

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. ____-____-CV-____-____

**JAMES RANDOLPH LEONARD, and
JOAN G. LEONARD**, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

RUST-OLEUM CORPORATION,

Defendant.

CASE NO. _____

CLASS ACTION COMPLAINT

1. Plaintiffs, James Randolph Leonard, and Joan G. Leonard (“Plaintiffs”) on behalf of themselves and all others similarly situated, by and through his undersigned counsel, brings this class action complaint against Defendant Rust-Oleum Corporation (“Rust-Oleum” or “Defendant”), and allege as follows upon personal knowledge as to themselves and their own acts and experiences and, as to all other matters, upon information and belief based upon, *inter alia*, investigations conducted by their attorneys.

2. Plaintiffs bring this consumer class action individually and on behalf of the Classes defined below against the Defendant to obtain relief, including, among other things, damages and declaratory and injunctive relief. This lawsuit arises out of violations of law in connection with Defendant’s design, manufacture, marketing, advertising, selling and warranting

of their Rust-Oleum Restore paint products¹ (“Restore” or “Restore paint”) used as a resurfacing finish on outdoor decks and related structures. Defendant’s Restore product contain serious design and manufacturing defects, making it susceptible to separating, cracking, bubbling, flaking, chipping and general degradation after application and causing damage to other building components.

3. Defendant warrants that its Restore paint is designed to resiliently protect a consumer’s existing decking and related structures with minimal maintenance. Defendant’s website, www.rustoleum.com, describes its Restore paints as “liquid-armor resurfacers” which “offer a high-performance, low-maintenance, long-lasting alternative to the endless cycle of repairing and repainting.” Defendant represents that its paint is ten (10) times thicker than ordinary paint, giving it superior coverage qualities with the ability to mask imperfections such as cracks on decks and patios. Further, on the container, Defendant states, among other things:

- “THE SMART ALTERNATIVE TO DECK & CONCRETE REPLACEMENT”
- “LIQUID ARMOR RESURFACER”
- “WATER BASED, LOW ODOR”
- “REVIVES WOOD & BROOM SWEEP CONCRETE”
- “LASTING MOISTURE PROTECTION”
- “FILLS UP TO ¼” CRACKS”
- “ONE PART, READY-TO-USE AFTER TINTING”
- “LOCKS DOWN WOOD SPLINTERS

¹ According to Defendant’s website Restore paint is currently sold as a number of different products: Deck & Concrete Restore® 10X; Deck and Concrete Restore® 4X; Vertical Restore®; and Extreme Concrete®. See <http://www.rustoleum.com/product-catalog/consumer-brands/restore/> (last reviewed November 6, 2014 at 1:15 PM). Plaintiffs reserve the right to amend, or add to this list of defective Restore products after conducting further discovery.

- “IDEAL FOR WOOD & COMPOSITE DECKING, CONCRETE PATIOS, DOCKS & MORE”

4. Unfortunately, the common failures with Restore paint require replacement far sooner than consumers reasonably expect. Accordingly, Plaintiffs assert claims for violation of the Magnuson-Moss Act, breach of implied warranties, breach of express warranty, violations of consumer protection laws and deceptive trade practice acts, unjust enrichment, negligent misrepresentation, negligence, and declaratory and injunctive relief.

5. Defendant designed, manufactured, marketed, advertised, warranted and sold Restore paint to Plaintiffs and the Class as well as the general public. Defendant advertised that the product was fit for the ordinary purpose for which such goods were used and was free from defects in materials and workmanship.

6. Defendant however knew, prior to the time of sale that their Restore paint was defective, and in fact separated, cracked, bubbled, flaked, chipped, peeled and generally deteriorated shortly after application.

7. Plaintiffs and members of the Class relied on Defendant's representations, and as a result of Defendant's failure to properly develop, test, and ensure that its Restore paint was properly designed, Plaintiffs and the Class have suffered damages.

8. Consequently, Defendant is responsible and liable for, among other things, the costs of removing and replacing the Restore paint installed in the homes, offices, buildings and other structures of Plaintiffs and members of the proposed Class, as well as other related consequential damages resulting from Defendant's defective Restore paint that has failed prematurely.

JURISDICTION AND VENUE

9. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 as one of the claims arise under the laws of the United States, specifically, the Magnuson-Moss Warranty Act 15 U.S.C. § 2301 *et seq.*

10. Additionally, this Court has subject-matter jurisdiction over this action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. Sections 1332 (a) and (d), because the amount in controversy exceeds \$5,000,000.00 exclusive of interest and costs, and more than two-thirds of the members of the Class are citizens of states different from that of Defendant.

11. Venue is proper in this District under 28 U.S.C. § 1391(b) because Defendant's improper conduct alleged in this complaint occurred in, was directed from, and/or emanated from this judicial district. The Defendant is an Illinois corporation with, upon information and belief, its principal place of business in Illinois.

PARTIES

12. Plaintiffs James Randolph Leonard and Joan G. Leonard are citizens and residents of New Hanover County, North Carolina, where Plaintiffs own a home. Plaintiff James Randolph Leonard, a former licensed building inspector who now works part-time at Ace Hardware hired a respected and competent licensed general contractor, Venters' Construction, Inc. ("Venters") to install a coating on an existing deck at Plaintiffs' home. Venters and Plaintiff James Randolph Leonard reviewed Defendant's materials and, in reliance thereof, jointly decided that Venters would purchase and install the product on Plaintiffs' deck. Thus, in October 2013, the product was purchased at Home Depot in Wilmington, North Carolina for approximately \$846.25. Venters installed the Restore paint on Plaintiffs' wood deck at Plaintiffs' home in or around

October 2013. The Restore paint applied to Plaintiffs' deck has failed and Plaintiffs have suffered damages as a result of the product failure.

13. Defendant Rust-Oleum Corporation is a subsidiary of RPM International, Inc. Rust-Oleum Corporation makes protective paints and coatings for home and businesses. Its corporate headquarter is located in Vernon Hills, Illinois.

COMMON FACTUAL ALLEGATIONS

14. Defendant holds itself out to the public as a manufacturer of durable and long lasting paint products. Defendant designed, developed, manufactured, tested, marketed, warranted and sold Restore paint products directly and indirectly, through distributors, to Plaintiffs and the Class, contractors, subcontractors, and/or agents.

15. Defendant represents to consumers that Restore paint is designed to refresh decks and patios by forming a "tough [sic] resilient coating over existing deck" which "last for years with less maintenance than deck paints or stains! Satisfaction guaranteed."

16. Among other claims, Defendant made express warranties about the quality and fitness of Restore paint on Defendant's website and on Defendant's YouTube page (created by Rust-Oleum Corporation to market Restore paint). Defendant stated, *inter alia*, that:

Restore is a durable coating product formulated to resurface most wooden and composite decks while providing lasting protection against moisture and the damaging effects of the sun. Designed for a variety of applications, it is the most cost effective and environmentally conscious way to revitalize wood surfaces. Deck & Concrete Restore can be applied with a roller and dries to form a tough, resilient surface that will look beautiful and last for years with little maintenance.

10x thicker than ordinary deck coating

Fills cracks, locks down splinters

Water based, safe easy clean up

Easy to apply with Restore Roller

Hide Imperfections, slip resistant²

It lasts 10 to 12 years and in fact it comes with a life time warrantee.³

It's a thick viscous product that fills cracks up to a quarter inch and encapsulates splinters and extends the life of your deck.⁴

17. Defendant provided the following lifetime warranty on all of the Rust-Oleum Restore paint products: Defendant warrants "Rust-Oleum Corporation guarantees product performance for the product in this can only for as long as you own or reside in your home when our product was applied according to the label directions."⁵

18. Despite Defendant's express and implied warranties and claims that the products are fit for ordinary purposes, Restore paint fails to deliver as promised and expected. Furthermore, Defendant has failed to fully honor existing warranties and failed to compensate Plaintiffs and members of the Class under their warranties and applicable law.

19. Subsequent to the failure of the Restore paint on their home, Plaintiffs became informed and therefore believe that Defendant construes their warranty to be limited to reimbursement of the costs actually paid by the consumer for the Restore paint and will not cover any other damages, regardless of whether this damages were reasonably foreseeable to Defendant when the product left its control and when the warranty was drafted by Defendant.

² See: <http://web.archive.org/web/20130409043501/http://rustoleumrestore.com/dcr> (Plaintiffs are informed and believe this statement was contained in Defendant's marketing videos.)

³ See: <https://www.youtube.com/watch?v=-IcXA8966b4>

⁴ See: <https://www.youtube.com/watch?v=e156aQVTr9Y> (last reviewed November 6, 2014, 10:35 am).

⁵ See: <http://www.rustoleum.com/en/product-catalog/consumer-brands/restore/~media/D562F624B8CA4165A4CDEB4E129D745D.ashx>

20. Among other reasons, because Defendant had been aware of the defective nature of its Restore paint, any limitations on Defendant's warranties are unconscionable and/or fail their essential purpose because Restore paint was defective at the time Plaintiffs and members of the Class acquired Restore paint.

21. Plaintiffs and members of the Class did not have notice of the defect and had no way of learning about the defect other than from Defendant.

22. The bargaining power between Plaintiffs and members of the Class on one hand and Defendant on the other hand was grossly unequal and therefore any limitations on the warranty are substantially one-sided, making those limitations unconscionable.

23. Defendant Rust-Oleum Corporation limits its offer of warranty payment to its estimate of the purchase price of Restore paint—just a fraction of the actual replacement cost.

24. Despite Defendant's representations to consumers as alleged herein, Restore paint is plagued with design and manufacturing flaws that cause the paint to, among other things, separate, crack, bubble, flake, chip and generally degrade shortly after installation.

25. Restore paint is a water-based acrylic paint with a blend of inorganic and organic pigments. Restore paint additionally contains crystalline silica, which according to Defendant's website requires additional precautions when removing through sanding or abrading due to dangerous nature of the compound in particulate form.⁶ Consequently, removal and replacement of the defective Restore paint requires a labor-intensive, expensive process that runs the risk of damaging or deteriorating the underlying substrate and carries with it substantial costs and significant health risks to Plaintiffs and members of the Class.

⁶ See: <https://www.rustoleum.com/pages/homeowner/tips-and-techniques/restore-10x-tips-and-techniques/restore-wood-tips/>

26. Defendant and its authorized agents and distributors made the above representations with the intent and purpose of inducing suppliers, builders, and consumers to purchase and apply Restore paint on their decks, patios and other structures in residential and commercial structures in the North Carolina and elsewhere.

27. Upon information and belief, Defendant also made numerous material omissions in its advertising and promotional literature and uniformly withheld important information relating to the design, reliability, and performance of Restore paint.

28. Defendant continue to make false representation about the quality and fitness of the Restore paint including, including but not limited to those referenced herein, including paragraphs 3, 5, and 14-16 *supra*.

29. Had Defendant not withheld and omitted important information about the design, reliability, and performance of Restore paint, Plaintiffs and members of the Class would not have purchased the products or used them on their properties.

30. Defendant knew or should have known that the foregoing defects made Restore paint susceptible to premature failure through various processes.

31. Defendant's design and materials choices have created a product that begins to fail on its first day of use, even if perfectly used in its intended environment.

32. Because of the defective design and manufacture, Restore paint failed in its intended purpose, is inherently defective and is substantially certain to fail before the expiration of the express warranty provided by Defendant or before the useful life of the decking.

33. Upon information and belief, Defendant did not test Restore paint in its anticipated environments before selling the product to the public, failed to test for things that

they knew or should have known would lead to premature failure and failed to investigate or test whether well-known and expected conditions would lead to premature failure of Restore paint.

34. Defendant knew or reasonably should have known that Restore paint products were defective prior to the time of sale, and intentionally concealed that material information (and the truth concerning their product) from Plaintiffs and members of the Class, while continually marketing Restore paint as a dependable and reliable product. Defendant's acts of negligent misrepresentation include failing to disclose that its Restore paint was defectively manufactured or designed and would deteriorate in less than the expected lifetime, leading to damage to the very structures they were purchased to protect.

35. The defects in Restore paint are latent and not detectable until manifestation, Plaintiffs and the Class members were not reasonably able to discover their Restore paint was defective and unreliable until after applying the Restore to their entire decks and related structures, despite their exercise of due diligence.

36. Defendant had a duty to disclose that their Restore paint was defective, unreliable, and inherently flawed in its design and manufacture.

Facts Specific to Plaintiffs

37. Plaintiffs, through Venters, purchased Restore paint on separate occasions from a Home Depot retail store in or around October 2013. Prior to purchasing Restore paint, Plaintiff James Randolph Leonard and Venters reviewed Defendant's marketing and other materials. Plaintiff James Randolph Leonard reviewed Defendant's website. Plaintiff James Randolph Leonard also viewed promotional material presented by Defendant on their website as well as at Home Depot.

38. Prior to purchasing Rust-Oleum's Restore paint, Plaintiffs and Venters relied on Defendant's reputation, as well as Defendant's advertisements, including but not limited to print, video and internet advertising and marketing materials. Additionally, Plaintiff James Randolph Leonard relied on Restore's representation that the product had a lifetime warranty when deciding to have the Restore paint applied to Plaintiffs' deck.

39. Within a month of purchasing Restore paint, Venters applied the Restore paint to Plaintiffs' deck and followed Defendant's instructions for preparation and application and the standard construction practices then existing in North Carolina. Venters used ten containers (4 gallons each) along with a couple single gallon containers of Restore paint.

40. Less than a year after applying Restore paint to their deck, the paint began to chip, crack and generally deteriorate. Not only has the Restore paint deteriorated and damaged itself, but the decking upon which it was installed has also been damaged.

41. Plaintiff James Randolph Leonard contacted Venters, and Venters attempted to evaluate the failures. Venters has been unable to determine exactly how the defects and damage to other building components can be remedied and whether the scope of repair will necessitate the complete removal of the deck and boards.

42. Plaintiffs intend to have the deck repaired and will do so in Spring 2015. Plaintiff James Randolph Leonard is informed and believes that the cost to perform this work will be in excess of \$10,000 if the deck and boards are replaced. In the event the deck and boards can be salvaged, in part or in whole, then Plaintiff James Randolph Leonard is informed and believes that the cost to perform this work will be in excess of \$4,000.

43. The repair work will cause substantial additional damage to the deck.

44. After taking photographs, on September 24, 2014, Plaintiff James Randolph Leonard spoke with Curt Jammy (“Jammy”), a Home Depot employee, who works in the paint department. After Plaintiff James Randolph Leonard explained his problems and showed Jammy the photographs, Jammy advised Plaintiff James Randolph Leonard to contact Defendant and provided Defendant’s phone number to James Randolph Leonard .

45. On September 24, 2014 at approximately 4:00 p.m., Plaintiff James Randolph Leonard called the number provided by Jammy and requested that he be put in contact with Defendant’s local representative and requested that Defendant evaluate his issues.

46. Plaintiff James Randolph Leonard was then placed in contact with Defendant’s employee Mike Casey (“Casey”). Plaintiff was given a file number (RO-1049364). Casey requested that Plaintiff send receipts for the Restore paint to him via facsimile transmission.

47. As requested, Plaintiff James Randolph Leonard sent all invoices of which he had copies to Casey on September 25, 2014.

48. Thereafter, Defendant sent Plaintiffs an envelope through the U.S. mail, bearing a postage mark of October 17, 2017. Enclosed in the envelope was a check from Defendant for \$846.25. No cover letter, release or other material accompanied the check that Defendant sent to Plaintiffs. This amount fails to compensate Plaintiffs for all the damages that they have incurred.

Consumer Complaints

49. The problems with Restore paint experienced by Plaintiffs are not unique. In fact, the product page for Restore paint on Amazon.com is replete with consumer complaints that mirror the difficulties and problems alleged in this complaint.⁷ In addition, Defendant’s own

⁷ See http://www.amazon.com/Rust-Oleum-49504-Deck-Concrete-4-Gallon/product-reviews/B005LDBGAO/ref=cm_cr_pr_btm_link_next_3?ie=UTF8&pageNumber=3&showViewpoints=0&sortBy=byRankDescending

Facebook page has been inundated with customer complaints, and reports of tribulations regarding the Restore paint.⁸

CLASS ACTION ALLEGATIONS

50. This action is brought and may be maintained as North Carolina class action for declaratory and injunctive relief pursuant to Rule 3 of the Federal Rules of Civil Procedure and on behalf of Plaintiffs and all others similarly situated. The proposed declaratory and injunctive relief class is defined as follows:

All individuals and entities that have owned, own, or acquired homes, residences, buildings or other structures physically located in North Carolina, on which Restore paint products is or has been applied. Excluded from the Class are Defendant, any entity in which Defendant have a controlling interest or which has a controlling interest of Defendant, and Defendant's legal representatives, assigns and successors. Also excluded are the judge to whom this case is assigned and any member of the judge's immediate family.

51. Plaintiffs reserve the right to redefine the Class prior to class certification.

52. The members of the proposed Class are so numerous that joinder of all members is impracticable.

53. The exact number of Class members is unknown as such information is in the exclusive control of Defendants. However, due to the nature of the trade and commerce involved, Plaintiffs believe the Class consists of thousands of consumers.

54. Common questions of law and fact affect the right of each Class member and a common relief by way of damages is sought for Plaintiffs and Class members.

55. The harm that Defendant caused or could cause is substantially uniform with respect to Class members. Common questions of law and fact that affect the Class members include, but are not limited to:

⁸ See www.facebook.com/Rust-Oleum

- a. Whether Restore paint is defective in that it fails prematurely and is not suitable for use as an exterior decking product for the length of time advertised, marketed, and warranted;
- b. Whether Restore paint is defectively designed or manufactured;
- c. Whether Restore failed to perform in accordance with the reasonable expectations of ordinary consumers;
- d. Whether Defendant failed to prevent damages which occurred as a result of defective Restore paint they designed, manufactured and placed into the stream of commerce;
- e. Whether Defendant properly warned consumers about the reasonably foreseeable defective nature of Restore paint;
- f. Whether Defendant was unjustly enriched by the sale of defective Restore paint;
- g. Whether Defendant breached its warranties as represented and engaged in fraudulent, false, deceptive or misleading advertising and misconduct with respect to the handling of warranty claims;
- h. Whether the Defendant was aware or should have been aware of the defects when the product was sold in North Carolina;
- i. Whether the Defendant was aware or should have been aware that the reasonable repairs to the structures upon which Restore paint is applied will cause damages that exceed its warranty and whether the limitations placed in its warranty were designed to avoid liability for those foreseeable and expected damages.
- j. Whether Defendant's limitations on its express warranty are unconscionable are otherwise unenforceable;
- k. Whether the express warranty, with limitations, fails of its essential purpose;
- l. Whether Plaintiffs and the proposed Class are entitled to compensatory damages, including, among other things, compensation for all out-of-pocket monies expended by members of the Class for replacement of the Restore paint and the other materials on the structures that have been damaged by reason of the defects and which will be damaged when a reasonable repair is undertaken;
- m. Whether Defendant sold and entered a defective product into the stream of commerce in North Carolina;

- n. Whether Defendant omitted material information when it sold Restore paint;
- o. Whether Defendant violated the North Carolina Unfair and Deceptive Trade Practices Act by failing to disclose the defects in the Restore paint, by continuing to sell the defective product even after it knew of the defect, by including limitations in its warranty that limited its liability for damages that were reasonable foreseeable and expected to be incurred by users of its product, without disclosing this foreseeable and expected consequence to consumers.
- p. Whether members of the proposed Class have sustained damages and, if so, the proper measure of such damages; and
- q. Whether Defendant should be declared financially responsible for notifying all Class members about their defective Restore paint and for all damages associated with the incorporation of such decking into Class members' homes, residences, buildings, and other structures.

56. The claims and defenses of the named Plaintiffs are typical of the claims and defenses of the Class. Plaintiffs and all members of the Class own or have owned homes, residences, or other structures on which Restore paint has been used. The product has failed, and will continue to fail prematurely. When the product fails, other components of the structures are damaged and, when reasonable repairs are undertaken to correct the defects, other components of the structure will be damaged. The named Plaintiffs, like all Class members, have been damaged by Defendant's conduct in that they have incurred or will incur the costs of repairing or replacing their decks and repairing the additional property and structure damaged by the Restore paint's premature failure, which should have been or were known by the Defendant, who unjustly limited its exposure by excluding reasonable foreseeable and expected damages that would be incurred by the consumers when the Restore paint was applied to the structures. Furthermore, the factual basis of Defendant's conduct is common to all Class members and represents a common thread of deliberate, fraudulent, and negligent misconduct resulting in injury to all members of the Class.

57. The named Plaintiffs will fairly and adequately assert and protect the interests of the Class. Specifically, they have hired attorneys who are experienced in prosecuting class action claims and will adequately represent the interests of the class and they have no conflict of interest that will interfere with the maintenance of this class action.

58. A class action provides a fair and efficient method for the adjudication of this controversy for the following reasons:

- a. The common questions of law and fact set forth herein predominate over any questions affecting only individual class members;
- b. The Class is so numerous as to make joinder impracticable but not so numerous as to create manageability problems;
- c. There are no unusual legal or factual issues which would create manageability problems;
- d. Prosecution of separate actions by individual members of the Class would create a risk of inconsistent and varying adjudications against Defendant when confronted with incompatible standards of conduct;
- e. Adjudications with respect to individual members of the Class could, as a practical matter, be dispositive of any interest of other members not parties to such adjudications, or substantially impair their ability to protect their interests; and
- f. The claims of the individual Class members are small in relation to the expenses of litigation, making a Class action the only procedure in which class members can, as a practical matter, recover. However, the claims of individual Class members are large enough to justify the expense and effort in maintaining a class action.

**ESTOPPEL FROM PLEADING AND TOLLING OF APPLICABLE STATUTES
OF LIMITATIONS**

59. Plaintiffs and putative members of the Class are within the applicable statute of limitation and repose for the claims presented here. Defendant's failure to disclose this known but non-public information about the defective nature of their Restore paint – information over which it had exclusive control – and because Plaintiffs and Class Members therefore could not

reasonably have known that the Products were defective, Defendant is estopped from asserting any statute of limitation defense that might otherwise be applicable to the claims asserted herein.

FIRST CLAIM FOR RELIEF
VIOLATION OF MAGNUSON-MOSS ACT
(Plaintiffs, Individually, and on behalf of the Class)

60. Plaintiffs re-allege and incorporate by reference the allegations contained in all preceding paragraphs of this Class Action Complaint as though set forth fully herein.

61. Congress enacted the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.* (the “Act”) in response to widespread complaints from consumers that many warranties were misleading and deceptive. The Act imposes civil liability on any “warrantor” for, *inter alia*, failing to comply with any obligation under a written warranty and/or implied warranty. See 15 U.S.C. § 2310(d)(1).

62. Restore paint products are “consumer products”, as that term is defined by 15 U.S.C. §2301(1).

63. Plaintiffs and Class members are “consumers” as that term is defined by 15 U.S.C. §2301(3).

64. Defendant is “warrantor” and “supplier,” as those terms are defined by 15 U.S.C. §2301(4) and (5).

65. Defendant has failed to remedy the defects associated with Restore paint, despite knowledge of its propensity to prematurely bubble, peel, crack, flake, chip, and degrade after application.

66. By Defendant’s conduct as described herein, including Defendant’s knowledge of the defective Restore paint, and its actions, and inaction, in the face of that knowledge,

Defendant has failed to comply with their obligations under their written and implied promises, warranties, and representations.

67. As a result of Defendant's breach of implied warranties, Plaintiffs and Class members are entitled to revoke their acceptance of the Restore paint, obtain damages and equitable relief, and obtain attorneys' fees and cost pursuant to 15 U.S.C. §2310.

SECOND CLAIM FOR RELIEF
BREACH OF IMPLIED WARRANTIES
(Plaintiffs, Individually, and on behalf of the Class)

68. Plaintiffs re-allege and incorporate by reference the allegations contained in all preceding paragraphs of this Class Action Complaint as though set forth fully herein.

69. Defendant designed, manufactured, marketed, advertised, warranted and sold Restore paint for purposes of its eventual sale to retail buyers.

70. Defendant impliedly warranted that Restore paint product was properly designed, developed, manufactured, distributed, marketed, sold, and installed and that the designs and materials were proper and of workmanlike quality.

71. Defendant knew and intended that Restore paint would be applied on exterior decks and patios throughout the United States where it would be exposed to high temperature and humid conditions in the summer, freezing temperatures and extremely dry air in the winter, and repeated freeze-thaw cycles.

72. Plaintiffs and Class members who purchased the Restore paint in North Carolina are "buyers" within the meaning of N.C. Gen. Stat. § 25-2-103 (1)(a) and N.C. Gen. Stat. § 99B-2(b).

73. Restore paint is a "good" within the meaning of N.C. Gen. Stat. § 25-2-105.

74. Restore paint is a "product" within the meaning of N.C. Gen. Stat. § 99B-2(b).

75. Defendant is a “manufacturer” of the Restore paint within the meaning of N.C. Gen. Stat. § 99B-1 and a “seller” within the meaning of N.C. Gen. Stat. § 25-2-103.

76. Plaintiffs and the Class all purchased Restore paint having the defects alleged herein.

77. Pursuant to N.C. Gen. Stat. §25-2-314 and other applicable law, including to N.C. Gen. Stat. § 99B-1 et. seq., Defendant warranted that the Restore paint was suited for its normal and intended use and purpose and was merchantable. Restore paint is not merchantable because it has a propensity to bubble, peel, crack, flake, chip, or otherwise prematurely degrade that renders it unfit for the ordinary use of deck constructions and the quality is objectionable in the trade.

78. Defendant knew that Plaintiffs and the Class would use Restore paint to cover and protect decks and patios, and Plaintiffs and the Class relied upon Defendant’s skill and judgment to furnish suitable decking material. Restore paint is not fit for its intended purpose because it has a propensity to bubble, peel, crack, flake, chip, or otherwise prematurely degrade.

79. Plaintiffs and the Class relied upon said warranties and the claims, skill, expertise, and quality assurance of Defendant’s workers to provide suitable goods.

80. Defendant breached said warranties by failing to provide adequate and proper designs, calculations, or materials for Restore paint.

81. Restore paint fails to perform in accordance with the reasonable expectations of Plaintiffs and the Class and the benefits of the design of Restore paint do not outweigh the risk of its failure.

82. Defendant had and has a duty and responsibility to disclose to the consuming public the foreseeable risks associated with the use of Restore paint; Defendant further had, and has, a duty not to put defective products on the market.

83. Defendant breached the implied warranty of merchantability by selling the Restore paint without giving specific instructions or warning or other caution to Plaintiffs and the Class in order to notify them of the defects and danger to other building components.

84. Upon information and belief, at the time the Restore paint left the Defendant's control, the Defendant unreasonably failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design or formulation that could then have been reasonably adopted and that would have prevented or substantially reduced the risk of harm without substantially impairing the usefulness, practicality, or desirability of the Restore paint.

85. The defects, as alleged herein, were not an open and obvious risk or a risk that was a matter of common knowledge at the time the Restore paint was purchased.

86. At the time the Restore paint left the Defendant's control, the design or formulation of the product was so unreasonable that a person, aware of relevant facts, would not use a product of this design.

87. But for Defendant's breach of implied warranty, Plaintiffs and the proposed Class would not have sustained damages.

88. As a direct and proximate result of the breach of said warranties, Plaintiffs and the Class have suffered and will continue to suffer loss as alleged herein in an amount to be determined at trial.

89. Plaintiffs, on behalf of themselves and all other similarly situated, demand judgment against Defendant for compensatory damages, for the establishment of a common fund, plus attorneys' fees, interest and costs.

THIRD CLAIM FOR RELIEF
BREACH OF EXPRESS WARRANTY
(Plaintiff, Individually, and on behalf of the Class)

90. Plaintiffs re-allege and incorporate by reference the allegations contained in all preceding paragraphs of this Class Action Complaint as though set forth fully herein.

91. Defendant made affirmations of fact, promises and descriptions to Plaintiffs and members of the Class which related to Restore paint as more fully described herein.

92. Defendant's affirmations of fact, promises and descriptions became part of the basis of the bargain between the parties.

93. Pursuant to N.C. Gen. Stat. §25-2-313, these affirmations of fact, promises and descriptions of the goods are express warranties that the goods shall conform to the affirmation, promise and descriptions.

94. Defendant uniformly warranted all of Restore paint against defects in material or workmanship at a time when they knew that it suffered from serious defects and, nevertheless, continued to market and sell Restore paint with this express warranty.

95. The misrepresentations were made by Defendant to induce Plaintiffs and the Class members to purchase, and were material factors in their decisions to purchase Restore paint.

96. Defendant are obligated under the terms of their written warranty to repair and/or replace the defective Restore paint sold to Plaintiffs and Class members and repair and/or replace any structural damages caused by the paint.

97. Defendant have breached their written warranty, as set forth above, by supplying the Restore paint in a condition which does not meet the warranty obligations undertaken by Defendants, and by failing to repair the damages caused by the defective product.

98. As set forth above, Defendant's assert that their warranty is limited to cost of the product. If so, Defendant's warranty fails in its essential purpose and, accordingly, Plaintiffs and Class members cannot and should not be limited to the remedies set forth in the written warranty and instead should be permitted to recover all measures of appropriate relief.

99. The limitations of damages and the limitations contained in the express warranty, as asserted by Defendant, are harsh, oppressive and one-sided. The limitations related to the amount of damages, the type of remedies available to Plaintiffs and Class Members are unconscionable when Defendant knew or should have known that there are defects in the design and manufacturing of Restore paint.

100. The limitations of damages and the limitations contained in the express warranty, as asserted by Defendant, are unconscionable given that Defendant knew or should have known that the Restore paint was defective and not fit for its ordinary and intended and did not perform in accordance with its advertisements, marketing materials and warranties or within the reasonable expectations of ordinary consumers and that Defendant concealed from Plaintiffs and the Class the defects with its product.

101. The limitations of damages and the limitations contained in the express warranty, as asserted by Defendant, are unconscionable and do not provide a fair quantum of remedy under the circumstances given the facts and circumstances surrounding the warranty, and given that Plaintiffs and members of the class are consumers.

102. The limitations of damages and the limitations contained in the express warranty, as asserted by Defendant, cause the warranty to fail of its essential purpose and therefore Defendant's warranty with Plaintiffs and the Class were breached.

103. Defendant refused to pay Plaintiffs for 100% of the costs associated with repairing the damage caused by the defective Restore paint and such failure is a breach of the warranty.

104. As a direct and proximate result of Defendant's conduct and failure to conform to representations in breach of Defendant's express warranties, Plaintiffs and Class members have suffered damages, injury in fact and/or ascertainable loss in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF
VIOLATIONS OF THE NORTH CAROLINA UNFAIR AND DECEPTIVE TRADE
PRACTICES ACT

(Plaintiffs, Individually, and on behalf of the Class)

105. Plaintiffs re-allege and incorporate by reference the allegations contained in all preceding paragraphs of this Class Action Complaint as though set forth fully herein.

106. At all times relevant hereto, there was in full force and effect the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat §75-1.1 *et seq.*

107. N.C. Gen. Stat. § 75-1.1 *et. seq.* makes unlawful, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.

108. Plaintiffs and the Class members are consumers within the meaning of N.C. Gen. Stat. § 75-1.1 *et. seq.* given that Defendant's business activities involve trade or commerce, are addressed to the market generally and otherwise implicate consumer protection concerns.

109. By selling defective Restore paint throughout the State of North Carolina and by undertaking the acts complained of herein, including the sale of the Restore paint to Plaintiffs and the Class and making misleading representations to Plaintiffs and the Class about the

defective Restore paint, Defendant has affected commerce within the meaning of N.C. Gen. Stat. §§75-1.1 *et. seq.*

110. Defendant engaged in unfair or deceptive acts or practices in violation of N.C. Gen. Stat. §75-1. 1 *et. seq.* by, among other things:

a. Once the defects in Defendant Restore paint became apparent to the Defendant, consumers, such as the Plaintiffs and the Class, were entitled to full disclosure because: a significant risk of failure would be a material fact in a consumer's decision-making process; and without Defendant's disclosure, consumers would not know of the substantial risks the defect poses. Defendant made no such disclosures.

b. At all times relevant, Defendant continuously and consistently failed to disclose to consumers, like the Plaintiffs and the Class, of the consequences of the Restore paint's defect and about the potential for removal and replacement expenses.

c. Defendant intended that the Plaintiffs and the Class would rely on the deception by purchasing the Restore paint, unaware of the material defects described above. This conduct violates the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat §75-1.1 *et seq.*

111. Plaintiffs and the Class have been damaged by Defendant's deception because: (a) they purchased Restore paint which had a high probability of failure, and (b) Defendant has failed or refused to pay for necessary and complete repairs to Plaintiffs' deck.

112. If Defendant had disclosed the above facts to the Plaintiffs and the Class, they could have (and would have) prevented economic injury by either negotiating additional warranty coverage, negotiating a lower price to reflect the risk, or simply would have avoided the risk altogether by not purchasing the Restore paint.

113. Defendant has committed deceptive acts or practices within the meaning of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat §75-1.1 *et seq.* by engaging in the acts and practices alleged herein, including, but not limited to, its failure to disclose the material defects.

114. Defendant's conduct alleged herein is furthermore unfair insofar as it offends public policy, is so oppressive that consumers have little alternative but to submit, and causes consumers substantial injury.

115. As a direct and proximate result of the unfair acts or practices of Defendant alleged herein, the Plaintiffs and other members of the proposed Class were damaged and are entitled to receive compensation for these damages, have those damage awards trebled and recover an award of attorney's fees.

FIFTH CLAIM FOR RELIEF
UNJUST ENRICHMENT

(Plaintiffs, Individually, and on behalf of the Class)

116. Plaintiffs re-allege and incorporate by reference the allegations contained in all preceding paragraphs of this Class Action Complaint as though set forth fully herein.

117. Plaintiffs and the Class have conferred substantial benefits on Defendant by purchasing Restore paint products, and Defendant have knowingly and willingly accepted and enjoyed these benefits.

118. Defendant either knew or should have known that the payments rendered by Plaintiffs and the Class were given and received with the expectation that Restore paint would perform as represented and warranted. It is inequitable for Defendant to retain the benefit of the payments under these circumstances.

119. Defendant, through deliberate misrepresentations or omissions in connection with the advertising, marketing, promotion, and sale of Restore paint reaped benefits, which resulted in Defendant's wrongful receipt of profits.

120. Equity demands disgorgement of Defendant's ill-gotten gains. Defendant will be unjustly enriched unless Defendant is ordered to disgorge those profits for the benefit of Plaintiffs and the Class.

121. As a direct and proximate cause of Defendant's wrongful conduct and unjust enrichment, Plaintiffs and the Class are entitled to restitution from and institution of a constructive trust disgorging all profits, benefits, and other compensation obtained by Defendant.

SIXTH CLAIM FOR RELIEF
NEGLIGENT MISREPRESENTATION
(Plaintiffs, Individually, and on behalf of the Class)

122. Plaintiffs re-allege and incorporate by reference the allegations contained in all preceding paragraphs of this Class Action Complaint as though set forth fully herein.

123. Defendant, in the course of its business and in the course of inducing Plaintiffs and the Class to purchase the defective Restore paint, supplied false and misleading information and concealed and failed to supply material information of which it was aware.

124. Defendant owed a duty of care to Plaintiffs and the Class because they were within the class of persons to whom Defendant intended to supply information in order influence their decision to purchase defective Restore paint. At all times, Defendant was aware that the information that they supplied to Plaintiffs and the Class would be relied upon by Plaintiffs and the Class in making their decision to purchase defective Restore paint.

125. Defendant failed to exercise reasonable care or competence in obtaining or communicating said information relied upon by the Plaintiffs and the Class in making their decision to purchase the defective Restore paint.

126. In making material misrepresentations of material facts regarding the characteristics and capabilities of Restore paint through their advertising and product information publications that were in fact untrue, Defendant knew or should have known they were misrepresenting material facts and that the Plaintiffs and Class would be relying on Defendant's representations to their detriment and damage.

127. In concealing material facts regarding the characteristics and capabilities of Restore paint, Defendant knew or should have known they were not disclosing material facts and that the Plaintiffs and the Class would be relying on Defendant's representation to their detriment and damage.

128. Plaintiffs and the Class were unaware of the falsity of Defendant's representations, and as a result, they, or their contractor intermediaries, justifiably relied upon them in purchasing or applying Restore paint products to their decks and patios.

129. Defendant made the false representations in the course of their business with the intent that the Plaintiffs and the Class would rely on them and purchase or construct structures using Restore paint.

130. As a direct, proximate and foreseeable result of Defendant's failure to fully disclose material facts and its misrepresentations of material facts, Plaintiffs and the proposed Class suffered damage.

131. As a result of Defendant's misconduct, Plaintiffs and the Class have suffered actual damages in that they purchased defective Restore paint.

132. As a result of Defendant's misconduct, Plaintiffs and the Class will suffer damages that include the full cost to repair their decks and patios. Damages also include, without limitation, consequential and incidental damages.

133. As a direct, proximate and foreseeable result of Defendant's negligent misrepresentations, the Plaintiffs and the Class sustained damages in an amount to be determined at trial.

134. Plaintiffs, on behalf of themselves and all others similarly situated, demand judgment against Defendant for compensatory damages, for the establishment of a common fund, plus attorneys' fees, interest and costs.

SEVENTH CLAIM FOR RELIEF
NEGLIGENCE

(Plaintiffs, Individually, and on behalf of the Class)

135. Plaintiffs re-allege and incorporate by reference the allegations contained in all preceding paragraphs of this Class Action Complaint as though set forth fully herein.

136. Defendant owed a duty to Plaintiffs and the proposed Class to exercise reasonable care while designing, manufacturing, marketing, advertising, warranting and selling Restore paint products.

137. Defendant breached its duty to Plaintiffs and the Class by designing, manufacturing, selling, advertising, and warranting a defective product to Plaintiffs and the proposed Class and by failing to take those steps necessary to repair or otherwise discontinue selling a defective product to consumers.

138. Defendant knew or should have known that Restore paint is defective and does not perform its intended use. Upon information and belief, initial testing included accelerated

weathering tests that failed to account for many of the climates in which Restore paint would be used.

139. Despite lacking sufficient knowledge regarding the actual performance of Restore paint, Defendant marketed the product as durable, long-lasting, and low maintenance.

140. Plaintiffs and the proposed Class were not aware of Restore paint's defective nature when they purchased the product.

141. As a direct and proximate cause of Defendant's failures, Plaintiffs and the Class have suffered and will continue to suffer damages and economic loss described fully above in an amount to be proven at trial, including damage to other building components.

142. As a result of Defendant's negligence, Plaintiffs and the Class have suffered actual damages in that they purchased and applied on their home decks and other structures decking material that is defective and that has failed or is failing prematurely causing damage to the product itself as well as other building components. This failure has required or is requiring Plaintiffs and the Class to incur significant expense in repairing their decks and causing damage to other building components.

143. Plaintiffs, on behalf of themselves and all other similarly situated, demand judgment against Defendant for compensatory damages, for the establishment of a common fund, plus attorneys' fees, interest and costs.

EIGHTH CLAIM FOR RELIEF
DECLARATORY AND INJUNCTIVE RELIEF
(Plaintiffs, Individually, and on behalf of the Class)

144. Plaintiffs re-allege and incorporate by reference the allegations contained in all preceding paragraphs of this Class Action Complaint as though set forth fully herein.

145. Defendant 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.

146. Plaintiffs, on behalf of themselves and putative Class members, seek a Court declaration of the following:

- a. Restore paint manufactured until the present has defects which cause it to prematurely degrade and fail resulting in damage to deck and other structures and the necessity to repair related damage;
- b. Restore paint manufactured until the present has a defect in workmanship and material that causes failures;
- c. Defendant knew of the defects in Restore paint and that the warranties are unenforceable;
- d. Defendant shall re-audit and reassess all prior warranty claims on Restore paint, including claims previously denied in whole or in part, where the denial was based on warranty or other grounds; and
- e. Defendant shall establish an inspection program and protocol to be communicated to Class members, which will require Defendant to inspect, upon request, a Class member's structure to determine whether a Restore paint failure is manifest.

WHEREFORE, Plaintiffs pray that this case be certified and maintained as a class action and for judgment to be entered upon Defendant Rust-Oleum Corporation as follows:

- A. Enter an order certifying the proposed Class (and subclasses, if applicable), designating Plaintiffs as class representatives and designating the undersigned as class counsel;
- B. Declare that Defendant is financially responsible for notifying all Class members of the problems with Restore paint;
- C. Declare that Defendant must disgorge, for the benefit of the Class, all or part of the ill-gotten profits it received from the sale of Restore paint, or order Defendant to make full restitution to Plaintiffs and the members of the Class;
- D. Defendant shall re-audit and reassess all prior warranty claims regarding Restore paint, including claims previously denied in whole or in part, where the denial was based on warranty or other grounds;

- E. Awarding additional injunctive relief as permitted by law or equity, including enjoining Defendant from continuing the unlawful practices as set forth herein, and ordering Defendant to engage in a corrective recall campaign
- F. For economic and compensatory damages on behalf of Plaintiffs and all members of the Class;
- G. Order the Defendant to pay treble damages pursuant to the provisions of N.C. Gen. Stat. § 75-16 and costs of this action, including reasonable attorneys' fees in accordance with N.C. Gen. Stat. § 75-16.1 and as otherwise is allowed by law;
- H. Order Defendant to pay punitive damages, as allowable by law, to Plaintiffs and the other members of the Class;
- I. Order Defendant to pay both pre- and post-judgment interest on any amounts awarded, and reimbursement of all costs for the prosecution of this action;
- J. For trial by jury of all issues so triable; and
- K. For such other relief that the court deems just and reasonable.

This the 6th day of November, 2014.

Respectfully submitted,

/s/ Joel R. Rhine
RHINE MARTIN LAW FIRM, P.C.
Joel R. Rhine
North Carolina State Bar No. 16028
Email: jrr@rhinelawfirm.com

/s/ Jean Sutton Martin
Jean Sutton Martin
North Carolina State Bar No. 25703
Email: jsm@rhinelawfirm.com
1612 Military Cutoff Road Suite 300
Wilmington, North Carolina 28403
Tel: (910) 772-9960
Fax: (910) 772-9062