No. 18-1529

In the Supreme Court of the United States

LOUIS R. KOERNER, JR., Individually and as Assignee of Jean McCurdy Meade,

Petitioner

VERSUS

CMR CONSTRUCTION & ROOFING, L.L.C.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question I. Did the Fifth Circuit Court apply an incorrect standard of consideration by not considering the declarations of the non-moving party to be sufficient to establish issues of fact inconsistent with summary judgment, and did it disregard other important summary judgment evidence that established material issues of fact?

Question II: Did failure to file a Rule 54(b) motion prior to final judgment waive evidence of totally false assertions made to the district court that were "newly discovered" after issuance of the order granting the motion to set aside the default judgment but prior to final judgment in the case, so that this dramatic, newly-discovered impeachment evidence of willfulness could not be considered under Rule 59(e) or under Rule 60(b)(3) on the district court's own motion?

Question III: Did the court below fail to utilize the proper standard of consideration in denying the motion for certification without written reasons and without addressing the proper standard of consideration, thereby erroneously permitting an admitted *Erie* guess as to the applicable state law to stand uncorrected even though doing so required rejection by name of a recent Louisiana intermediate court of appeal decision?

RULE 14.1 STATEMENT - LIST OF PARTIES

Petitioner (petitioner-plaintiff-appellant below) is Louis R. Koerner, Jr.

Respondent (defendant-appellee below) is CMR Construction & Roofing, L.L.C.

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ADDITIONS TO STATEMENT OF THE CASE

CMR's Statement of the Case its Opposition is false and unsupported by the Record on Appeal. As follows, its statement of facts is easily contradicted.

A. The Initial Agreement

A representative of CMR, Eric Hunter, came to Koerner's home to attempt to sell him a Slate 2.0 roof.[1] CMR's salesman intentionally misrepresented that the Slate 2.0 roof was a new and improved version of a traditional slate roof, -- demonstrably false.[2] CMR's intentional misrepresentations induced Koerner to purchase a roof that he otherwise would not have purchased had the truth been disclosed.[3] Contrary to CMR's assertions, Koerner stated in his declarations that he did not have of an understanding of what he

[1] ROA.1062; App-A. ¶ 2, page 3.

[2] ROA.1065; App-A , ¶ 11, page 10.

[3] ROA.847.

had been sold or that the waterproofing portion was not slate but a black membrane subject to puncture and sunlight degradation. CMR's Opposition references the affidavit of CMR's president, Steve Soulé, who does not claim personal knowledge, has only "an understanding," but **no personal knowledge** of what was said by Hunter or anything else about the sales call -- only hearsay.[4]

B. Warranty Calls, the Guaranty Report, and Velasquez

Following the 2005-2006 replacement of Koerner's roof, CMR provided remedial work and contended that these would fully solve all of his reported roof problems.[5] In 2011 and 2012, CMR agreed to address **every** issue raised in the Guaranty

[4] App. C, ¶¶ 2 and 11, pages 53, 55 ""I know the following to be true and correct to the best of my knowledge." "It is my understanding . . . "

[5] ROA.1083-1086.

Sheet Metal Report that Koerner sent on September 8, 2011.[6] CMR's Gary Klocke immediately conducted an inspection of Koerner's roof during and after which Koerner was given neither findings nor conclusions but only an verbal guaranty that his "leak issue" (tied to his entire roof) would be fixed. This is established in Koerner's declarations and backed by contemporaneous e-mails and correspondence between CMR employees and Soulé.[7] CMR committed to that comprehensive scope of repair of Koerner's defective roof.

The same leaking issues continued into 2012, when Koerner continued to seek repair. This time, upon CMR's agreement to make the repairs, CMR found and decided to hire one Brian Velasquez. CMR,

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[6] ROA.1084.

[7] ROA.1086.

without factual support in the record, contends that Velasquez was an independent contractor and that CMR had no control over his work. Rather Velasquez was provided to Koerner by CMR, and Soulé expressly stated that the work he assigned to Velasquez would not void the workmanship warranty supposedly provided by CMR.[8] The 2012 repairs were to correct work CMR had been performing since 2007 and particularly since September 2011. Soule's correspondence with Koerner and several CMR employees proves that CMR was providing supervision and material necessary for the completion of the Velasquez work and also workers' compensation insurance.[9] CMR also reimbursed almost all of the

[8] ROA.2354.

[9] ROA.2354.

associated costs.[10] Soulé even went as far as to refer to the work as "CMR work."[11] In a November 16, 2012 e-mail dated, Koerner compliments work done by CMR's Brad Menerey, who "made sure that the flashing was done properly" and who was "instrumental" on "at least one occasion."[12] Koerner has had no problems with Velasquez's work. Rather, CMR's initial and defective work on his dormer, facade, and the lack of drip edges, all listed by Guaranty, all known to be defective as reported by Klocke, all promised to be fixed by Soulé, none assigned to Velasquez, that have resulted in thousands of dollars of damage.

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[10] ROA.2355.

[11] ROA.2357.

[12] ROA.2356.

C. CMR's Wilful Refusal to Defend

CMR contends that it had no knowledge of being added as a defendant to Koerner's original suit against homeowner insurer, Vigilant. Claiming that it "did not need to respond to the suit papers it received from Koerner, due to the caption of the suit including Vigilant but not CMR as defendants," [13] CMR contradicts itself by affirming that the court papers received by CMR from Koerner had attached papers in which CMR itself was named.[14] Soulé admits this in the August 25, 2017 CMR corporate deposition. The deposition and exhibits conclusively demonstrated the falsity of Soulé's declaration,[15] and testimony,[16] and

[13] See CMR's *Opposition to Petition for Writ of Certiorari*, page 3.

[14] *Id.*, page 4.

[15] ROA.2370-2371.

[16] Soulé, TR. 25/14-23.

the motion/memorandum/affidavit to set aside default judgment by unexplained contradictions and absence of any basis for CMR's claims of lack of knowledge and of willfulness.

SUMMARY OF THE ARGUMENTS FOR GRANTING CERTIORARI

In all three points in its Opposition, CMR mischaracterizes the facts and evidence in the ROA and has relied on procedural technicalities as misapplied by the courts below in order to support denial of certiorari. Its opposition actually demonstrates material issues of fact contradicting CMR's false factual and legal conclusions.

The issues raised by Koerner involve important procedural protections afforded to the non-moving party in a summary-judgment motion, the interplay between Rule 54(b) and Rule 59(e)/60(b) motions, and whether a one-word denial of certification to a state

supreme court without explanation and in violation of an established standard of consideration justified an admitted *Erie* guess adverse to the non-moving party.

In its opposition, CMR simply repeats, as it had to the Fifth Circuit, generic statements contradicted by Koerner's declarations and contemporaneous documentation contained in the appendices and/or hyperlinked to www.koernerlaw.com/koernerwrit and that court's misapplied legal authority. It is insufficient to simply saying that declarations are vague and self-serving without quoting one example.

RESPONSE TO CMR'S ARGUMENTS

CMR contends the following:

I. The Fifth Circuit correctly applied the summary judgment standard under Fed. R. Civ. P. 56, by crediting a declaration backed by contemporaneous business records over conclusory statements in plaintiff's own unsworn declaration

CMR actually quotes the Fifth Circuit's statement that credibility determinations have no

place in summary judgment proceedings because non-movant's evidence must be taken as true. However, while Koerner (non-movant) provided evidence in support of his declarations,[17] CMR (movant) did not and could not prove an absence of issues of material fact through Soulé's affidavits and its few exhibits. Soulé's declaration contradicted his own emails, documentary evidence, and his deposition. The so-called evidence, contemporaneous but *ex parte* business records, that supposedly supports Soulé's affidavit contain no concrete evidence of the absence of the fraud described by Koerner, descriptions of the material he was sold, or the representations made by CMR's employee to Koerner prior to purchase, and Koerner's eventual but belated full knowledge of the misrepresented goods. This is no evidence showing

[17] ROA.1083-1086.

that during Hunter's one visit before Koerner signed the front-only purchase agreement, Koerner was shown brochures and physical samples of the replacement roofing. Koerner's declarations state otherwise.[18]

Inasmuch as CMR, as movant, failed to provide concrete evidence in support of its summary judgment motion, and Koerner's declarations are non-conclusory, non-self-serving, reliable and supported by extensive physical evidence in the summary judgment record (so powerful that CMR now has to claim that this Court cannot consider it), there is no reason why Koerner's declarations and supporting material were not be taken as true as they must be.

There is not **one** example given to support CMR's claim or the lower courts' conclusion that

[18] ROA.1069; App-A pages 8-9, ¶ 9; page 18, ¶ 21..

Koerner's declarations were conclusory and self-serving and therefore not significant probative evidence that should have prevented summary judgment or would have required reversal. All of is thus contrary to a standard of consideration favoring non-movant's probative evidence unfollowed by the courts below.

In *Richardson v. Oldham*, 12 F.3d 1373, 1379 (1994), the Fifth Circuit stated that a "vague or conclusory affidavit [without more] is insufficient to create a genuine issue of material fact in the face of conflicting probative evidence." CMR's claim that *Richardson* supports the misapplication of these principles to the facts in the ROA is devoid of even one example. Koerner's affidavit is supported by physical evidence including e-mails from Koerner, Hunter, Klocke, Velasquez, and Soulé. CMR provides **no** evidence that contradicts Koerner's declaration other

than Soulé's unreliable affidavit that lacked personal knowledge and was contradicted by his deposition. In the absence of uncontested probative evidence, summary judgment should have been denied. The courts below disregarded this Court's standard in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Rather they accepted CMR's knowingly false and unsupported affidavit that were contradicted not only by Koerner's declarations but by his citations/quotations from the summary judgment ROA record that are so powerful and convincing that CMR has to claim that Koerner somehow waived this evidence by only urging them in support of his Rule 59(e) motion.

CMR falsely states that the facts recited by the Fifth Circuit, the absence of fraudulent intent on CMR's part despite their employees' vague and misleading contentions to Koerner[19] and Koerner's knowledge from other sources about the nature of the roofing product, are not taken from the record. CMR contends, without any ROA citation, that "[b]ecause Hunter had shown Koerner physical samples of the Slate 2.0 roofing system and other products, Koerner knew that Slate 2.0 was a synthetic membrane with slate tiles on top of it."[20] The courts below also erroneously found that CMR completed a particular line of work in 2011 rather than 2012 on the basis of

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[19] ROA.1086. See e-mail dated September 10, 2011 from CMR employee Gary Klocke to CMR president Steven Soulé in which he states: *"But I did not disclose or offer any info on my findings and simply left him assured we are working on correcting his leak issue, after all he is a lawyer and I know they are sneaky :)".*

[20] ROA.1312; App-C , p. 55, ¶ 11, p. 57, ¶ 23,

contemporaneous but *ex parte* job tickets, although those, as provided by CMR, show no meaningful distinction between the 2011 and 2012 repairs. CMR employees' representations and affirmations to Koerner regarding the repair work in 2012[21] and their response to the Guaranty Report (relating directly to their earlier work)[22] demonstrates that the CMR 2012 work was a direct continuation of its pre-2011 work.

CMR, parroting the Fifth Circuit, claims, support from *Scott v. Harris*, 550 U.S. 372 (2007) and attempts to distinguish *Tolan v. Cotton,* 572 U.S. 650 (2014). In *Scott*, a videotape **directly contradicted the non-mover's declarations**. No such "objective" contradictory evidence was placed in the ROA by CMR. Koerner's declarations are also supported by e-

[21] ROA.2352; App-B page 48, ¶ 4.

[22] ROA.2355.

mails[23] and other documents. CMR's job tickets do not constitute "objective evidence" – they neither disprove nor even address Koerner's claims (including fraud and sale representations made by Hunter to him).[24]

Tolan likewise applies. There, no objective evidence was introduced by the mover. The non-mover's reliable and supported evidence and testimony was not credited by courts below, which instead accepted the mover's incompetent evidence.

There can be no serious dispute that there were genuine issues of material facts that the courts below erroneously disregarded.

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[23] ROA.1428-1458; App-A.

[24] ROA.1318-1336.

II. The Fifth Circuit properly affirmed the district court's denial of a motion to amend or alter a final judgment under Fed.R.Civ.P. 59(e), filed after the district court entered a final judgment, instead of treating the final judgment as an interlocutory ruling and applying a different standard under Fed.R.Civ.P. 54(b)

> As a general proposition, when a trial court enters final judgment in a case, all interlocutory rulings merge with the final judgment, making the final judgment **and** the interlocutory orders reviewable on appeal. *Hendler v. United States,* 952 F.2d 1364, 1368 (Fed.Cir.1991).

Beta Analytics Int'l, Inc. v. United States, 15 F.App'x 853, 855 (Fed. Cir. 2001).

When evidence was newly-discovered on August, 25 2017, review of the May 10, 2017 Order setting aside the CMR default judgment was available only under 54(b) as the May 10, 2017 Order did not dismiss all claims. Upon entry of the October 18, 2017 final judgment, Koerner had the right to file a motion to amend or alter pursuant to Rule 59(e) as well as to

consideration under Rule 60(b). An interlocutory judgment merges into the final judgment when the latter rendered and so it may be reviewed on an appeal from that final judgment (*Monarch Asphalt Sales Co., Inc. v. Wilshire Oil Co. of Texas*, 511 F.2d 1073, 1077 (10th Cir. 1975)). See proposed FRAP 3 rule changes to, Rules Committee for the Federal Rules pp. 7-16 (proposed Committee Note pp. 11-16) https://www.uscourts.gov/sites/default/files/preliminary_draft_proposed_amendments_to_the_federal_rules_of_appellate_bankruptcy_and_civil_procedure_0.pdf,

The May 10 order was merged into the October 18 final judgment and was reviewable by a Rule 59(e) motion to amend or alter (also under Rule 60(b)). Koerner does not request review under the lenient Rule 54(b) standard and knowingly waived it. **Review under some standard was not waived**.

CMR cites *Cabral v. Brennan*, 853 F.3d 763, 766 (5th Cir. 2017) in support of its contention that Koerner could have filed a Rule 54(b) motion any time between August 25 and October 18. *Cabral* correctly explains different timing/standards under Rules 54(b) and 59(e). Omitted, however, is the interesting and fitting analysis of the interplay between Rule 54(b) and Rule 59(e) relief as well as the application of respective standards of consideration:

> The Postal Service agrees that this was error. It was, however, harmless. The court acted within its authority to revise interlocutory orders. Though it applied the wrong rule of procedure, the rule it applied carried with it a standard more exacting than the one that the court should have applied. Cabral does not explain how he could have been harmed by the procedural error, so there is no reason to reverse on procedural grounds.

The district court's error, deemed harmless, was granting the motion to reconsider the court's

partial denial of summary judgment under Rule 59(e) rather than under Rule 54(b) (which allows revision of interlocutory orders).

Cabral illustrates liberality in the application and analysis of 54(b) vs. 59(e) relief. Error in *Cabral* was found harmless as permitting the application of a more "exacting" standard. Koerner's choice not to file a Rule 54(b) motion had no adverse impact on the opposing party, nor did CMR even suggest how it could have been harmed by this "misstep." Koerner filed his 59(e) motion in light of newly discovered evidence (August 25, 2017) even though 54(b) relief would have been appropriate (with an easier consideration standard) prior to the October-18 judgment.

Koerner's decision to wait in order to ask to amend or reverse the May 17 ruling in light of the newly discovered August 25 evidence should have no

impact on relief to which he is entitled. The Federal Rules are liberally construed. "Mere technicalities" should not stand in the way of consideration of a case on its merits.[25]

60(b)(3), which allows a party to be relieved from a final judgment when there is fraud, provides this same result because CMR committed a "fraud on the court." This principle, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 239–71 (1944), was why Rule 60(b)(3) was added in 1946.

Wright & Miller, 11 Fed. Prac. & Proc. Civ. § 2860 (3d ed.), Fraud, citing *Assmann v. Fleming*, 159 F.2d 332, 336 (8th Cir. 1947), state:

> The proceeding by motion to vacate a judgment is not an independent suit in equity but a legal remedy in a court of law; yet the relief is equitable in character and must be administered upon equitable principles. Fraud and

[25] *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988).

> circumvention in obtaining a judgment are ordinarily sufficient grounds for vacating a judgment, particularly if the party was prevented from presenting the merits of his case. The burden of proving such fraud and misrepresentation is, of course, upon the applicant and fraud is not to be presumed but must ordinarily be proven by clear and convincing evidence. It must also be made to appear where the application is made by a defendant that he has a meritorious defense to the action. If, however, there are adequate allegations of a meritorious defense properly verified, no counter-showing will be received to refute the allegations of merits presented by the moving party.9

CMR's default was willful. Soulé's affidavit was dishonest, untruthful, and accepted by the district court without allowing traversal. Consequently, the district court was unable to adjudicate the case properly.

Rule 60(b)(3) entitles Koerner to relief from the May 10 order (that became final on October 18), because that order was procured by a "fraud on the

court" that prevented Koerner from fully and fairly presenting his case. The date of its discovery and whether it was before or after October 18, 2017, while is may be relevant to Rule 59(e), is irrelevant to Rule 60(b)(3) as 60(b)(3) contains no such restriction.

III. The Fifth Circuit properly denied certification of a question to the Louisiana Supreme Court in response to Koerner's request for certification after issuance of the Fifth Circuit's decision on the merits of the appeal

CMR's argument merely repeats or restates the one-word, unexplained, and erroneous decision to deny certification of an important issue of Louisiana law to the Louisiana Supreme Court but instead rely on an admitted *Erie* guess that disregarded a recent, contrary Louisiana intermediate appeal decision. Please refer to the arguments in the Petition.[26]

[26] Petition, pages 53-66.

CONCLUSION

The petition for a writ of certiorari is both interesting and meritorious and should be granted.

Respectfully submitted,

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APPENDIX A – UNSWORN DECLARATION OF LOUIS R. KOERNER, JR.

United States District Court
Eastern District of Louisiana
2:16-cv-13319(I)(1)

Louis R. Koerner, Jr., Individually and as Assignee of Jean McCurdy Meade, Plaintiff,
Versus
Vigilant Insurance Company, Defendant

UNSWORN DECLARATION OF LOUIS R. KOERNER, JR.

On August 15, 2017, I, **LOUIS R. KOERNER, JR.**, declare under penalty of perjury under the laws of the United States of America, that the following, is true and correct.

I. INTRODUCTION AND FORMAT OF THIS UNSWORN DECLARATION

This unsworn declaration is in the same order as the response and numbered identically to the response to CMR's Statement of Uncontested Facts. The identified factual proof is referenced and attached. For the convenience of the Court, each of CMR's Statements is followed by my response.

II. RESPONSE TO CMR'S STATEMENT OF UNCONTESTED FACTS

Koerner responds to the separately numbered paragraphs of CMR's Statement of Uncontested Facts (Doc. 69-3 and Doc. 68-3) as follows:

STATEMENT NO. 1:

1. CMR is based in St. Louis, Missouri, but the company performs roofing work all over the country. CMR Showed Koerner physical roofing samples and product literature before Koerner bought a Slate 2.0 system.

RESPONSE TO STATEMENT NO. 1:

This "statement" does not contain a fact that is material to the resolution of CMR's motions for summary judgment. CMR did show me product literature and may have shown me a piece of the slate of the type that CMR proposed to install, because I recognized the slate when CMR left slates after the new roof was installed as I had asked CMR to do so that CMR would have immediate access to the same

size and color of slate to honor the 75-year warranty it promised me but did not send me in writing despite several written and many verbal requests. The CMR contract I signed [CMR00078] did not contain an address but only telephone numbers.

STATEMENT NO. 2:

2. After Hurricane Katrina hit New Orleans in August 2005, CMR sent salesmen to New Orleans to sell roof repair and replacement services.

RESPONSE TO STATEMENT NO. 2:

I dispute this "statement" to the extent that it suggests that I was sold "roof repair and replacement services." I was sold a roof system by CMR. CMR did solicit me to purchase this roof system following Hurricane Katrina's making landfall in Louisiana at the end of August 2005. Obviously, CMR sent a salesman who contacted me as that salesman went "door-to-door" on Jackson Avenue, spotted me from

the street, and started a conversation that ultimately led to a sale by CMR and a purchase by me.

STATEMENT NO. 3:

3. Eric Hunter ("Hunter") was one of those salesmen.

RESPONSE TO STATEMENT NO. 3:

I am not in a position to offer a further opinion as to whether I dispute this "statement" because I have not yet had the opportunity to depose Mr. Hunter despite request. I can make out that the signature of the CMR representative on the "Agreement" [CMR00078] says "Eric Hunter."

STATEMENT NO. 4:

4. Hunter worked with Louis R. Koerner, Jr. ("Koerner") and his insurer, Hanover Insurance Company ("Hanover") on the removal and replacement of roof on Koerner's house at 1204 Jackson Avenue in New Orleans.

RESPONSE TO STATEMENT NO. 4:

I am not a position to offer a further opinion as to whether I dispute this "statement" because I do not remember Mr. Hunter by name and have not yet had the opportunity to depose Mr. Hunter. Therefore, I cannot yet be sure whether Mr. Hunter was indeed the CMR representative who sold me a roof system following Hurricane Katrina. However, I dispute this "statement" to the extent that it suggests I purchased repair and replacement services from CMR. I was sold a roof. Hunter did not "work with" Hanover. However, Hanover, did approve the CMR purchase and reimbursed me for my purchase of the CMR roof and the funds paid by me.

STATEMENT NO. 5:

5. Most of the roofs that CMR replaced in New Orleans after Katrina were asbestos tile, Ludowici tile, or slate.

RESPONSE TO STATEMENT NO. 5:

This "statement" does not contain a fact that is material to the resolution of CMR's motions for summary judgment. I do not know whether this is true or not.

STATEMENT NO. 6:

6. When CMR replaces a roof, the company works with homeowners and their insurers to obtain a replacement roof as close as possible to the roof that is being replaced.

RESPONSE TO STATEMENT NO. 6:

This "statement" does not contain a fact that is material to the resolution of CMR's motions for summary judgment. I can only respond with what I personally know. I do know that CMR did not work with Hanover — I did —and I did not want or need input from CMR.

STATEMENT NO. 7:

7. After Katrina, that generally meant that asbestos was replaced with a synthetic (polymer or plastic) roof, a traditional slate with another traditional slate roof, and Ludowici tiles with another clay tile roof. Case 2:16-cv-13319-LMA-JVM Document 73-2 Filed 08/16/17 Page 3 of 26-4-

RESPONSE TO STATEMENT NO. 7:

This "statement" does not contain a fact that is material to the resolution of CMR's motions for summary judgment. See Response to Statement No. 6.

STATEMENT NO. 8:

8. Koerner's roof was a combination of slate in some areas and asbestos tiles in others, so it was not as simple to identify a replacement.

RESPONSE TO STATEMENT NO. 8:

This statement is not true. The front roof of my house, which I was told had been replaced by the Marcheses, the prior owner, was asbestos, which had come off in chunks in Katrina. The rear roof, the

original slate, which had not been repaired, now needed to be replaced. There was no difficulty in selecting an appropriate roof. I made clear to CMR's salesman that I wanted to purchase a traditional slate roof to maintain the historic character of my home and that cost was not a factor in my decision-making process with respect to my roof for my historic home. I wanted and could pay for the best.

STATEMENT NO. 9:

9. Hunter visited Koerner on multiple occasions, taking him brochures and physical samples of the potential types of replacement roofing systems.

RESPONSE TO STATEMENT NO. 9:

This statement is only partially true. The CMR salesman initially met with me and did show me a Slate 2.0 brochure. As I was convinced from his sales presentation and the assurances and representations by him that CMR was providing a new and improved

version (2.0) of a traditional slate roof (while still possessing all of the attributes of traditional slating but better in every meaningful way), I was convinced to purchase the Slate 2.0 roof from CMR. I cannot specifically remember if the salesman shown me a sample of the slate, but he may have. I was never presented with samples of the roofing system or any brochure that I was allowed to keep. Although there were at least two visits, the first and the signature visit, there were no visits on "multiple occasions."

STATEMENT NO. 10:

10. As indicated in the contract that Koerner signed with CMR, the system that Koerner ultimately chose was then called a Slate 2.0 roofing system.

RESPONSE TO STATEMENT NO. 10:

See CMR00078. It states in the section "Grade of Shingle SLATE 2.0" and that of "Style of Shingle SLATE."

STATEMENT NO. 11:

11. The Slate 2.0 system was then less expensive than a traditionally installed slate roof.

RESPONSE TO STATEMENT NO. 11:

Whether or not this is true, this is not what was represented to me by CMR. I was never presented with a choice between a traditional slate roof and the Slate 2.0 roof. Rather, I was given to understand that the Slate 2.0 roof was a new and improved version of a traditional slate roof (which still possessed all of the attributes of a traditional slate roof but was better in every meaningful way), was the absolute best slate roof available to be purchased anywhere, that its warranty of 75 years was longer than the life of other slate roofs, and that I was paying a premium over the cost of any other slate roofs in order to purchase and to get a Slate 2.0 roof. Because I believed the representations made by the CMR salesman, I did not

seek or entert7ain any other offers. I did not, for instance, approach or seek a quote for a traditional slate roof from Augustino Brothers, the roofing company who had provided emergency roof repairs on the day of the fire after Katrina and to whom I sent at least one neighbor, Gary MacNamara (owner of an historic house on the downtown side of Jackson Avenue). I am not in a position to offer a further opinion as to whether I dispute this "statement" because I have not yet had the opportunity to depose Mr. Soulé or Mr. Hunter, despite requests to do so.

STATEMENT NO. 12:

12. Use of the Slate 2.0 system therefore allowed Koerner to achieve the look of a new slate roof, without any non-slate portions, but at a lower cost that could be funded by Koerner's insurance proceeds.

RESPONSE TO STATEMENT NO. 12:

This statement is untrue. I was not presented with a choice between buying a traditional slate roof

or buying the Slate 2.0 roof. I was offered Slate 2.0 as the best option available and therefore the most expensive. Cost was not a factor in my decision-making process with respect to my new roof.

STATEMENT NO. 13:

13. If CMR had sold Koerner a traditionally installed slate roofing system, it would have been much more expensive than the Slate 2.0 system.

RESPONSE TO STATEMENT NO. 13:

I deny the truth of this "statement," particularly if it implies or suggests that I was presented with a choice between a traditional slate roof and the Slate 2.0 roof. CMR conveyed to me that the Slate 2.0 roof was a new and improved version of a traditional slate roof (which still possessed all of the attributes of a traditional slate roof but was better in every meaningful way), was the best slate roof available to be purchased anywhere, that its warranty

of 75 years was longer than the life of other slate roofs, and that I was paying a premium over the cost of other slate roofs in order to purchase a Slate 2.0 roof. I believed this, or I would not have purchased it and would not have spent over $90,000 for an inferior or otherwise second-class roof. I would be better prepared to dispute this statement after deposing Mr. Soulé or Mr. Hunter, who have not made themselves available for deposition on a date on which I can attend, despite requests to do so.

STATEMENT NO. 14:

14. Like many contractors, CMR plans its projects based on an expected cost of materials and labor plus an expected profit margin.

RESPONSE TO STATEMENT NO. 14:

In my practice, I represent contractors and assume that this is true. However, this "statement" does not contain a fact that is material to the

resolution of CMR's motions for summary judgment, and I do not know whether this was true as to CMR.

STATEMENT NO. 15:

15. If CMR had sold Koerner a traditionally installed slate roofing system, CMR would have earned a much bigger profit on the Koerner roofing project.

RESPONSE TO STATEMENT NO. 15:

See response to statement No. 13. That is not true. I was never presented with a choice between buying a traditional slate roof or buying the Slate 2.0 roof. I was never told that the Slate 2.0 was not the best and therefore most expensive roof replacement that I could buy to put a slate roof back on my historic home at 1204 Jackson Avenue. I will be more knowledgeable when I have deposed Mr. Soulé or Mr. Hunter, which I have not been able to do, despite requests to do so.

STATEMENT NO. 16:

16. The same is true for CMR's salespeople, who work on commission.

RESPONSE TO STATEMENT NO. 16:

See response to statement No. 13. That is not true. I was never presented with a choice between a traditional slate roof and the Slate 2.0 roof. I was never told that the Slate 2.0 was not the best and therefore most expensive roof replacement that I could buy to put a slate roof back on 1204 Jackson Avenue. I will be more knowledgeable when I have deposed Mr. Soulé or Mr. Hunter, which I have not been able to do, despite requests to do so.

STATEMENT NO. 17:

17. If Hunter had sold Koerner a traditionally installed slate roof, he would have earned a bigger commission than he earned on the Slate 2.0 system.

RESPONSE TO STATEMENT NO. 17:

See response to statement No. 13. That is not true. I was never presented with a choice between a traditional slate roof and the Slate 2.0 roof. I was never told that the Slate 2.0 was not the best and therefore most expensive roof replacement that I could buy to put a slate roof back on 1204 Jackson Avenue. I will be more knowledgeable when I have deposed Mr. Soulé or Mr. Hunter, which I have not been able to do, despite requests to do so.

STATEMENT NO. 18:

18. However, for Koerner and for other homeowners, CMR tried to find the best roof that was available based on the amount of money that Koerner and those other homeowners expected to receive form their homeowner's insurance.

RESPONSE TO STATEMENT NO. 18:

This statement is not true. There was no choice offered. Had there been, I would have smelled a rat

and inquired further. Moreover, I did not exhaust the Hanover policy limits. There were multiples of the cost of the CMR roof as purchased that could have been used.

STATEMENT NO. 19:

19. Since 2005, the Slate 2.0 system has been sold at least twice to new companies, most recently to GAF Materials Corporation ("GAF").

RESPONSE TO STATEMENT NO. 19:

This "statement" does not contain a fact that is material to the resolution of CMR's motions for summary judgment. I have been informed that GAF is now the owner.

STATEMENT NO. 20:

20. GAF now markets the former Slate 2.0 system as the TruSlate® system. Koerner knew that he bought a roof with a synthetic membrane beneath slate tiles.

RESPONSE TO STATEMENT NO. 20:

This first sentence of this "statement" does not contain a fact that is material to the resolution of CMR's motions for summary judgment. I did not know that I was buying a roof with a synthetic membrane beneath slate tiles. Had I known this, I would not have bought this roof from CMR. There is nothing on the CMR agreement [CMR00078] that discloses a membrane.

STATEMENT NO. 21:

21. Because Hunter had shown Koerner physical samples of the Slate 2.0 roofing system and other products, Koerner knew that Slate 2.0 was a synthetic membrane with slate tiles on top of it.

RESPONSE TO STATEMENT NO. 21:

This statement is untrue. I was not shown physical samples of the Slate 2.0 roofing system, although the salesman may have had samples of the slate which would have appeared to be real slate. I

was not aware that the Slate 2.0 roof consisted of a decorative slate façade over a membrane, as opposed to traditional slating, until February 2016, when I was informed of such by Louis Relle. My understanding, which I learned from the CMR's salesman, was just the opposite.

STATEMENT NO. 22:

22. Koerner's contract clearly stated that he was buying a Slate 2.0 roofing system, as opposed to a traditionally installed slate roof.

RESPONSE TO STATEMENT NO. 22:

This statement is untrue. The contract, which speaks for itself, is for the purchase of a Slate 2.0 roof. There is no language in the contract [CMR00078] that compares and/or contrasts the Slate 2.0 roof with a traditional slate roof. Rather, the contract recites that it is Slate 2.0 with copper metal edging and Titanium

UDL as the felt. The final agreement amount is "Replacement Cost $87,023.33."

STATEMENT NO. 23:

23. Koerner confirmed in writing that he knew he was buying a roof with a synthetic membrane. On November 12, 2006, while CMR was working to resolve some issues following the roof's installation earlier in 2006, Koerner sent an email to CMR's Christian Larson, which stated in part: "I…also need to deal permanently with the fact that your guys drilled through the membrane with the roof caps, made leaks, and only put glue on the top. I think that they need to be taken off, the membrane problem fixed, and then cemented."

RESPONSE TO STATEMENT NO. 23:

This "statement" is untrue. My recollection is that although I had made a deal with CMR to reinstall the existing roof caps so as to maintain the historic character of the Property, CMR did not do that and claimed that this obligation was not part of the

contract. In an undated agreement, CMR00079,[1] I agreed to pay CMR "iii) Additional work scope $5000,00 (Re-Install ridge cap). I was not aware that the Slate 2.0 roof consisted of a decorative slate façade over a membrane, as opposed to being a traditional slate roof, until February 2016, when I was informed of such by Louis Relle. I understood that instead of felt CMR was installing some kind of advanced underlayment that enabled CMR to provide me a roof with a seventy-five-year warranty and that the roof would "outlast" me.[2]

It is my understanding that the $5,000 extra I was paying included not only placement of the roof caps on the roof but also securing them fast to the roof with additional material, which I now understand to

[1] Exhibit 2.

[2] CMR00164.

be a "membrane," so that the roof caps would not leak. It was my impression that, when the CMR people came out after the roof caps were not properly secured at installation, they drilled holes that compromised the sealant, which I now understand is also called a membrane. My recollection is I got that information from the representative of CMR when that representative was trying to explain what went wrong and how CMR was actually trying to fix it so that there would be no leaks and the roof caps would be secured. CMR's information, of course, was not true.

I had no experience with roofing materials or roofing systems and instead placed my trust in CMR to sell me what was promised, nothing more and nothing less.

STATEMENT NO. 24:

24. Koerner was also informed that his roof system included a synthetic or plastic membrane, with real slate on top, in the

> January 18, 2011 inspection report that he commissioned from Guaranty Sheet Metal.

RESPONSE TO STATEMENT NO. 24:

This "statement" is untrue. The Guaranty Report merely confirmed my understanding that, instead of felt, CMR was installing some kind of advanced underlayment that would enable it to provide me a slate roof with a seventy-five-year warranty that would "outlast" me. I was not actually aware that the Slate 2.0 roof consisted of a decorative slate façade over a membrane, as opposed to a traditional slate roof, until February 2016, when I was informed of such by Louis Relle. I sent the Guaranty roof inspection report to Louis Relle on February 4, 2016.

STATEMENT NO. 25:

> 25. Guaranty Sheet Metal plainly stated that: "The roof on the house is a Slate 2.0 or True Slate [*sic*] roof system. It is

comprised of real slate installed on a steel track with a plastic sleeve as the head lap."

RESPONSE TO STATEMENT NO. 25:

See Response to Statement No. 24.

STATEMENT NO. 26:

26. The use of a synthetic underlayment does not change the fact that Slate 2.0 and TruSlate® use real slate tiles on top of the membrane.

RESPONSE TO STATEMENT NO. 26:

I dispute this "statement" to the extent that it falsely suggests that Slate 2.0 roof is the same as the traditional slate roof that I believed I was purchasing from CMR.

STATEMENT NO. 27:

27. GAF's Web site confirms that TruSlate®, as the successor to Slate 2.0, remains real slate, comprised in part of grade S1 quarried slate.

RESPONSE TO STATEMENT NO. 27:

This is not a material fact. Statement No. 27 actually supports the CMR salesman's representation that a Slate 2.0 roof is the same as the traditional slate roof that I believed I was purchasing from CMR because it was comprised of real quarried slate. I did not and do not know the meaning of S1 quarried slate.

STATEMENT NO. 28:

28. The grade S1 reference is apparently the source of Koerner's expectation that his roof should have a lifetime of seventy-five (75) years. ASTM C406 has long stated that Grade S1 slate has an expected lifetime in that range. That is documented as far back as the "Q&A" article in the January 1995 issue *Professional Roofing*, which is available at http://docserver.nrca.net/technical/3826.pdf.

RESPONSE TO STATEMENT NO. 28:

This is untrue. I did no research but rather accepted as true the representations of the CMR

salesman. The source of my expectation that my roof was backed by a 75-year "all risk" warranty is the statement by CMR's salesman that its product was backed by such a warranty and was of such great quality that it would outlive or "outlast" me.

STATEMENT NO. 29:

29. On November 13, 2005, Koerner signed a written contract to buy his Slate 2.0 roofing system from CMR.

RESPONSE TO STATEMENT NO. 29:

Admitted. See CMR00078.

STATEMENT NO. 30:

30. CMR completed Koerner's roof replacement in February or March of 2006. Koerner appears to have made his first payment to CMR by check from his law firm dated December 21, 2005, and his last payment by a similar check dated March 17, 2006.

RESPONSE TO STATEMENT NO. 30:

I am not entirely sure of the dates, but this appears to be correct. I paid CMR in full. In the CMR

production, there are three checks, 2/21/06, 3/9/06, and 3/17/06.

STATEMENT NO. 31:

31. Koerner began using the house again for personal purposes no later than March 23, 2007 and used the house for business purposes again no later than 2008.

RESPONSE TO STATEMENT NO. 31:

I returned to New Orleans on or about September 23, 2005 and regained and maintained access to the Property continuously since that time. Koerner Law Firm/Koerner Law Office is not a separate entity from me. I did not maintain a separate personal bank account in 2005 and do not at the present time. My residence is a residence not a commercial and/or nonresidential establishment. I have maintained and do maintain a "home office."

STATEMENT NO. 32:

32. CMR's contract with Koerner provided for a ten-year warranty against "substantial defects" in workmanship and materials.

RESPONSE TO STATEMENT NO. 32:

This statement is false. The "agreement," [3] signed 11/11/05 by Eric Hunter on behalf of CMR as approved and by Louis R. Koerner, Jr. as "Customer" contains the name of "Louis Koerner" in the box captioned "Name." There is no warranty language contained in this document as provided to me. I do not recall the document produced by CMR, CMR00074, as the actual back of the CMR "agreement," CMR00078. I would never have accepted a ten-year warranty in lieu of a seventy-five-year warranty as promised and referenced over and over in my discussions with CMR

[3] CMR-00078.

and in the email correspondence between me and my staff and CMR.

STATEMENT NO. 33:

33. Koerner's contract with CMR disclaimed all other warranties, except for the manufacturer's warranty on materials.

RESPONSE TO STATEMENT NO. 33:

This statement is false. See Responses to Statements 32 and 34.

STATEMENT NO. 34:

34. Koerner's contract with CMR also barred any claims for incidental or consequential damages.

RESPONSE TO STATEMENT NO. 34:

This statement is false. See Responses to Statements 32 and 33.

STATEMENT NO. 35:

35. CMR honored its warranty when Koerner called CMR out in 2006 and 2007 to fix reported problems with the roof, and to perform additional, non-warranty work.

RESPONSE TO STATEMENT NO. 35:

I do not dispute that CMR performed roof-related work in 2006 and 2007 but dispute the use of the ambiguous classification of such work as "warranty" and "non-warranty" work.

STATEMENT NO. 36:

36. CMR has not retained many records from that far back, but CMR does have some documents that indicate repair work. A six-page profit and loss listing for September 9, 2005 through May 15, 2009 shows both repairs and additional work.

RESPONSE TO STATEMENT NO. 36:

I dispute this "statement" as being vague and ambiguous, and because it does not contain a fact that is material to the resolution of CMR's motions for summary judgment.

STATEMENT NO. 37:

37. In late 2011, CMR again performed warranty work for Koerner, to address

reported issues with a leak after Tropical Storm Lee.

RESPONSE TO STATEMENT NO. 37:

I do not think this statement is true. CMR assured me that it would address all of the defects identified in the 2011 inspection report and began doing that work in 2011 but, based on my recollection, did not complete that work until November 2012. After those repairs, I believed all issues with my roof had been addressed. CMR's failures are documented in its production to me in this case.

STATEMENT NO. 38:

38. CMR completed this work by the beginning of November 2011, and closed it job ticket on November 10, 2011.

RESPONSE TO STATEMENT NO. 38:

I do not think that this statement is true. CMR assured me that it would address all of the defects identified in the 2011 inspection report and began

doing that work in 2011 but, based upon my understanding, did not complete that work until November 2012, after which I believed all issues with his roof had been addressed.

STATEMENT NO. 39:

39. In February 2012, CMR performed additional work on Koerner's home, to repair roofing issued that were not part of CMR's original job in 2005 and 2006.

RESPONSE TO STATEMENT NO. 39:

I do not consider this statement to be true. Of course, CMR performed additional work on my home in 2012. I dispute that it was unrelated to the work that CMR performed in 2005 and 2006, as it all relates to the roof that I was sold by CMR.

STATEMENT NO. 40:

40. Koerner paid $1,809.86 on the February 3, 2012 contract for this work.

RESPONSE TO STATEMENT NO. 40:

I did pay this amount, although the payment was only for some part of the work.

STATEMENT NO. 41:

41. CMR provided Koerner with a two-year warranty on the work it performed in February 2012.

RESPONSE TO STATEMENT NO. 41:

The CMR agreement is CMR00340. It is the best evidence of its terms.

STATEMENT NO. 42:

42. On February 29, 2012, Koerner complained that he had an electrical outlet explode because of water leaks caused by heavy rain.

RESPONSE TO STATEMENT NO. 42:

This "statement" does not contain a fact that is material to the resolution of CMR's motions for summary judgment. I did make such a complaint.

STATEMENT NO. 43:

43. On March 5, 2012, CMR inspected the area with water issues and found that the issue with the electrical outlet seemed to be caused by a problem with a water pipe.

RESPONSE TO STATEMENT NO. 43:

This "statement" does not contain a fact that is material to the resolution of CMR's motions for summary judgment. I recall that this was CMR's position.

STATEMENT NO. 44:

44. On July 20, 2012, CMR repaired a portion of the roof that Koerner claimed was leaking during heavy rains.

RESPONSE TO STATEMENT NO. 44:

I do not recall this date.

STATEMENT NO. 45:

45. CMR performed this work as warranty work, as a courtesy to Koerner. The Hurricane Isaac Repairs.

RESPONSE TO STATEMENT NO. 45:

I do not understand the statement and dispute its truth. This work was performed by CMR as an ongoing effort by CMR to correct all defects in the roof that had been identified in the 2011 inspection report and was so represented to me, in an apparent effort to placate me and to avoid a suit I did not want to file.

STATEMENT NO. 46:

46. CMR next heard from Koerner after Hurricane Isaac, which hit New Orleans in late August 2012.

RESPONSE TO STATEMENT NO. 46:

This is true.

STATEMENT NO. 47:

47. CMR responded that it could fix Koerner's roof damage caused by Hurricane Isaac but could not take responsibility for that damage.

RESPONSE TO STATEMENT NO. 47:

That is what Steve Soulé emailed. This was not the final deal that was made.

STATEMENT NO. 48:

48. In a series of discussions with CMR's president, Steven Soulé ("Soulé "), Koerner insisted that CMR bear responsibility for the storm damage.

RESPONSE TO STATEMENT NO. 48:

This is true.

STATEMENT NO. 49:

49. Ultimately, CMR agreed to pay for the roof repair work by a contractor named Brian Vela, if Koerner agreed to back off his effort to hold CMR liable for interior damage.

RESPONSE TO STATEMENT NO. 49:

I dispute this "statement" only to the extent that it suggests that Brian Vela was not CMR's own contractor. Brian Vela was provided to Koerner by CMR and did work on Koerner's property in

November 2012. The work was reviewed and verified as complete by CMR. CMR's assurances that this work would address the remaining issues with his roof lulled me into a false sense of security that persuaded me not to file suit against CMR at that time.

STATEMENT NO. 50:

50. Brian Vela's total price for the repair work was $4,900.00.

RESPONSE TO STATEMENT NO. 50:

I do not dispute this "statement."

STATEMENT NO. 51:

51. However, that price included both roof repair work plus other items which Koerner said "I am not happy with, but would be willing to pay for."

RESPONSE TO STATEMENT NO. 51:

I do not dispute the statement.

STATEMENT NO. 52:

52. CMR itself did not perform this work in late 2012.

RESPONSE TO STATEMENT NO. 52:

This is not exactly true. Brian Vela was CMR's own contractor. Brian Vela was provided to me by CMR and did work on my property in November 2012 with the work being reviewed and verified as complete by CMR's supervisor, Gary Klocke.

STATEMENT NO. 53:

53. CMR's records indicate that the last time CMR performed on Koerner's house was on July 20, 2012.

RESPONSE TO STATEMENT NO. 53:

This is untrue because Brian Vela was CMR's own contractor. Brian Vela was provided to me by CMR and did work on my property in November 2012 with the work being reviewed and verified as complete by CMR's supervisor, Gary Klocke.

STATEMENT NO. 54:

54. After CMR and Koerner agreed how to deal with the Hurricane Isaac damage,

CMR did not hear from Koerner for almost three and a half (3½) years.

RESPONSE TO STATEMENT NO. 54:

This is correct, because during that time period and based upon intentional misrepresentations made by CMR as to the completeness of the repair work that had been performed up to them, I believed that all issues with my roof, particularly those identified in the 2011 inspection report, had been addressed.

STATEMENT NO. 55:

55. On February 23, 2016, Koerner sent Soulé an email requesting payment from CMR for $780,000.00 for repairs to Koerner's house.

RESPONSE TO STATEMENT NO. 55:

This is not what the email said. See CMR00188. I stated that: As you can see from the attachments, I have really bad news. At least partially because of defective roofing, I have to make $700,000 of immediate repairs and almost of million dollars of

necessary repairs. The entire roof needs to be replaced. Worse, yet, your workers let asbestos contaminate my attic to the tune of $80,000 in remediation costs.

STATEMENT NO. 56:

56. By that time, CMR believed it was well beyond the duration of any warranty or repair obligations.

RESPONSE TO STATEMENT NO. 56:

I do not believe that. Moreover, what CMR may have believed is irrelevant. Moreover, when I made amicable demand upon CMR in February 2016, I was still within any ten-year period of warranty against substantial defects in workmanship and materials and well within the 75-year warranty that accompanied the purchase of my slate roof.

III. ADDITIONAL MATERIAL FACTS IN DISPUTE

In addition to the above declarations in response to CMR's Statement of Uncontested Facts and in addition to the factual disputes set forth in the foregoing, there are other material facts in dispute. They are as follows:

Additional material facts in dispute 1:

CMR intentionally misrepresented to me that (1) the Slate 2.0 roof was a new and improved version of a traditional slate roof (which still possessed all of the attributes of a traditional slate roof but was better in every meaningful way), (2) that the Slate 2.0 roof was of such great quality that it would outlive ("outlast") me, (3) that the Slate 2.0 roof would be properly installed by CMR, (4) that the previous roof on my home would be properly removed

by CMR, (5) that the Slate 2.0 roof was backed by a 75-year "all risk" warranty, and (6) that CMR's subsequent repairs would address the issues I was having with my roof.

Additional material facts in dispute 2:

CMR gained an unjust advantage over me by making these intentional misrepresentations. When I bought 1204 Jackson Avenue, I made a decision that I was going to restore the house, which had become a rooming house, to the condition that its builder/owner had originally constructed it. I was not happy to have an asbestos roof and was anxious to restore a traditional slate roof. I thought that the CMR quote was high but agreed to pay the cost of the purchase because not only was I going to restore the roof with slate as originally constructed, but I was going to get a better roof, a Roof 2.0 as it was, by buying from CMR. There was plenty money in the Hanover policy.

Additional material facts in dispute 3:

I did not acquire knowledge of my claims against CMR sufficient, within the meaning of Rule 11, to file suit or to sufficient to start the running of liberative prescription until Louis Relle told me in February of 2016 that I had been deceived and that I had a defective roof that was causing extremely serious problems to a house that I really cared about. Until that time, I had trusted CMR and had tried to act toward them in the same way as had been successful with Hanover. CMR's representatives, particularly Gary Klocke and Steve Soulé, said all of the right words, all lies, to assure me that I was doing the right thing, that CMR had sold me the right roof and that the installation that came with the sale was done properly, and that any problems were being addressed in 2011 and 2012 and that specific additional work, such as a copper drip edge, was being

installed. I also had some confidence in CMR because CMR had come through for me on 830 Burdette Street in 2008 and had corrected defects in that home to the satisfaction of the homeowners. I did not acquire knowledge of my claims sufficient to start the running of liberative prescription until February of 2016. Even then, I just notified CMR and did not make a demand or file suit, because I still believed prior representations by CMR and believed that CMR would come through. When they did not, I joined CMR as a defendant.

Additional material facts in dispute 4:

CMR's representation with respect to the work that was begun in 2011 and completed in 2012 convinced me that CMR was fixing everything. Had I had the documents produced by CMR in discovery (which are attached hereto as Exhibit "A"), I would have filed suit then.

Additional material facts in dispute 5:

The first time that I noticed the damage to the exterior of the walls of my house was when Louis Relle came to do an inspection in connection with my divorce in 2016. For the first time, I was told of substantial problems with the house that Mr. Relle informed me had been caused by the defective roof and by the failure to make the 2011 and 2012 repairs. He actually showed me defects that were not apparent to me. I have been informed that almost all of the consequential damages claimed other than replacement of the roof were caused after 2012.

Additional material facts in dispute 6:

I considered my contractual relationship with CMR in 2005 to be a contract of sale and CMR's obligation to be an obligation of result, to sell to me and for me to buy a roof that had all of the attributes of a traditional slate roof but was better in every

meaningful way, in other words, a Slate 2.0 roof. I believed that this roof that would equal the one that the original owner/builder purchased and had installed in 1893.

Additional material facts in dispute 7:

The date in 2016 on which I made amicable demand on CMR by email was less than 10 years from the completion of the delivery of the slate, the main item sold, and the completion of its installation and from the last payment. It was less than five years from the dates on which CMR made representations and repairs in 2012.

APPENDIX B – SUPPLEMENTAL UNSWORN DECLARATION OF LOUIS R. KOERNER, JR.

United States District Court
Eastern District of Louisiana
2:16-cv-13319(I)(1)

Louis R. Koerner, Jr., Individually and as Assignee of Jean McCurdy Meade, Plaintiff,
Versus
Vigilant Insurance Company, Defendant

SUPPLEMENTAL UNSWORN DECLARATION OF LOUIS R. KOERNER, JR.

On November 14, 2017, I, **LOUIS R. KOERNER, JR.**, declare under penalty of perjury under the laws of the United States of America, that the following, is true and correct.

1. The emails attached hereto as Exhibit "A" are true and correct copies of email communications that were either sent to and/or received from me, all of which were produced by me in the course of discovery in this matter. The document attached hereto as Exhibit "B" is a true and correct copy of a CMR Construction & Roofing, LLC ("CMR") job ticket, which was produced by CMR in the course of discovery in this matter.

2. The emails and other material concerning Slate Direct and the statement that Slate 2.0 had a 75-year warranty, Exhibit C, are true and correct copies of material that I retrieved from my email or located on the internet through archiving programs.

3. The fraudulent representations relating to the nature of the roof that I purchased from CMR were made to me by CMR's salesman, Eric Hunter ("Hunter").

4. Hunter represented to me that the Slate 2.0 roof had all of the same attributes as a traditional slate roof, but it did not, and he knew it did not.

5. A traditional slate roof is comprised of functional slate with the slate itself providing protection against the elements, whereas the Slate 2.0 roof is merely a decorative slate façade where the only protection is a membrane that is prone to puncture and UV degradation.

6. The representations by Hunter were made shortly after the devastation of Hurricane Katrina (which made landfall on August 29, 2005) and occurred at my home, which is located at 1204 Jackson Avenue in New Orleans, Louisiana, when Hunter solicited me to purchase a roof from CMR.

7. With respect to my claims that relate to the subsequent repair work in 2011 and 2012, Gary Klocke ("Klocke"), a CMR employee, represented to me that CMR would address all of the issues contained in the Guaranty Sheet Metal Report, including installing a drip edge around the home.

8. This representation was made to me at 1204 Jackson Avenue in New Orleans, Louisiana on or about September 10, 2011 when Klocke inspected the roof.

9. Klocke had a copy of the 2011 inspection report and utilized it in the course of his inspection, because I had sent it to CMR by email on September 8, 2011.

10. Then, on November 1, 2012, Steve Soulé ("Soulé"), came to my home to inspect it in connection with the November 2012 repair work. During that meeting, which occurred at 1204 Jackson Avenue in New Orleans, Louisiana, Soulé assured, or promised, me that the work scope that CMR was proposing (which is detailed in the emails attached hereto as Exhibit "A") would address all of the remaining issues with my roof and would be a "complete" fix of my problems. My understanding with respect to this work is further confirmed by deposition testimony (the full transcript of which is attached hereto as Exhibit "D"). The full

transcript of Eric Hunter's deposition is attached hereto as Exhibit "E".

11. The step-by-step instructions for the work that was to be performed by Brian Velasquez ("Velasquez") in November 2012, an individual who was provided to me by CMR, were set forth by Soulé. *See* KOERNER DOCS 000547 (attached hereto as part of Exhibit "A").

12. CMR provided the majority of the materials to be used by Velasquez in his work. *See id*.

13. CMR's employee, Brad Menerey ("Menerey"), supervised the work performed by Velasquez throughout the repair process, including correcting work that CMR determined had been performed incorrectly. *See* KOERNER DOCTS 000448- 000450 (attached hereto as part of Exhibit "A").

14. Velasquez was not paid the final amount that he was owed until CMR verified that the work had been done and done well. *See id*.

15. I understood that CMR, through Menerey, would indeed "do a particular thing," namely, actively supervise the work by Velasquez. *See id*.

16. I believed that the work was going to be "done and done well" and that it would

be "up to CMR standards," and CMR did nothing to dispel this belief by me, despite me emailing that understanding to both Soule and Menerey. *See id*.

17. Because I relied upon the promise made by CMR, I did not file suit against CMR at that time and believed to my detriment that all issues with my roof had been corrected.

18. The roof on my home is precariously high and steep (so much so that multiple roofers have refused to walk on it), so I personally has never set foot on it (and likely never will).

19. Considering other sources of learning the truth of CMR's deceit, I actually went to the website for Slate 2.0 around the time that I was purchasing my roof from CMR, but it did not inform me that the Slate 2.0 roof was a decorative slate facade over a membrane.

20. There was nothing in the materials provided to me by Hunter that showed me that this was a decorative slate facade over a membrane. I would not have bought the Slate 2.0 roof if I had realized that it was simply a decorative slate façade over a membrane.

21. I had CMR come out and do additional work on the roof between 2006 and 2012, and at no time did anyone from CMR

inform me that my roof was a decorative slate façade over a membrane.

22. I had additional repair work conducted by Guaranty Sheet Metal & Roofing, yet I still was not informed that his roof was a decorative slate façade over a membrane.

23. I did not learn this information until February 2016 when Louis Relle informed me of such.

24. On September 15, 2017, in a telephone conference with this Court, the Court, upon being asked if mover could file a sur-reply stated that it was not necessary because any new matter in the reply brief was waived. I therefore did not file a sur-reply brief on the issues which were new in the reply brief, on which the Court ruled adversely to me, and which I would have addressed in the sur-reply brief that I was told was not necessary.

APPENDIX C – DECLARATION OF CMR'S STEVEN SOULE

United States District Court
Eastern District of Louisiana
2:16-cv-13319(I)(1)

Louis R. Koerner, Jr., Individually and as Assignee of Jean McCurdy Meade, Plaintiff,
Versus
Vigilant Insurance Company, Defendant

SECOND DECLARATION OF STEVEN SOULE

State of Texas
County of Denton

1. My name is Steven Soule. I am over twenty-one (21) years of age and otherwise competent to provide this Declaration.

2. I am President of CMR Construction & Roofing, LLC ("CMR") and in that capacity I know the following to be true and correct to the best of my knowledge.

3. CMR is based in St. Louis, Missouri, but the company performs roofing work all over the country.

CMR showed Koerner physical roofing samples and product literature before Koerner bought a Slate 2.0 system.

4. After Hurricane Katrina hit New Orleans in August 2005, CMR sent salesmen to New Orleans to sell roof repair and replacement services.

5. Eric Hunter ("Hunter") was one of those salesmen.

6. Hunter worked with Louis R. Koerner, Jr. ("Koerner") and his insurer. Hanover Insurance Company ("Hanover") on the removal and replacement of roof on Koerner's house at 1204 Jackson Avenue in New Orleans.

7. Most of the roofs that CMR replaced in New Orleans after Katrina were asbestos tile, Ludowici tile, or slate.

8. When CMR replaces a roof, we work with homeowners and their insurer to obtain a replacement roof as close as possible to the roof that is being replaced.

9. After Katrina, that generally meant that asbestos was replaced with a synthetic (polymer or plastic) roof, a traditional slate with another traditional slate roof, and Ludowici tiles with another clay tile roof.

10. Koerner's roof was a combination of slate in some areas and asbestos tiles in others, so it was not as simple to identify a replacement.

11. It is my understanding that Hunter visited Koerner on multiple occasions, taking him brochures and physical samples of the potential types of replacement roofing systems.

12. As indicated in the contract that Koerner signed with CMR, the system that Koerner ultimately chose was then called a Slate 2.0 roofing system.

13. The Slate 2.0 system therefore allowed Koerner to achieve the look of a new slate roof, without any non-slate portions, but at a lower cost that could be funded by Koerner's insurance proceeds.

14. Use of the Slate 2.0 system therefore allowed Koerner to achieve the look of a new slate roof, without any non-slate portions, but at a lower cost that could be funded by Koerner's insurance proceeds.

15. If CMR had sold Koerner a traditionally installed slate roofing system, it would have been much more expensive than the Slate 2.0 system.

16. Like many contractors, CMR plans its projects based on an expected cost of

materials and labor plus an expected profit margin.

17. If CMR had sold Koerner a traditionally installed slate roofing system, CMR would have earned a much bigger profit on the Koerner roofing project.

18. The same is true for our salespeople, who work on commission.

19. If Hunter had sold Koerner a traditionally installed slate roof, he would have earned a bigger commission than he earned on the Slate 2.0 system.

20. However, for Koerner and for other homeowners, CMR tried to find the best roof that was available based on the amount of money that Koerner and those other homeowners expected to receive from their homeowner's insurance.

21. Since 2005, the Slate 2.0 system has been sold at least twice to new companies, most recently to GAF Materials Corporation ("GAF).

22. GAF now markets the former Slate 2.0 system as the TruSlate® system.

Koerner knew that he bought a roof with a synthetic membrane beneath slate tiles.

23. Because Hunter had shown Koerner physical samples of the Slate 2.0 roofing system and other products, Koerner knew that Slate 2.0 was a synthetic membrane with slate tiles on top of it.

24. Koerner's contract clearly stated that he was buying a Slate 2.0 roofing system, as opposed to a traditionally installed slate roof.[1]

25. Koerner even confirmed in writing that he knew he was buying a roof with a synthetic membrane. On November 12, 2006, while we were working to resolve some issues following the roof's installation earlier in 2006, Koerner sent an email to CMR's Christian Larson, which stated in part: "I…also need to deal permanently with the fact that your guys drilled through the membrane with the roof caps, made leaks, and only put glue on the top. I think that they need to be taken off, the membrane problem fixed, and then cemented."

26. Koerner was also informed that his roof system included a synthetic or plastic membrane, with real slate on top, in the

[1] A copy of Koerner's 2005 contract follows my Declaration as Exhibits "A".

January 18, 2011 inspection report that he commissioned from Guaranty Sheet Metal.

27. Guaranty Sheet Metal plainly stated that: "The roof on the house is a Slate 2.0 or True Slate [*sic*] roof system. It is comprised of real slate installed on a steel track with a plastic sleeve as the head lap."[2]

28. The use of a synthetic underlayment does not change the fact that Slate 2.0 and TruSlate® use real slate riles on top of the membrane.

29. GAF's Web site confirms that TruSlate®, as the successor to Slate 2.0, remains real slate, comprised in part of grade S1 quarried slate.

30. The grade S1 reference is apparently the source of Koerner's expectation that his roof should have a lifetime of seventy-five (75) years. ASTM C406 has long stated that Grade S1 slate has an expected lifetime in that range. That is documented as far back as the "Q&A" article in the January 1995 Issue *Professional Roofing*, which is available at

[2] A copy of this report follows my Declaration as Exhibit "B".

http://docserver.nrcs.net/technical/3826.pdf. [3]

Koerner's contract with CMR.

31. On November 13, 2005, Koerner signed a written contract to buy his Slate 2.0 roofing system from CMR.[4]

32. CMR completed Koerner's roof replacement in February or March of 2006. Koerner appears to have made his first payment to CMR by check from his law firm dated December 21, 2005, and his last payment by a similar check dated March 17, 2006.

33. CMR's contract with Koerner provided for a ten-year warranty against "substantial defects" in workmanship and materials.[5]

34. Koerner's contract with CMR disclaimed all other warranties, except for the manufacturer's warranty on materials.[6]

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[3] A copy of this article follows my Declaration as Exhibit "C".

[4] A copy of the contract follows my Declaration as Exhibit "A".

[5] *See* Exhibit "A" following my Declaration, at second page.

[6] *See* Exhibit "A" following my Declaration, at second page.

35. Koerner's contract with CMR also barred any claims for incidental or consequential damages.[7]

CMR's 2006 and 2007 warranty and non-warranty work for Koerner.

36. CMR honored its warranty when Koerner called us out in 2006 and 2007 to fix reported problems with the roof, and to perform additional, non-warranty work.

37. CMR has not retained many records from that far back, but we do have some documents that indicate repair work. A six-page profit and loss listing for September 9, 2005 through May 15, 2009 shows both repairs and additional work.[8]

CMR's 2001 and 2012 warranty and non-warranty work for Koerner

38. In late 2011, CMR again performed warranty work for Koerner, to address reported issues with a leak after Tropical Storm Lee.[9]

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[7] *See* Exhibit "A" following my Declaration, at second page.

[8] A copy of this P&L statement follows my Declaration as Exhibit "D".

[9] *See* Exhibit "E" following my Declaration.

39. CMR completed this work by the beginning of November 2011, and closed its job ticket on November 10, 2011.[10]

40. In February 2012, CMR performed additional work on Koerner's home, to repair roofing issues that were not part of CMR's original job in 2005 and 2006.[11]

41. Koerner paid $1,809.86 on the February 3, 2012 contract for this work.[12]

42. CMR provided Koerner with a two-year warranty on the work it performed in February 2012.[13]

43. On February 29, 2012, Koerner complained that he had an electrical outlet explode because of water leaks caused by heavy rain.[14]

44. On March 5, 2012, CMR inspected the area with water issues and found that the issue with the electrical outlet

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[10] *See* Exhibit "E" following my Declaration.

[11] *See* Exhibit "F" following my Declaration.

[12] *See* Exhibit "F" following my Declaration.

[13] *See* Exhibit "F" following my Declaration.

[14] *See* Exhibit "G" following my Declaration.

seemed to be caused by a problem with a water pipe.[15]

45. On July 20, 2012, CMR repaired a portion of the roof that Koerner claimed was leaking during heavy rains.[16]

46. CMR performed this work as warranty work, as a courtesy to Koerner.

The Hurricane Isaac Repairs.

47. CMR next heard Koerner after Hurricane Isaac, which hit New Orleans in late August 2012.

48. CMR responded that it could fix Koerner's roof damage caused by Hurricane Isaac but could not take responsibility for that damage.[17]

49. In a series of discussions with me, Koerner insisted that CMR bear responsibility for the storm damage.[18]

50. Ultimately, CMR agreed to pay for the roof repair work by a contractor named Brian Vela, if Koerner agreed to back off

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[15] *See* Exhibit "G" following my Declaration.

[16] *See* Exhibit "G" following my Declaration.

[17] *See* Exhibit "H" following my Declaration.

[18] *See* Exhibit "I" following my Declaration.

his effort to hold CMR liable for interior damage.[19]

51. Brian Vela's total price for the repair work was $4,900.00.[20]

52. However, that price included both roof repair work plus other items which Koerner said "I am not happy with, but would be willing to pay for."[21]

53. CMR itself did not perform this work in late 2012.

54. CMR's record indicate that the last time CMR performed on Koerner's house was on July 20, 2012.

Koerner's apparent decision that CMR should pay to repair his entire house.

55. After CMR and Koerner agreed how to deal with the Hurricane Isaac damage, CMR did not hear from Koerner for almost three and a half (3½) years.

56. On February 23, 2016, Koerner sent me an email requesting payment from CMR

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[19] *See* Exhibit "I" following my Declaration.

[20] *See* Exhibit "J" following my Declaration.

[21] *See* Exhibit "J" following my Declaration.

for $780,000.00 for repairs to Koerner's house.[22]

57. By that time, CMR believed it was well beyond the duration of any warranty or repair obligations.

58. Except for the *Professional Roofing* article discussed in paragraph 30 of my Declaration, all of the documents that follow my Declaration are true and correct copies of documents that were located in CMR's job file for Koerner's house.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, this 8th day of August, 2017.

Steven Soule

[22] *See* Exhibit "K" following my Declaration.