

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION**

ANDREW POHUTSKY
individually and on behalf of himself
and on behalf of all others similarly
situated,

Plaintiff,

v.

PELLA CORPORATON,

Defendant.

CASE NO. 1:14-CV-2565

CLASS ACTION COMPLAINT

Plaintiff, Andrew Pohutsky (“Plaintiff”), by and through his undersigned counsel, on behalf of himself and all other persons and entities similarly situated, allege against defendant Pella Corporation (“Pella” or “Defendant”) the following facts and claims upon knowledge the following facts and claims upon knowledge as to matters relating to himself and upon information and belief as to all other matters and, by way of this Class Action Complaint, avers as follows:

INTRODUCTION AND SUMMARY OF ACTION

1. This is a proposed class action brought by Plaintiff on behalf of himself and other consumers who own structures containing Pella Architect and Designer series windows (“Windows”) as described more fully herein.

2. Unknown to Plaintiff and the Class, the Windows contain a latent defect that allows water to penetrate through four common paths: the glazing pocket, the cladding, the

casement crank hardware and the frame-to-sash joint. The water leaks into the interior of the home, damaging wood members within the cladding, the wall cavity and adjacent finishes.

THE PARTIES

3. Plaintiff, Andrew Pohutsky, is a natural person and citizen of Maryland. Plaintiff owns a home at 15506 Bushy Tail Run in Woodbine, Maryland in which Pella Windows are installed. Plaintiff purchased the Windows at the time of construction of his home.

4. Defendant, Pella Corporation, is an Iowa Corporation, organized and existing under the laws of the State of Iowa. At all relevant times, Pella transacted and conducted business in Maryland and throughout the United States.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d)(2) (diversity jurisdiction) and the Class Action Fairness Act, in that (i) there is complete diversity (Plaintiff is a citizen of Maryland and Defendant is domiciled and incorporated in another state), (ii) the amount in controversy exceeds \$5,000,000.00 (Five Million Dollars) exclusive of interests and costs, and (iii) there are 100 or more members of the proposed Plaintiff's class.

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

COMMON FACTUAL ALLEGATIONS

7. The products at issue in this case are the Pella Designer and Architecture series aluminum wood clad Windows. Pella began marketing the Architect Series line in 1990, and began marketing the Designer Series in 1992.

8. Upon information and belief, Pella has sold, directly or indirectly (through dealers and other retail outlets), tens of thousands of Windows nationwide and in the State of Maryland. Pella sells its Windows through third party sellers or through its directly-owned showrooms.

9. At the time of sale, Pella warranted that each Window was fit for the ordinary purpose for which such goods were used and were free from defects in materials and workmanship.

10. Both series share the same or similar design function, cladding attachment and hardware manufacture, installation and defect.

THE DEFECT

11. The Windows are defective in that water permeates the window unit through four common leakage paths: (a) the glazing pocket; (b) the aluminum cladding and wood; (c) the crank hardware and fasteners; and, (d) the frame to sash joint.

12. The Architect and Designer Series Windows are wet glazed with the exterior face of the glass sealed against wood or metal cladding.

13. The glazing pocket allows water to permeate with no means of egress because the seal via has gaps and the sealant is inadequate. Compounding this failure is the fact that the aluminum cladding that runs over the top of the sash does not run much past the sealant bead, providing no protection of its own from water egress. The design does not allow water to weep

to the exterior, resulting in it migrating into the interior of the home. Water also remains in contact with the wood member for prolonged periods of time. The water is absorbed into the wood and the wood rots.

14. The Windows' aluminum cladding permits water to bypass metal cladding at joints, at operable arm mounting hardware and where the roto operator is fashioned into the wood, through the wet/dry zone. The design does not allow water to drain to the exterior, resulting in it migrating into the interior of the home. The design exposes the interior wood components, which are inadequately treated with wood preservative, to water penetration and contributes to cause an increase in the moisture content of the wood components beyond their capacity to resist wood rot and microbial colonization. Although the cladding varies between styles and series, the method of aluminum attachment to the frame and sash is effectively the same, resulting in water penetration through gaps at metal to metal, gaps at metal to wood and through the discontinuous jamb-to-sill joints.

15. The hardware and fasteners common in both the Architect and Designer casement Windows are areas of further leakage. The casement hardware allows water to bypass the crank hardware, leaking into the interior of the home. The water also penetrates the fasteners in the hardware, resulting in leakage through the wood frame and into the wall cavity as well as wood frame deterioration. The discontinuous jamb-to-sill joint exacerbate this aspect of the defect.

16. The frame-to-sash joints are also common to both the Architect and Designer Windows. The rubber gaskets installed between the sash and frame has inadequate compression and/or seal. This allows water to bypass the gasket, saturate wood members and cause wood deterioration.

17. Pella's failure to disclose to purchasers of its Windows, the builders of the purchaser's structures, and owners of the Windows, that the Windows were defective in material and workmanship as a result of the design and manufacturing practices of Pella. As a result of the defect there is a high probability those Windows will fail, and likely already have developed wood rot in the Window sashes. The wood rot will progress to the frames and adjoining structure unless repaired and replaced before the rot progresses to those components. The defect is the product of Pella's design and manufacturing process: (a) the resulting wood rot is masked by the aluminum cladding of the Windows; (b) the wood rot is incipient and takes an extended period to advance to the stage in which it becomes visible upon ordinary inspection; and (c) because of its incipient nature and masking by the exterior cladding, the wood rot will likely not exhibit itself until it is so advanced as to become apparent upon ordinary inspection but not until after the Pella's limited warranty period has expired.

18. Because the wood rot resulting from the defective design and manufacture is concealed by the cladding and otherwise does not become visible upon ordinary inspection until after years after installation, it is not detectable in spite of its presence within the Windows.

**PELLA'S CONDUCT WITH RESPECT
TO THE WIDESPREAD WOOD ROT
PROBLEM AT ISSUE HERE**

19. Pella has been aware, or but for its negligence should have been aware, that its Windows were manufactured with wood components which needed to be protected from exposure to water penetrating behind the cladding of its Windows and that the failure to do so significantly increased the moisture retention of those interior wooden components under circumstances where they could not dry in sufficient time to prevent the initiation of progressive

wood rot.

20. At all relevant times, Pella knew, or should have known, the Windows were (a) defective; (b) would experience wood rot to the sash components of the Windows; (c) would need to be repaired and replaced well short of the reasonably expected useful life of the Windows; (c) the defect, if known, would have failed to meet the reasonable expectations of purchases, and would not be sold at the premium price Pella charge for the Windows; and (d) that the limitation in its warranty, did and was calculated to shield liability for a known, material defect in the Windows.

21. Pella knew (or but for its negligence or reckless indifference would have known) that it, or its distribution channels were going continue receive, and did receive reports of wood rot in the Windows. Pella also knew, or should have known, that even if diligently inspected Window owners would not (a) be capable of detecting wood rot until it was significantly advanced, likely years after the rot began; (b) be able to determine the cause of the problem as a defect in material and workmanship; and (c) would not be able to determine the steps to be taken to remediate the wood deterioration.

22. Thus, Pella knew (or but for its negligence, or reckless indifference would have known) that for the indefinite future: (a) the risk of wood rot was substantial; (b) Pella's customers were unaware of that substantial risk; (c) those customers had a reasonable expectation that Pella would disclose that risk and cure the latent defect, even if the defect did not exhibit itself until after the warranty period had expired; and (d) that it did not intend to honor warranty claims for the known defective Windows.

23. Despite such knowledge, or as a result of its negligence or reckless indifference,

Pella did not disclose to the market or otherwise that: there was a substantial risk their Windows would manifest the defect late in, or after the warranty period; and, that Pella's warranty, as they drafted it, would provide no warranty benefits for the known risk of their defective Windows.

24. Furthermore, when questioned about wood rot, Pella would claim faulty installation, excessive moisture in the home, or would deny claims as "out of warranty" without disclosing the defect.

25. On information and belief, in an attempt to correct the defect, Pella made various, ineffectual changes in the Windows, including application of sealants, wood preservatives all of which failed to correct the defect or mitigate its consequences.

26. At all relevant times, Pella had knowledge that the Windows were defective but took no action to: (1) inform owners of the Windows of the defects; (2) recall the Windows; or (3) otherwise repair the Windows that had already been purchased. Instead, Pella concealed this knowledge.

27. At all relevant times, Pella knew its Windows were defective, but chose to conceal, suppress, or omit this material fact while distributing, marketing, and selling the Windows to unsuspecting consumers, builders, and homeowners in Maryland and throughout the United States.

28. Rather than provide warranty protection, Pella chose to conceal, suppress or omit knowledge of the defect, and the material facts related to the defect, all the while distributing, marketing and selling the Windows which purported to be warranted to unsuspecting consumers, builders, and homeowners across the Class States.

WARRANTIES

29. Pella represented and warranted that each Window conformed to the applicable Maryland building codes, applicable ASTM standards, applicable American Architectural Manufacturers Association (“AAMA”) standards and applicable National Fenestration Ratings Council (“NFRC”), applicable Window & Door Manufacturers Association (“WDMA”).

30. These representations, described herein, became part of the basis of the bargain when Plaintiff and Class Members, and/or their builders purchased the Windows, and/or assumed the warranty.

31. In addition, these representations became part of the basis of the bargain when Plaintiff and/or Class Members purchased the homes with Pella’s express representations concerning the quality of the Windows.

32. Further, Pella also provides an Owners’ Manual that states, *inter alia*:, that the Windows:

- a. have a “Proven resistance to water penetration.” and,
- b. are “Pella’s most energy-efficient wood and windows and doors.”
- c. “More decorative style choices than any other brand.”
- d. “Years of smooth openings and closings.”

33. Plaintiff and Class Members relied on Pella’s warranty, published specifications and/or advertisements regarding the quality of the Windows.

34. However, the Windows do not conform to these express representations and warranties, and, as alleged herein, Pella breached its express warranties and representations concerning these Windows.

35. The Windows suffer from various design deficiencies which further discovery will establish in detail, including, a defect in the glazing pocket, the aluminum cladding, the crank hardware and the frame to sash joint. Due to these design defects, water is permitted to be trapped between the aluminum and the operable wood frame causing damage to the Windows and other property within the home as well as permit leaks.

36. Because the Windows permit water intrusion, they violate the Maryland building code and industry standards, including the applicable Building Codes, AAMA standards, NFRC standards, WDMA standards, and/or ASTM standards as well as Pella's express representations and warranties.

37. Despite warranting that the Windows are compliant with the pertinent ASTM standards, the Windows failed ASTM E1105 Water Testing standards.

38. The Windows also do not comply with ASTM E2136-04 which states that the **minimum** anticipated service life for a window is 20 to 25 years. Pella Windows failed ASTM E2136-04 testing, as they have an anticipated service life of 5 to 15 years.

39. The defects and deficiencies are due to fundamental design, engineering, and manufacturing errors well within Pella's area of expertise. Indeed, Pella touts its almost 90 year history of designing and manufacturing Windows and doors on its website and promotional materials.

40. In addition to the express representations and warranties regarding the quality of the Windows discussed herein, Pella also ships a Limited Warranty with its Windows. Upon information and belief, the Limited Warranty states, "If Pella is given notice of a defect in materials or workmanship occurring within ten (10) years from the date of sale by Pella or its

authorized dealer, Pella shall, at its sole option: 1) repair or replace the defective part(s) or product(s) (with cost of labor included only within two [2] years of the date of sale by Pella or its authorized dealer) or 2) refund the original purchase price.”

41. Rather than acknowledge the existence of this defect, and its incipient consequences, Pella unilaterally drafted this limited warranty which is not calculated to provide any protection for this defect in material and workmanship, but to the contrary, is written so as to provide no meaningful remedy to consumers and owners of these Windows.

42. In spite of its knowledge regarding the defect in the Windows Pella uses the limited warranty to profit from the premium price charged for defective Windows.

43. Pella presented the warranty to consumers as protection for defects in material and workmanship all the while knowing that it provided no warranty protection for the Window defect as alleged herein, provided no meaningful, or at best only illusory, benefits when in fact it was calculated to not provide warranty benefits, and as such was deceptive and unconscionable.

44. Pella’s conduct thereby deprived consumers of the opportunity to negotiate additional warranty coverage, negotiate a lower price to reflect the risk posed by the defect, or simply avoid the risk altogether by purchasing a different manufacturer’s Windows. Thereafter, the undisclosed risk occurred – Plaintiff’s Windows (and thousands of others) have rotted– and Plaintiff and the Class have been damaged in the amount it will cost, or they paid, to repair, install, and replace the Windows.

45. However, Pella’s shipping of the Windows with prior knowledge of the defects, or with negligent or reckless disregard of the presence of defects, constituted a breach of its express warranty, makes the limitations of the Limited Warranty unconscionable in all respects,

and therefore is void *ab initio*. Further, by limiting its cost to fully repair and replace the Windows for only the first two years after sale, the Limited Warranty is unconscionable because Pella know that there is a defect in the Windows.

46. The Limited Warranty is not a negotiated contract and is so one-sided that no reasonable person would ever knowingly agree to its terms if properly disclosed.

47. Moreover, during contact with the Class Members, Pella concealed its knowledge of repeated product defects in the Windows in the Class Members' structures.

48. As Pella has known of the Window defects and has failed to timely honor its express and implied warranties, the Limited Warranty has failed of its essential purpose, and the limitations therein are null and void. Further, the limitations contained in the Limited Warranty are not conspicuous.

49. Consumers reasonably expected that their Windows would not rot behind the cladding, and that their Windows would last for their reasonable useful life without rotting.

50. The reasonable expectation is that the Windows will last without rot to their interior components, as long as the exterior wall into which they are installed, conservatively 30 years.

51. Consumers, like Plaintiff and the proposed class, have a reasonable expectation:

- a. That a manufacturer such as Pella Corporation would make a disclosure to consumers if it determined there was a significant evidence of wood deterioration in their cladded Windows;
- b. That a manufacturer such as Pella Corporation would repair the latent defect – even if the defect did not exhibit itself until after the warranty

period expired – because the potential causes of the defect are within the control and responsibility of the manufacturer (not the consumer); and

- c. That had there been evidence of wood deterioration in their clad Windows, either because the wood preservative was inadequate protection for the reasonable life of the Windows; or that the cladding was contributing to increased moisture retention in the wood components of the Windows, that Pella would extend replacement repair and the costs associated therewith to owners of the Windows.

52. Plaintiff and Class Members have not received the value for which they or their builder bargained when the Windows were purchased. There is a difference in value between the Windows as warranted and the Windows containing the defect.

PLAINTIFF’S EXPERIENCE

53. Pella Windows were installed in Plaintiff’s home when it was constructed in in 2000. The Windows were purchased directly from K.C. Company, Inc. (“KC”), one of the largest Pella retailers in the country. The Windows were shipped directly to Plaintiff.

54. Plaintiff purchased Pella Windows based upon Pella’s representations that the Windows were the upper tier of Windows as far as quality and the Windows were above code. Based on additional representations by Pella and otherwise, Plaintiff understood that the Windows would have a reasonable service life, be free from defects that would impact that service life and be warranted to ensure such a service life.

55. Plaintiff first saw signs of water leaks in one of his Windows in or around 2005. Plaintiff contacted KC regarding the leaks.

56. KC came to Plaintiff's home to inspect the Windows and advised that all that was needed to correct the leaks was caulk. KC applied caulk to the leaking window and informed Plaintiff that the problem was fully resolved.

57. Plaintiff believed in good faith that KC had fully resolved the leaks in 2005.

58. In 2008, Plaintiff again noticed signs of water leaks in one of his Windows and called KC.

59. KC came to Plaintiff's home to inspect the Windows and, again, advised that caulk would fully resolve the leak. KC applied caulk to the leaking window and informed Plaintiff that the problem was fully resolved.

60. Plaintiff believed in good faith that KC had fully resolved the leaks in 2008.

61. In 2013, Plaintiff again noticed signs of water leaks in his Windows and conducted an internet search to determine if others were experiencing similar problems. At that time, Plaintiff began to suspect that there was a design defect in the Windows.

62. Unknown to Plaintiff at the time, the Windows he purchased were defective in that they allowed water penetration, which caused condensation, wood rot, leaks, mold and other failures as described herein.

63. The characteristics of the Windows' defect were present in the Windows when they left the factory, and were part of the Window by design and manufacture.

64. The Windows allowed water to intrude into Plaintiff's home resulting in other property damage to his home.

CLASS ACTION ALLEGATIONS

65. Plaintiff bring this class action pursuant to Fed. R. Civ. P. 23. The requirements

of Fed. R. Civ. P. 23(a), (b)(2), (b)(3) and (c)(4) are met with respect to the classes defined below:

INJUNCTIVE RELIEF CLASS:

All persons and entities who are current or former owners of a structure located within Maryland and the United States on which Pella Designer or Architect Windows are installed.

DAMAGES CLASS:

All persons and entities who are current or former owners of a structure located within Maryland on which Pella Designer or Architect Windows are installed, and whose Windows have exhibited wood rot.

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

66. *Numerosity:* The Classes are composed of thousands of persons geographically dispersed, the joinder of whom in one action is impractical. Moreover, upon information and belief, the Classes are ascertainable and identifiable from Pella records or identifying marks on the Windows.

67. *Commonality:* Questions of law and fact common to the Classes exist as to all Class Members and predominate over any questions affecting only individual Class Members. These common legal and factual issues include, but are not limited to the following:

- a. Whether the Windows are defective;
- b. Whether the Windows have not performed or will not perform in

accordance with: (i) the reasonable expectations of ordinary consumers;
(ii) industry expectations of a 30-year useful life;

- c. Whether Pella knew or should have known of the defect;
- d. Whether Pella concealed from consumers and/or failed to disclose to consumers the defect;
- e. Whether Pella breached the express warranty that the Windows were free of defects in material and workmanship when sold when in fact, Pella knew or should have known they were in defective by allowing water to penetrate behind the cladding and expose the interior wood components to moisture for prolonged periods without draining, evaporation, or adequate preservative to prevent wood rot;
- f. Whether Pella breached the implied warranty of merchantability by designing, manufacturing and selling the Windows when those Windows would not pass without objection in the trade; were not fit for the ordinary purpose of exterior Windows; did not conform to the promises and affirmations of fact Pella made concerning the Windows;
- g. Whether Pella breached the implied warranty of fitness for particular purpose when Pella knew that the Windows would be used for applications as exterior Windows exposed to water, snow and moisture; and that wood rot was incipient and would not be recognized by ordinary inspection until it had reached an advanced stage.
- h. Whether Pella's Limited Warranty contained limitations, exclusions and

disclaimers such as to cause it to fail of its essential purpose;

- i. Whether Pella's warranty was drafted and implemented to exculpate Pella from liability for Windows it knew, or should have known were defective when designed, manufactured and sold;
- j. Whether Plaintiff and the Class Members are entitled to compensatory damages, including, among other things: (i) compensation for all out-of-pocket monies expended by members of the Classes for replacement of Windows and/or installation costs; (ii) the failure of consideration in connection with and/or difference in value arising out of the variance between the Windows as warranted and the Windows containing the defect; and (iii) the diminution of resale value of the structures containing the Windows resulting from the defect.
- k. Whether Plaintiff and the Class Members are entitled to replacement of their defective Windows with non-defective Windows;
- l. Whether Plaintiff and the Class Members are entitled to restitution and/or disgorgement.
- m. Whether Pella falsely advertised and marketed its products to consumers;
- n. Whether the Windows conform to the applicable Maryland building code and/or applicable industry standards;
- o. Whether the Windows damage other property within Plaintiff and Class Members' homes;
- p. Whether Pella concealed the defective nature of the Windows;

- q. Whether Pella's Limited Warranty is unconscionable;
- r. Whether Pella's Limited Warranty adequately disclaimed its liability; and
- s. Whether Pella conduct as alleged is misleading, deceptive and/or unconscionable.

68. *Typicality*: Plaintiff's claims are typical of the claims of the Class Members, as all such claims arise out of Pella's conduct in designing, manufacturing, marketing, advertising, warranting and selling the defective Windows, Pella's conduct in concealing the defect in the Windows, and Plaintiff's and Class Members' purchasing structures with the defective Windows.

69. *Adequate Representation*: Plaintiff will fairly and adequately protect the interests of the Class Members and has no interests antagonistic to those of the Class. Plaintiff have retained counsel experienced in the prosecution of complex class actions, including consumer class actions involving product liability and product design defects.

70. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the Class Members predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all Class Members is impracticable. Should individual Class Members be required to bring separate actions, this Court and Courts throughout Maryland would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this

class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

TOLLING OF THE STATUTE OF LIMITATIONS

Discovery Rule

71. The Windows contain a latent defect that allows water to penetrate through four common paths: the glazing pocket, the cladding, the casement crank hardware and the frame-to-sash joint. The latent defect allows water to leak into the interior of the home, damaging wood members within the cladding, the wall cavity and adjacent finishes.

72. Plaintiff could not have discovered, nor through the exercise of reasonable diligence should have discovered, his Windows were defective and that he incurred damages as the result of the defective Windows within the applicable statute of limitations. Plaintiff has commenced this action within the applicable statute of limitations as tolled by the discovery rule.

Fraudulent Concealment

73. Pella, though fraud or concealment, caused Plaintiff to relax his vigilance or deviate from his right of inquiry. Pella knew or should have known of the defective nature of the Windows for years and has affirmatively or unintentionally concealed from owners of the Windows and/or failed to alert the owners of the defective nature of the Windows while continuing to market the Pella Windows as suitable for ordinary use. Pella continued to sell its defective Windows to Plaintiff and Class Members and continues to “fix” and replace defective Windows with similarly defective Windows.

74. Pella had a duty to disclose that its Windows were defective, because it had superior knowledge. Pell had exclusive knowledge of the defect yet actively concealed the existence and true root cause of the defect.

75. Pella made these representations, rather than disclosing that the Windows were defective and that the defect was the cause of the water infiltration. Plaintiff justifiably relied upon Pella's misrepresentations and was injured by them.

76. Given Pella's failure to disclose this known but non-public information about the defective nature of the Windows – information over which it had exclusive control – and because Plaintiff and Class Members therefore could not have known in the exercise of reasonable diligence that the Windows were defective, Pella is estopped from relying and should not be allowed to rely on any exception regarding any statutes of limitation that might otherwise be applicable to the claims asserted herein.

77. Plaintiff could not have discovered, or through the exercise of reasonable diligence should have discovered, the latent defect and resulting damage.

78. Once Plaintiff noticed his Windows leaking, he informed KC Company of the leaks. KC Company sent individuals to his residence on three occasions to inspect the Windows.

79. Pursuant to the doctrines of Equitable Tolling, Equitable Estoppel, and/or Fraudulent Concealment, the period for bringing claims shall not be barred due to the statute of limitations or statute of repose.

80. The interest of justice requires equitable tolling in this case. In applying this doctrine the relevant factors include the claimant's diligence, the claimant's knowledge of the relevant facts, and whether these statements misled the claimant. Accordingly, with respect to

each and every cause of action and/or Count asserted herein, Plaintiff expressly pleads Equitable Tolling, Equitable Estoppel, Fraudulent Concealment and/or the Discovery Rule and its application thereto.

81. Further, on August 18, 2006, Dr. Leonard E. Saltzman filed a class action complaint in the Northern District of Illinois against Pella, alleging a defect similar to the one alleged here and asserting claims against Pella for defects in the design and manufacture of Pella's ProLine, Architect and Designer Series Windows. *See Saltzman v. Pella Corp.*, No. 06-C-4481 (Zagel, J. presiding). The Class was certified only as to Pella's ProLine series, and in 2012 the parties reached a class action settlement which resolved claims relating to the ProLine Window series. On June 2, 2014, the United States Court of Appeals for the Seventh Circuit reversed the District Court's approval of the settlement and remanded the action to the Northern District of Illinois. Pella has been on notice of the defects in the Architect and Designer Windows series since at the latest August 18, 2006, and thus claims involving those window lines have been tolled under *American Pipe* and its progeny, since at least 2006.

COUNT I
BREACH OF EXPRESS WARRANTY

82. Plaintiff on behalf of himself and all others similarly situated, adopts and incorporates by reference all foregoing allegations as though fully set forth herein

83. After putting their Windows into the stream of commerce, Pella expressly represented and warranted that the Windows were appropriate for their intended use and were free from defects and that they conformed to all applicable building codes and industry standards.

84. Pella entered into contracts with Plaintiff, Class Members, retailers, Plaintiff's Builders, Class Members' Builders, suppliers and/or contractors to sell its Windows that were to be installed at Plaintiff's and the Class Members' properties.

85. Plaintiff and Class Members were intended third party beneficiaries of the contracts between Pella and their respective Builders.

86. Pella's express and written warranties, and representations are applicable to the Windows installed in Plaintiff's homes.

87. Pella expressly represented and warranted that the Windows were appropriate for their intended use and were free from defects.

88. Pella also expressly represented that the Windows conform to all applicable building codes and industry standards.

89. Pella has made other representations, as described above, through its website, brochures, marketing materials, and representatives that the Windows are free from defects.

90. The representations and warranties formed part of the basis of the bargain between Pella and the purchasers of the Windows, at the time of the sale.

91. These representations, described herein, became part of the basis of the bargain when Plaintiff, Plaintiff's builders, Class Members and/or Class Members' builders purchased the Windows and/or purchased the homes containing the Windows.

92. In addition, these representations became part of the basis of the bargain when Plaintiff and/or Class Members purchased the homes with Pella's express representations concerning the standards to which the Windows conformed, and all manufacturers warranties were assigned to Plaintiff.

93. The limitations of damages contained in the express warranty provisions are harsh, oppressive and one-sided. The limitations related to the amount of damages, the type of remedies available to Plaintiff and Class Members are unconscionable when Pella knows or should have known that there are defects in the design and manufacturing of the Windows.

94. However, despite Pella's assurances, as described in detail *supra*, the Windows contain the aforementioned defects and do not conform to all applicable building codes and industry standards and are not free from defects.

95. These aforementioned defects are present when the Windows leave Pella's control.

96. Pella has been repeatedly put on notice of the defects in the Windows by various methods described above.

97. As Plaintiff and Class Members have defective Windows in their homes, which have not been and would not be sufficiently repaired or replaced by Pella, they have not received the value of what the window purchaser bargained for at the time the Windows were sold or at the time they were transferred through the sale of the home.

98. Pella breached the express warranty by selling its Windows that were defective and not reasonably fit for their ordinary and intended purpose at the time the Windows left Pella's control. Further, the Windows did not conform to the express representations about the Windows, including that they complied with all industry standards when, in fact, they did not.

99. By its conduct and defective products, Pella has breached its express warranty with Plaintiff and Class Members.

100. In addition, Pella has breached its express written warranties by not providing Plaintiff with Windows which are free from defects and/or by suppressing warranty claims.

101. Pella's written warranty is also unconscionable and fails of its essential purpose. Because it is so replete with limitations, disclaimers and exceptions that it effectively prevents any warranty claim in spite of the Windows having a known defect when sold.

102. Pella's warranty fails of its essential purpose because no remedies offered by Pella give purchasers of Pella Windows the benefit of their bargain, i.e. merchantable Windows.

103. Plaintiff did not negotiate or bargain for the terms of the express warranty provisions and any purported limitations contained therein. Upon information and belief, the distributors, contractors, and other customers of Pella did not and could not negotiate or bargain for the terms of the express warranty provisions and any purported limitations contained therein. Instead, Pella stood in a position of domination and control over the terms.

104. The purported disclaimer of warranties are also ineffective because Pella does not provide its warranties to purchasers of Pella Windows before or at the time of the purchase. Purchasers only learn of such purported disclaimers at the time of delivery or installation of their Windows, and such limitations cannot be considered to be a part of the bargain.

105. Upon information and belief, Pella knew that the Windows had a history of failures, resulting in damage to other property, yet Pella failed and omitted to inform its distributors, its customers, Plaintiff and Class Members on whose residence the Windows were installed.

106. In light of the foregoing, Pella's limitations within its warranties are invalid and fail of their essential purpose and/or are unconscionable.

107. The foregoing breaches of express warranty at issue were substantial factors in causing damages to Plaintiff and Class Members.

108. As a direct and proximate result of Pella's breach of the express warranty on the Windows, the Plaintiff and Class Members have suffered actual and consequential damages.

COUNT II **UNJUST ENRICHMENT**

109. Plaintiff on behalf of himself and all others similarly situated, adopts and incorporates by reference all foregoing allegations as though fully set forth herein.

110. "The unjust enrichment claim can be made from common classwide proof." *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 239 (C.D. Cal. 2003) (certifying a nationwide class where Plaintiff alleged defendants were unjustly enriched through a common scheme.). "Although there are numerous permutations of the elements of the unjust enrichment cause of action in the various states, there are few real differences. In all states, the focus of an unjust enrichment claim is whether the defendant was unjustly enriched. At the core of each state's law are two fundamental elements - the defendant received a benefit from the Plaintiff and it would be inequitable for the defendant to retain that benefit without compensating the Plaintiff. The focus of the inquiry is the same in each state." *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 58 (D.N.J. Apr. 24, 2009), *quoting Powers v. Lycoming Engines*, 245 F.R.D. 226, 231 (E.D. Pa. 21 2007).

111. Plaintiff and Class Members conferred a benefit on Defendant when they purchased the Windows.

112. Pella has been unjustly enriched in retaining the revenues derived from Class Members' purchases of the Windows, the retention of which under these circumstances is unjust

and inequitable because Pella Windows were defective in design, were not fit for their ordinary and intended use, and performed in accordance with neither the advertisements, marketing materials and warranties disseminated by Pella nor the reasonable expectations of ordinary consumers and caused the Plaintiff and Class Members to lose money as a result thereof.

113. Plaintiff and Class Members suffered a loss of money as a result of Pella's unjust enrichment because: (a) they would not have purchased the Windows on the same terms if the true facts concerning the defective Windows had been known; (b) they paid a price premium due to the fact the Windows would be free from defects; and (c) the Windows did not perform as promised.

114. Because Pella's retention of the non-gratuitous benefit conferred on them by Plaintiff and Class Members is unjust and inequitable, Pella must pay restitution to Plaintiff and the Class Members for their unjust enrichment, as ordered by the Court.

115. Plaintiff and the Class Members are entitled to restitution of, disgorgement of, and/or the imposition of a constructive trust upon, all profits, benefits, and other compensation obtained by the Defendant from its deceptive, misleading, and unlawful conduct.

COUNT III **VIOLATION OF MAGNUSON-MOSS ACT**

116. Plaintiff on behalf of himself and all others similarly situated, adopts and incorporates by reference all foregoing allegations as though fully set forth herein.

117. The Magnuson-Moss Consumer Products Liability Act, 15 U.S.C §2301, et seq. ("MMCPWA" or the "Act") provides a private right of action to purchasers of consumer products against retailers who, *inter alia*, fail to comply with the terms of a written warranty, express warranty and/or implied warranty. As demonstrated above, Pella has failed to comply

with the terms of its warranties, written, express and implied, with regard to the Windows that it advertised, distributed, marketed and/or sold.

118. Plaintiff and the Class Members are “consumers” under the MMCPWA.

119. Pella has been given a reasonable opportunity by Plaintiff and other Class Members to cure such failures to comply and has repeatedly failed to do so.

120. By virtue of the foregoing, Pella and other Class Members are entitled to an award of damages and other appropriate relief, including attorneys’ fees.

COUNT IV
DECLARATORY RELIEF 28 U.S.C. § 2201

121. Plaintiff on behalf of himself and all others similarly situated, adopts and incorporates by reference all foregoing allegations as though fully set forth herein.

122. Defendant has acted or refused to act on grounds that apply generally to the Declaratory Relief Class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the Class as a whole within the meaning of Fed. R. Civ. P. 23(b)(2). Plaintiff seeks a ruling that:

- a. The Windows have a defect which results in a premature failure and premature rotting of wood component of the sash. The rotting of the wood component may not be detectable until after the warranty provided by Pella has expired. The Court finds that this defect is material and requires disclosure for all of these Windows;
- b. The Windows have a defect in workmanship and material that allows water to penetrate behind the aluminum clad sash component of the window resulting in premature rotting of the wood component, which rot

may progress to adjacent wood components, and that the rotting of the wood component may not be detectable until after the existing warranty provided by Pella has expired. The Court declares that all persons who own structures containing Windows are to be provided the best practicable notice of the defect, which cost shall be borne by Pella;

- c. Certain provisions of Pella's warranty are void as unconscionable'
- d. The 10-year limitation on the warranty is removed;
- e. The limitation of the warranty to the date of manufacture, rather than the date of installation, is removed;
- f. Pella shall re-audit and reassess all prior warranty claims, including claims previously denied in whole or in part, where the denial was based on warranty or on other grounds, of claims related to wood rot, and pay the full cost of repairs and damages; and,
- g. Pella will establish an inspection program and protocol, under Court supervision, to be communicated to Class Members, which will require Pella to inspect, upon request, a Class Member's structure to determine whether wood rot is manifest. Any disputes over coverage shall be adjudicated by a Special Master appointed by the Court and/or agreed to be the parties.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself all others similarly situated, pray for a judgment against Defendant as follows:

1. For an order certifying the Classes, pursuant to Fed. R. Civ. P. Rule 23, appointing Plaintiff as representative of the Classes, and appointing the law firms representing Plaintiff as counsel for the Classes;
2. For compensatory damages sustained by Plaintiff and the Damages Class;
3. For equitable and/or injunctive relief for the Declaratory Relief Class;
4. For payment of costs of suit herein incurred;
5. For both pre-judgment and post-judgment interest on any amounts awarded;
6. For punitive damages;
7. For payment of reasonable attorneys' fees and expert fees as may be allowable under applicable law; and
8. For such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff on behalf of himself and on behalf of the Class Members, hereby demand a trial by jury as to all issues so triable.

Respectfully submitted,

Dated: _August 13, 2014

/s/Gary E. Mason_____
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