
23 therefore, waived every implied warranty granted
24 under the statute.

25 THE COURT: All right.

MR. JEL: The thing that they keep forgetting is there is another warranty, the expressed warranty. We're not leaving these people high and dry. They have another warranty.

THE COURT: I understand. Thank you.

With regard to the demurrer, I'm going to sustain the demurrer as those four parties with regard to Subsection C. They must disclaim effectively.

MR. WISE: I'm sorry, Your Honor. You're sustaining it?

THE COURT: Sustain the demurrer.

MR. WISE: I would request leave to amend those four specific counts, Your Honor.

MR. SAMUEL: I would object. How do you amend a statutory disclaimer?

THE COURT: I don't know.

MR. WISE: I'd like the opportunity, Your Honor.

THE COURT: I'll give him one leave to amend.

MR. WISE: Thank you, Your Honor.

MR. HUGHES: Your Honor, if I could ask one question just for clarification. I know we've had some issues in the past getting orders

Exhibit F

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

JAMES I. MADAY

Plaintiff,

v.

TOLL BROTHERS, INC., et al.

Defendants.

)
)
)
)
) At Law No.: 184844
)
)
)
)
)

ORDER

This matter came to be heard before the Court on March 2, 2000 and March 17, 2000, upon Defendants' Demurrer and First Plea in Bar, Defendants' supplemental filings, Plaintiff's Responses thereto and Plaintiff's supplemental filings, and Defendants' Motion For Sanctions. Based on papers filed, argument of counsel heard, and the Court's ruling from the bench, it is:

ORDERED and ADJUDGED as follows:

1. Defendants' Demurrer with respect to Count I, Fraud, is hereby OVERRULED;
2. Defendants' Demurrer with respect to Count II, Negligent Misrepresentation, is hereby SUSTAINED;
3. Defendants' Demurrer with respect to Count III, Constructive Fraud, is hereby OVERRULED;
4. Defendants' Demurrer with respect to Count IV, Breach of Contract, is hereby OVERRULED;
5. Defendants' Demurrer with respect to Count V, Breach of Warranty, is hereby OVERRULED and defendants' motion to Crave Oyer concerning Plaintiff's written warranty is GRANTED;

6. Defendants' Demurrer with respect to Count VI, Violation of the Virginia Consumer Protection Act of 1977, is hereby OVERRULED;

7. Defendants' Demurrer with respect to Count VII, Negligence, is hereby SUSTAINED;

8. Defendants' Demurrer with respect to Count VIII, Trespass, is hereby SUSTAINED;

9. Defendants' Demurrer with respect to Count IX, Negligence Per Se, is hereby OVERRULED;

10. Defendants' First Plea in Bar with respect to Count II, Negligent Misrepresentation, is hereby deemed moot;

11. Defendants' First Plea in Bar with respect to Count VI, Violation of the Virginia Consumer Protection Act of 1977, is hereby OVERRULED;

12. Defendants' First Plea in Bar with respect to Count VII, Negligence, is hereby deemed moot;

13. Defendants' First Plea in Bar with respect to Count IX, Negligence Per Se, is hereby SUSTAINED;

14. Defendants' Motion For Sanctions is hereby DENIED.


ENTERED this 5th day of March, 2000


JUDGE R. TERRENCE NEY

SEEN AND EXCEPTIONS NOTED AS TO PARAGRAPHS 2, 7, 8, 10, 12, and 13.

For the reasons stated in Plaintiff's memoranda (and supplements thereto) filed in opposition to Defendants' Memorandum of Law in Support of Demurrer and First Plea in Bar.


By:


William H. Bode (VSB #32923)
Counsel for Plaintiff
BODE & BECKMAN L.L.P
1150 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036

SEEN AND EXCEPTIONS NOTED AS TO PARAGRAPHS 1, 3, 4, 5, 6, 9, 11, and 14.

For the reasons stated in Defendants' Memorandum of Law in Support of Demurrer (and supplements thereto) and First Plea in Bar (and supplements thereto), and Defendants' Motion For Sanctions.

By:


Michael McManus (VSB #15521)
Counsel for Defendants
DRINKER BIDDLE & REATH L.L.P
1500 K Street, N.W.
Suite 1100
Washington, D.C. 20005

Agreement of Sale

This Agreement is made this 31st day of March, 1992, by and between 1417 N. 11th St. #201, Arlington, VA 22201 ("Seller") and 10365 Green Hollow Rd, Silver Spring, MD 20902 ("Buyer"), whose address is: 10365 Green Hollow Rd, Silver Spring, MD 20902

1. PURCHASE: Seller shall sell to Buyer who shall purchase from Seller a 1 1/2 style home on Lot 46 in the community known as 1417 N. 11th St. #201 having a street address of 1717 N. 11th St. #201 (the Lot and the home are hereinafter referred to as the "Premises"). The purchase price shall be 452,900.00 Dollars (\$ 452,900.00) payable as follows:

Buyer's check on non-binding lot reservation agreement	\$ <u>1,000.00</u>
Buyer's check at signing of this Agreement	\$ <u>10,322.00</u>
<u>April 30, 1996</u>	\$ <u>11,323.00</u>
Buyer's certified check at settlement	\$ <u>430,955.00</u>
<u>Nett for balance of 10% down payment (\$45,290.00)</u>	
TOTAL	\$ <u>452,900.00</u>

2. TITLE: Fee simple title to the Premises shall be conveyed by Seller's special warranty deed. Title shall be good and marketable and insurable as such at regular rates by a responsible title company subject only to restrictions, agreements, conditions and easements of record and rights of any utility companies.

3. MORTGAGE APPLICATION: Buyer shall, within 10 days of the date of Buyer's execution of this Agreement, at Buyer's expense, submit an application to First National Mortgage Co. 10/1 ARM under conditions herein stated for a mortgage in the amount of \$ 416,600.00 for a term of not less than 30 years and at the following interest rate: 10% ARM initial rate set 3 days prior to settlement

Buyer agrees to pay 1.5 points. Buyer shall in good faith make truthful and complete application for such mortgage and, within 5 days of request, furnish all required information. Buyer represents that the information contained in the loan qualification questionnaire already provided to Seller is truthful and accurate. Buyer agrees to pay all required fees in connection with Buyer's application and the closing of the mortgage loan. If the application is not approved within 45 days of application or within 10 days of any subsequent application, Seller may: (1) extend the time period for obtaining a mortgage commitment, (2) submit another application on substantially the same terms to a lender chosen by Seller at no additional cost to Buyer, or (3) declare this Agreement null and void in which event all sums paid on account of the purchase price and extras shall be returned to Buyer without interest, and neither party shall have any further rights or liabilities hereunder. Buyer agrees to immediately send Seller copies of any notice from Buyer's lender rejecting Buyer's loan application.

If the lender approves the application for a mortgage loan in the amount and for the terms stated above, Buyer agrees to accept the loan commitment within 5 days, to mail an executed copy of the commitment to Seller and to execute all documents and pay all fees required to consummate the mortgage transaction. Buyer agrees to be responsible for and bear the risk of meeting all conditions, if any, of the commitment including but not limited to the sale of other real estate presently owned by Buyer. Buyer's failure to fulfill any of such conditions, for any reason, shall not release Buyer from its obligations under this Agreement.

4. SETTLEMENT COSTS; APPORTIONMENTS: Buyer shall pay all customary and usual settlement costs, including title insurance, survey, notary fees and all city, county and state transfer or recordation taxes, except the Virginia Grantor's Tax which shall be paid by Seller. Real estate taxes and all other charges that are customarily apportioned shall be apportioned to the date of settlement.

5. TITLE INSURANCE: Buyer has the right to select the title insurance company for settlement; however, if Buyer fails to notify Seller in writing of Buyer's selection within 14 days of Buyer's execution hereof, Seller is authorized to order title insurance for Buyer at Buyer's expense.

6. DEFAULT: If Buyer defaults in performing any of its obligations under this Agreement, and such default continues for 7 days after notice, Seller may retain all sums paid on account of the purchase price and extras as liquidated damages and this Agreement shall be null and void. If Seller does not construct or convey the Premises or otherwise defaults under this Agreement and settlement does not occur, the maximum liability of Seller shall be to return all sums paid on account of the purchase price and extras to Buyer and this Agreement shall be null and void.

7. APPROVAL OF OWNER: This Agreement shall not be binding upon Seller unless executed by an officer of Seller within 30 days; Seller's salesperson has no authority to bind Seller hereunder. This Agreement shall constitute an irrevocable offer by Buyer for this 30 day period.

8. CONSTRUCTION: The house will be completed substantially similar to the model home, without extras, located on Lot 46 attached 1417 N. 11th St. #201

MA 00041

The furnishings, decorations, landscaping (including sodding), upgrades and all optional, decorator and other extra cost items displayed in the sample house are not included in this sale unless specifically itemized on Exhibits attached hereto.

The Premises will be graded and seeded (except in wooded areas). Seller may remove or leave any trees or other vegetation on the Premises and shall not be liable for any damage to trees. Final grading of the Premises and the number of steps are at Seller's sole option. Seller reserves the right to reverse the plan of the house. Seller may make substitutions of material of equivalent value and quality.

Certain items of outside work (e.g. grading, seeding and driveway) may not be completed prior to settlement. Seller agrees to complete such items after settlement as soon as practical and Buyer agrees that there will be no holdback or escrow of any part of the purchase price.

Insulation will be installed as follows: exterior walls in conditioned areas will have 3 1/2 inch batts with an R-value of 13. Ceilings in conditioned areas that adjoin unconditioned areas will have 9 inch batts or blown insulation with an R-value of 30. All R-values are according to the manufacturer's specifications.

9. **SETTLEMENT:** Settlement shall be made by Buyer at a place of Seller's choosing within 10 days after written notice by Seller to Buyer.

If construction of the house is not commenced within 5 months or substantially completed within 11 months of the date hereof, then Buyer's sole remedy shall be to terminate this Agreement by giving written notice to Seller within 30 days thereafter, provided, however, that said failure is not caused by strikes, emergencies or other events beyond Seller's control. Seller shall not be liable for any delay in completion of the Premises. If construction of the house is not commenced within 6 months of the date hereof, Seller may within 30 days thereafter cancel this Agreement. If Buyer or Seller shall cancel this Agreement as hereinabove provided, all sums paid on account of the purchase price and extras shall be returned to Buyer, without interest, and upon return of such sums, neither party shall have any further rights or liabilities hereunder.

10. **LIMITED WARRANTY:** SELLER AGREES TO PROVIDE BUYER A 10-YEAR HOW WARRANTY. SELLER HEREBY SPECIFICALLY EXCLUDES ANY OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND ANY IMPLIED WARRANTIES SET FORTH IN §55-70.1 OF THE VIRGINIA CODE. Except as expressly set forth in the warranty, Seller shall have no liability or obligation whatsoever after settlement with respect to the Premises or any occurrence arising by reason of the condition or the construction thereof. Seller's liability under the warranty or this Agreement or arising in any way out of the construction, delivery, sale or condition of the premises shall be limited to the repair of the premises in accordance with the warranty standards. In no event shall Seller be liable for any special, indirect or consequential damages.

11. **OPTIONS AND COLOR SELECTIONS:** Buyer shall make all selections of options and colors, except flooring, within 15 days of the Buyer's execution hereof. Flooring shall be selected within 45 days. If such selections are not made within the required time periods, Seller will have the right to select and install standard colors and materials for Buyer.

12. **PROTECTIVE COVENANTS:** The Premises are encumbered by a declaration of covenants and easements for the benefit of all homeowners and Seller. The declaration sets forth certain use and architectural restrictions, including restrictions on the construction and location of swimming pools, fences, tennis courts, signs, clotheslines, antennas, boats, trailers, campers, storage sheds and other structures.

13. **MISCELLANEOUS:**

(a) This Agreement and all Exhibits and Endorsements contain the entire agreement between the parties. Buyer acknowledges that no one has the authority to make or has made any statements or representations relied upon by Buyer which modify or add to the terms and conditions set forth herein, including any statements relating to the existence, condition, use or development of nearby property, roads or woods. No modification of this Agreement shall be binding unless it is in writing and signed by the parties.

(b) This Agreement shall not be recorded.

(c) This Agreement shall be binding upon the respective heirs and successors of the parties. Buyer shall not transfer, sell or assign this Agreement.

(d) Buyer acknowledges that the model home referred to herein and the location and contour of the lot purchased hereunder have been inspected by Buyer and that the Premises are being purchased by Buyer as a result of said inspection.

(e) Buyer's obligation to pay the entire purchase price, the price of any extras and settlement costs shall survive settlement.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound, have executed and delivered this Agreement on the day and year above written.

BUYER: James Madon

DATE: 3/31/96

BUYER: [Signature]

SELLER: [Signature]

DATE ACCEPTED: 4/1/96

MA 00042

VA-SF (3/93)

Page 2 of 2

White - Divisional Office Copy Green - Customer Copy Canary - Mortgage Company Copy Pink - Corporate Office Copy Goldenrod - Customer Draft Copy

Exhibit H

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

(703) 246-2221

Fax: (703) 385-4432

COUNTY OF FAIRFAX

CITY OF FAIRFAX

DR. MARK A. ZAFFARANO
DIRECTOR, JUDICIAL OPERATIONS

RICHARD J. JAMBORSKY
F. BRUCE BACH
J. HOWE BROWN
JACK B. STEVENS
MICHAEL P. McWEENEY
THOMAS S. KENNY
MARCUS D. WILLIAMS
GERALD BRUCE LEE
STANLEY P. KLEIN
ROBERT W. WOOLDRIDGE, JR.
ARTHUR B. VIEREGG, JR.
JANE MARUM ROUSH
M. LANGHORNE KEITH
DENNIS J. SMITH
DAVID T. STITT
JUDGES

JAMES KEITH
LEWIS D. MORRIS
BURCH WILLSAP
BARNARD F. JENNINGS
LEWIS H. GRIFFITH
WILLIAM G. PLUMMER
THOMAS J. MIDDLETON
THOMAS A. FORTKORT
OURNLAN H. HANCOCK
RETIRED JUDGES

December 12, 1995

Robert M. Gants, Esquire
Redmon, Boykin & Braswell, L.L.P.
510 King Street, Suite 301
Alexandria, Virginia 22314

Jordan M. Samuel, Esquire
Samuel & Kline
2009 N. 14th Street, Suite 501
Arlington, Virginia 22201

RE: Constantine J. Blastos, et al. v. Pulte Home Corporation
Law No. 141976

Dear Counsel:

This matter came before the Court on November 2, 1995, on Defendant's Motion for Summary Judgment. By conference call, both parties agreed that the motion would be decided by the Court on the briefs without oral argument. For the following reasons, Defendant's Motion for Summary Judgment is sustained in part and denied in part.

Plaintiffs filed a Motion for Judgment against the Defendant on June 27, 1995, for fraud. Plaintiffs claim that they were induced by false statements made by the Defendant's agent and by representations made in reference to a plan of development to purchase certain property and a model home built on the property ("Lot 27"). Plaintiffs allege that the Defendant's agent stated that an adjoining lot, Lot 28, would not be built upon and would remain in park-like condition. In March 1994, Plaintiffs discovered a "For Sale" sign on Lot 28, and made inquiries to the

Constantine J. Blastos, et al. v. Pulte Home Corporation

Law No. 141976

December 12, 1995

Page 2

Defendant about the development of the property. In May 1994, construction began on a house on Lot 27.

The Motion for Judgment alleges that the Plaintiffs, in reliance upon the Defendant's representations, were fraudulently induced to sign the Agreement of Sale for Lot 27. Plaintiffs seek both compensatory and punitive damages for the fraud. In the Motion for Summary Judgment, Defendant claims that the action is barred by a one-year limitation on any action arising out of the Agreement and because the Agreement's specific disclaimers precluded Plaintiffs from justifiably relying on any representations.

Paragraph three of the Agreement for Sale states:

NO ACTION, REGARDLESS OF FORM, ARISING OUT OF THE TRANSACTION UNDER THIS AGREEMENT, MAY BE BROUGHT BY PURCHASER MORE THAN ONE (1) YEAR AFTER THE CAUSE OF ACTION HAS ACCRUED.

Under the Code of Virginia, an action for fraud must be brought within two years from the date of accrual to be timely. Va. Code Ann. §8.01-248. In Virginia, however, parties may agree that a limitation period shorter than the one provided by statute governs the contract. The generally accepted rule is that unless such a contractual provision is precluded by statute or public policy, or is unreasonable or unreasonably short, the provision will be binding on the contracting parties. Bd. of Supervisors v. Sampson, 235 Va. 516 (1988).

In this case, the Plaintiffs did not seek rescission of the Agreement as a remedy for fraud, but instead sought an enforcement of the Agreement and an action for damages resulting from the fraud. This is a proper remedy for the Plaintiffs to seek from the Court. Carter Coal Co. v. Litz, 54 F.Supp. 115 (W.D. Va. 1943). In seeking to enforce the Agreement, Plaintiffs cannot choose to enforce only certain provisions, but must instead seek enforcement of the Agreement as a whole. Horner v. Ahern, 207 Va. 860 (1967). As a result, the provision in the Agreement governing

Constantine J. Blastos, et al. v. Pulte Home Corporation

Law No. 141976

December 12, 1995

Page 3

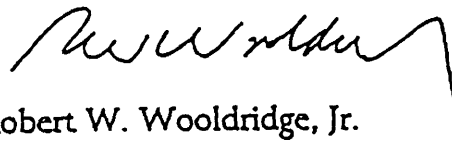
the limitations period for actions arising out of the Agreement will be enforced if not unreasonable, unreasonably short, or otherwise against public policy. The Court finds that the one-year limitation on actions is reasonable and does not violate public policy.

In Virginia, an action for fraud accrues when the fraud is discovered or reasonably should have been discovered. Va. Code Ann. §8.01-249. Plaintiffs admit seeing the "For Sale" sign in March of 1994, and made inquiries to the Defendant before construction began on the house on May 24, 1994. Even if the sign and the Plaintiffs' subsequent inquiries to the Defendant did not permit the Plaintiffs to discover the alleged fraud, the beginning of construction of the house certainly did. Plaintiffs, however, filed their action on June 27, 1994, more than one year from the latest possible date of discovery on May 24, 1994. Accordingly, the Court finds that the Motion for Judgment was not timely filed, and the Plaintiffs are barred from bringing this action for fraud against the Defendant. Summary judgment on that grounds is granted.

Summary judgment on the grounds that the disclaimers contained in the Agreement of Sale preclude the Plaintiffs from justifiably relying upon any representations not expressed in the Agreement is denied.

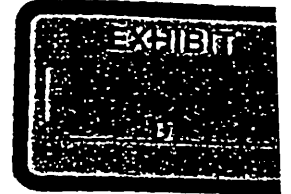
Mr. Samuel shall prepare an order reflecting this ruling and forward it to Mr. Gants for endorsement, and submit it to the Court for entry.

Very truly yours,



Robert W. Wooldridge, Jr.

RWW/ta



VIRGINIA

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX ✓

CONSTANTINE J. BLASTOS)

and)

JACQUELINE L. BLASTOS)

Plaintiffs,)

vs.)

AT LAW NO. 141976

PULTE HOME CORPORATION,)

Defendant.)

FINAL ORDER

THIS MATTER CAME BEFORE THE COURT this 3rd day of January, 1996, upon Defendant's Motion for Summary Judgment, Plaintiffs' Memorandum in Reply to Defendant's Motion for Summary Judgment, Defendant's Reply Memorandum to Plaintiffs' Memorandum in Reply to Motion for Summary Judgment, Plaintiffs' Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment, and Defendant's Memorandum in Reply to Plaintiffs' Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment.

IT APPEARING TO THE COURT that Plaintiffs' cause of action seeking an enforcement of the agreement and an action for damages resulting from the fraud is barred by the one (1) year statute of limitations set forth in the Agreement of Sale between the Parties, as more particularly set forth in the Court's Letter Opinion dated December 12, 1995, a copy of which is attached hereto as Exhibit A; and further

IT APPEARING TO THE COURT that Defendant's plea for summary judgment on the grounds that the disclaimers contained in the agreement of sale preclude the Plaintiffs from justifiably relying upon any representations not expressed in the agreement should be denied

IT IS THEREFORE

ADJUDGED AND ORDERED that, for the reasons set forth above and in the Court's Letter Opinion dated December 12, 1995, this matter is **DISMISSED WITH PREJUDICE**.

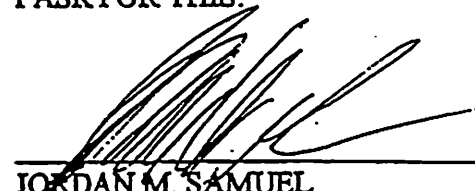
AND THIS ORDER IS FINAL.

ENTERED THIS 3rd ^{January} DAY OF ~~DECEMBER~~, 199~~5~~⁶.



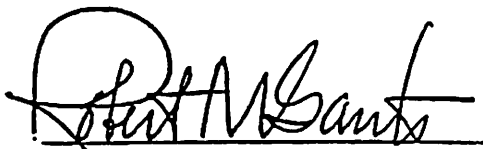
THE HONORABLE ROBERT W. WOOLDRIDGE, JR.

I ASK FOR THIS:



JORDAN M. SAMUEL
Samuel & Kline, P.C.
Counsel for Defendant
2009 N. 14th Street, Suite 501
Arlington, Virginia 22201
(703) 522-1125

SEEN AND OBJECTED TO:



ROBERT M. GANTS
Redmon, Boykin & Braswell, L.L.P.
Counsel for Plaintiffs
510 King Street, Suite 301
Alexandria, Virginia 22314
(703) 684-2000

IP NO. 118928

COUNTY OF FAIRFAX, VIRGINIA
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
DIVISION OF DESIGN REVIEW
RESIDENTIAL USE PERMIT
10/15/97

STREET NUMBER	STREET NAME	ST TY	ACT NO.	LEVEL	UNIT	ACT NO.
03187	WHEATLAND FARMS	DR	001			01

LOT NUMBER	SUBDIVISION NAME	MAP REFERENCE NUMBER	INSP AREA
00018	WHEATLAND FARMS, SEC 002	047-1- /16/ /0018-	3

	INSPECTED BY	DATE
ELECTRICAL	<u>JOE ENNIS</u>	<u>10-15-97</u>
PLUMBING	<u>J. ENNIS</u>	<u>10-15-97</u>
MECHANICAL	<u>J. ENNIS</u>	<u>10-15-97</u>
BUILDING	<u>J. ENNIS</u>	<u>10-15-97</u>
PUBLIC UTILITIES	<u>MORGAN SNYDER</u>	<u>10-17-97</u>
APPROVED	<u>Morgan Snyder</u>	<u>10-17-97</u>
REMARKS		

LOT SEEDED AND MULCHED

THE FOLLOWING REQUIREMENTS, IF CHECKED, ARE BEING WAIVED IN
ACCORDANCE WITH CHAPTER 112 ARTICLE 18 PART 704 OF THE FAIRFAX
COUNTY CODE TO OBTAIN A RESIDENTIAL USE PERMIT:

- ___ FINAL GRADING, SODDING, SEEDING OF LOT
- ___ COMPLETION OF LANDSCAPING AND SCREENING REQUIREMENTS
- ___ COMPLETION OF SIDEWALKS
- ___ BITUMINOUS CONCRETE STREET/DRIVEWAY SURFACE
- ☒ ADEQUATE STAND OF GRASS

* ATTENTION *

* *

* *

* NO TREES OR SHRUBS MAY BE PLANTED IN THE DEDICATED *

* RIGHT-OF-WAY WITHOUT FIRST OBTAINING A PERMIT FROM *

* VIRGINIA DEPARTMENT OF TRANSPORTATION AT 934-0584. *

* WHEN EXCEPTIONS FOR FINAL GRADING, SODDING AND/OR *

* SEEDING ARE GRANTED DURING THE WINTER, THE BUILDER IS *

* OBLIGATED TO COMPLETE THIS WORK BY THE FIRST DAY OF MAY. *

E

HOMESOWNER

BUILDER

701110

8/3/00

LAW NO.	PLAINTIFFS	DATE OF AGREEMENT	CLOSING DATE	DATE OF SUIT
183665	Anderson, Paul & Tiffini	01/25/1998	03/20/1998	10/06/1999
183428	Berger, Dean & Elaine	04/09/1997	09/30/1997	09/24/1999
184141	Burdin, Doug & Dianna	04/26/1996	11/22/1996	10/28/1999
184142	Columbi, Paolo & Mary	10/30/1995	12/23/1996	10/28/1999
183921	Eden, Henry & McWethy, Pat	08/02/0996	05/30/1997	10/19/1999
186501	Gang, David	10/27/1995	07/15/1996	03/01/2000
185075	Hawxhurst, Jack & Linda	12/02/1995	07/31/1996	11/30/1999
185073	Jarnas, Edward & Rebecca	12/11/1997	01/30/1998	11/30/1999
184015	Lincoln, Michael & Wendy	01/19/1997	10/24/1997	10/22/1999
184008	Malchow, Michael & Jakubcak, Doreen	09/16/1995	12/29/1995	10/21/1999
183920	Rebibo, Michael & Cynthia	01/05/1997	06/27/1997	10/19/1999
185074	Rodgers, Kent & Christine	12/10/1995	07/08/1996	11/30/1999
184424	Rowen, Michael & Lori	01/10/1997	07/24/1997	11/12/1999
184107	Weaver, James & Susan	10/02/1997	10/29/1997	10/27/1999
184719	Boutcher-Peckinpaugh	05/04/1996	05/23/1996	11/30/1999

SUIT FILED W/IN 3 YEARS
N/A
N/A
YES
YES
YES
NO
NO
N/A
YES
NO
YES
NO
YES
N/A
NO

Pick

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PAUL ANDERSON, et al.,

v.

At Law No. 183665

PULTE HOME CORPORATION, et al.

DEAN BERGER, et al.,

v.

At Law No. 183428

PULTE HOME CORPORATION, et al.

DOUGLAS S. BURDIN, et al.,

v.

At Law No. 184141

PULTE HOME CORPORATION, et al.

PAOLO COLOMBI, et al.,

v.

At Law No. 184142

PULTE HOME CORPORATION, et al.

HENRY FRANCIS EDEN, et al.,

v.

At Law No. 183921

PULTE HOME CORPORATION, et al.

DAVID GANG,

v.

At Law No. 186501

PULTE HOME CORPORATION, et al.

JACK M. HAWXHURST, et al.,

v.

At Law No. 185075

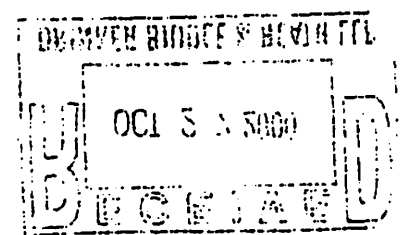
PULTE HOME CORPORATION, et al.

EDWARD P. JARMAS, et al.,

v.

At Law No. 185073

PULTE HOME CORPORATION, et al.



MICHAEL R. LINCOLN, et al.,	:	
	:	
v.	:	At Law No. 184015
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
MICHAEL MALCHOW, et al.,	:	
	:	
v.	:	At Law No. 184008
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
TIMOTHY L. PECKINPAUGH, et al.,	:	
	:	
v.	:	At Law No. 184719
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
MICHAEL J. REBIBO, et al.,	:	
	:	
v.	:	At Law No. 183920
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
H. KENT RODGERS, et al.,	:	
	:	
v.	:	At Law No. 185074
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
MICHAEL J. ROWEN, et al.,	:	
	:	
v.	:	At Law No. 184424
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	
JAMES R. WEAVER, et al.,	:	
	:	
v.	:	At Law No. 184107
	:	
<u>PULTE HOME CORPORATION, et al.</u>	:	

**PAREX' CONSOLIDATED MEMORANDUM IN OPPOSITION TO MOTION TO
RECONSIDERATION OF PULTE**

COMES NOW Defendant Parex, Inc., by and through counsel, and appears and submits this Consolidated Memorandum in Opposition to the Motion to Reconsider of Pulte in the above cases, and states as follows:

INTRODUCTION

The Court sustained the demurrers of Parex to each and every claim asserted by Pulte. As noted previously, the express warranty claims were improperly grounded on a conclusory third party beneficiary theory that was completely unsupported by the Pulte's response to the motion craving over. Contribution and indemnification were lacking due to the lack of relationship between Pulte and Parex. In addition, contribution required a joint liability to the plaintiff. Even with the demurrer to false advertising being overruled, there was no joint liability claim asserted that survived demurrer, such as negligence or negligence per se. Finally, the Court held that the implied warranty claims were barred because purely consequential damages were being sought.

These rulings were appropriate and the Court should deny Pulte's Motion to Reconsider to the extent it seeks to upset the rulings with respect to the Cross-claims in this matter.

ARGUMENT

I. Contribution will Not Lie

Parex noted that joint liability to the plaintiff was a predicate to contribution liability. Contribution may be enforced when the wrong results from negligence and involves no moral turpitude. See, Virginia Code § 8.01-34. Negligence claims against Parex were expressly dismissed in the first round of demurres, and negligence per se was dismissed in the second round of demurrers. As such, there is no liability arising against Parex by virtue of negligence.

To the extent that plaintiffs are successful in supporting a misrepresentation, fraud, deceptive advertising, or consumer protection act claim against Pulte, these misrepresentation based claims would involve acts of moral turpitude by Pulte. As such, contribution is expressly

from the plaintiffs in these actions. Accordingly, the Court's initial decision was proper and should not be reconsidered.¹

WHEREFORE, Defendant, Parex, Inc. respectfully requests that the Court enter the attached Order sustaining its Demurrers to the Cross-claims of Pulte Home Corporation, dismissing with prejudice the claims set forth in the Cross-claims, denying the Motion to Reconsider of Pulte, and such other relief as the Court deems proper.

Respectfully submitted,
HUGHES & ASSOCIATES, LLC

By: 

Timothy R. Hughes, VSB No. 33398
307 E. Annandale Road, Suite 101
Falls Church, VA 22042
(202) 255-6999
Counsel for Defendant, Parex, Inc.

¹ Parex is attaching its tendered proposed Order for entry on the Court's initial rulings along with an inclusion of preservation of objections of Pulte and waiver of signature of counsel along with this Opposition.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Parex, Inc.'s Consolidated Memorandum in Opposition to Motion to Reconsider was served, on this 25th day of October, 2000, via first class mail to the counsel of record set forth below.

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THE WISE LAW FIRM, P.C.
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Jordan Samuel
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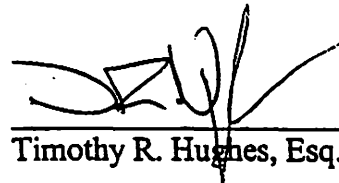
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Richmond Va. 23255



Timothy R. Hughes, Esq.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Paul Anderson, et al.,

Plaintiffs,

v.

Pulte Home Corporation, et al.,

Defendants.

At Law Nos. 183665,
 183428, 184141, 184142,
 183921, 186501, 185075,
 185073, 184015, 184008,
 184719, 183920, 185074,
 184424, and 184107.

ORDER

This matter came before the Court on Pulte Home Corporation's Consolidated Motion for Reconsideration of this Court's September 28, 2000 Order. Upon consideration whereof, the Motion for Reconsideration is granted, in part, and denied, in part.

Pulte's motion is GRANTED to the extent that the defendant's plea in bar illustrates that the following cases are time-barred as to the Implied Warranty claim: *Gang v. Pulte Home Corp.*, et al., Law No. 186501; *Hawthurst v. Pulte Home Corp.*, et al., Law No. 185075; *Malchow v. Pulte Home Corp.*, et al., Law No. 184008; *Rodgers v. Pulte Home Corp.*, et al., Law No. 185074; *Peckinpaugh v. Pulte Home Corp.*, et al., Law No. 184719. Pulte's Pleas in Bar are SUSTAINED.

Pulte's motion is GRANTED to the extent that the claims of Actual Fraud, Constructive Fraud, Deceptive Advertising, and violations under the Virginia Consumer Protection Act, are time-barred in the case of *Gang v. Pulte Home Corp.*, et al., Law No. 186501. Pulte's Pleas in Bar are SUSTAINED.

Pulte's motions are DENIED in all other respects.

ENTERED this 4 day of December, 2000

Terrence Ney
 JUDGE R. TERRENCE NEY

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT.

ASSIGNMENTS OF ERROR

- I. The circuit court erred in sustaining the Demurrer of Parex, Inc. (“Parex”) to the Cross-Claim of Pulte Home Corporation (“PHC”) for Breach of Implied Warranty based on the decision in Beard Plumbing and Heating, Inc. v. Thompson Plastics, Inc., 354 Va. 240, 491 S.E.2d 731 (1997) by determining that privity is required for recovery of non-consequential damages despite the language of § 8.2-318, or by determining that Pulte did not adequately assert a claim for non-consequential damages.
- II. The circuit court erred in sustaining Parex’s Demurrer to PHC’s Cross-Claim for Breach of Express Warranty by refusing to recognize that PHC’s allegations of Parex’s affirmations of fact, promises, descriptions and/or use of samples and/or models regarding appearance, durability and/or water resistance stated a statutory express warranty claim pursuant to Va. Code § 8.2-313 and by making a finding, without an evidentiary hearing, that Parex did not make any express warranties.
- III. The circuit court erred in sustaining Parex’s Demurrer to PHC’s Cross-Claim for Indemnification by refusing to recognize a claim for implied indemnification under Virginia law.
- IV. The circuit court erred in sustaining Parex’s Demurrer to PHC’s Cross-Claim for Contribution despite sufficient factual allegations that alleged PHC and Parex were potentially jointly liable to the plaintiffs.