

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN**

Mary Haley and Michael Haley, Leslie Banks  
and James Hal Banks, Annie Buinewicz and  
Brian Buinewicz, Gary Samuels, and Matthew  
Deller, on behalf of themselves and all others  
similarly situated,

Plaintiffs,

v.

KOLBE & KOLBE MILLWORK CO., INC. and  
JOHN DOE INSURANCE CARRIER,

Defendants.

Case Number : 14-CV-99

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

Plaintiffs Mary and Michael Haley (“Haley Plaintiffs”), Leslie and James Hal Banks (“Banks Plaintiffs”), Annie and Brian Buinewicz (“Buinewicz Plaintiffs”), Gary Samuels, and Matthew Deller (referred to collectively as “Plaintiffs”) file this class action complaint on behalf of themselves and all others similarly situated, by and through the undersigned attorneys, against Kolbe & Kolbe Millwork Co., Inc. (hereinafter “Kolbe” or “Defendant Kolbe”) and John Doe Insurance Carrier (hereinafter “Insurer” or “Defendant John Doe”), and state as follows:

**INTRODUCTION**

1. This is an action on behalf of Plaintiffs, and a class of all others similarly situated against Defendant Kolbe, the manufacturer of defective windows (“Windows”), and Defendant John Doe, Kolbe’s insurance carrier. Kolbe’s non-vinyl window products (including both all-wood and wood and aluminum product lines) are defective, as they are prone to chronic air and/or water infiltration following installation, and as the wood portions of the Windows are inadequately preserved or protected. As a result of Defendant Kolbe’s failure to properly design,

develop, test, manufacture, distribute, market, sell, and ensure that the Windows were properly designed, Plaintiffs' windows are leaking, rotting, cracking, warping, and otherwise failing, causing Plaintiffs to suffer damages.

2. Defendant Kolbe warrants and advertises that its windows are free from defects in materials and workmanship, are of superior quality, require little or no maintenance, and are durable, reliable, and long lasting.

3. Defendant Kolbe, however, refuses to honor its purported warranties.

4. Defendant Kolbe is responsible and liable for, among other things, all costs associated with repairing, removing and/or replacing the defective windows installed in the homes, offices, buildings, and other structures of Plaintiffs and members of the proposed class, as well as other related consequential damages that resulted from the failure of Defendant Kolbe's defective windows.

5. In turn, Defendant John Doe, Kolbe's insurance carrier, is liable to Plaintiffs and members of the proposed class for Kolbe's negligence, up to the amount stated in Kolbe's insurance policy.

### **PARTIES**

6. The Haley Plaintiffs are residents of Alden, Michigan, and had 36 Kolbe Ultra Series cladded casement windows installed in 2010.

7. The Banks Plaintiffs are residents of Pensacola, Florida, and had 23 Kolbe Ultra Series cladded casement windows installed in late-2003.

8. The Buinewicz Plaintiffs are residents of Doylestown, Pennsylvania, and had approximately 60 Kolbe all-wood windows installed when their home was built in 1997.

9. Plaintiff Gary Samuels is a resident of Deering, New Hampshire, and had 33

Kolbe Ultra Series cladded windows installed in the November 2011.

10. Plaintiff Matthew Deller is a resident of Vandalia, Ohio, and had approximately 20 Kolbe Ultra-Series cladded windows installed in his home in 2004.

11. Kolbe is a Wisconsin corporation with its principal place of business in Wausau, Wisconsin. Kolbe conducts business throughout the State of Wisconsin and the United States. It designed, manufactured, warranted, advertised, and sold the defective windows that were installed on Plaintiffs' homes and those of thousands of putative class members in Wisconsin and the United States.

12. Defendant John Doe is an insurance carrier that issued a general liability insurance policy to Defendant Kolbe.

#### **JURISDICTION AND VENUE**

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d)(2), because the Plaintiffs and Defendants are of diverse citizenship and the aggregate amount in controversy exceeds five million dollars (\$5,000,000.00) exclusive of interest and costs.

14. Venue is proper in this Court pursuant to 28 U.S.C. §1391 because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred, a substantial part of the property that is the subject of this action is situated, and Defendants are subject to personal jurisdiction, in this District.

15. By incorporating under the laws of Wisconsin and operating its principal place of business in Wisconsin, as well as designing, testing, developing, manufacturing, marketing, distributing, promoting, and/or selling, either directly or indirectly through third parties or related

entities, of windows to purchasers throughout Wisconsin, Defendant Kolbe obtained the benefits of the laws of Wisconsin and profited from Wisconsin commerce.

16. Likewise, Defendant John Doe obtained the benefits of the laws and profited from commerce in Wisconsin through the sale and marketing of insurance policies in Wisconsin and by otherwise intentionally availing itself of the markets of Wisconsin through the marketing and promotion of its business.

### **FACTUAL ALLEGATIONS**

17. Upon information and belief, Defendant Kolbe is, and at all relevant times was, engaged in the business of designing, developing, manufacturing, distributing, marketing and selling windows in Wisconsin and throughout the United States. Defendant Kolbe has been in the business of manufacturing windows since approximately 1946.

18. Defendant Kolbe manufactures a variety of window products, including both all-wood and aluminum and wood product lines. Each product line is available in a variety of shapes, sizes and styles, including casement and double-hung windows.

19. Kolbe advertised its all-wood windows as having a unique, high quality performance finish system, known as K-Kron. The three-step K-Kron finishing process consists of (1) immersion of all wood parts in a liquid pre-treatment preservative known as “Preservative In-Line Treatment” or “PILT,” which “provides resistance against water and insects and includes a fungicide to prevent rotting,” (2) application of a Polyurea primer, which “seals the surface and provides a bond for the finish,” and (3) application of a unique K-Kron/ Flexacron topcoat, which was formulated to protect “against weathering, chemical attack, ultra-violet deterioration and chalking,” as well as damage from salts, wind, sleet and snow. Kolbe described its K-Kron system as providing flexibility, durability, and beauty. Kolbe had knowledge that K-Kron was a

defective sealant, yet continued to produce hundreds of thousands of windows using its K-Kron system.

20. Likewise, Kolbe described its aluminum and wood products as containing aluminum cladding “[f]or the ultimate in low maintenance.” Kolbe further advertised that the sash joints on its aluminum clad windows “are overlapped and sealed for moisture resistance, making [Kolbe’s] clad windows both weathertight and attractive.” The wood portions of Kolbe’s aluminum and wood products, like Kolbe’s all-wood products, are pre-treated with PILT, which Kolbe claims “provides resistance against water and insects, and includes a fungicide to prevent rotting.” Kolbe had knowledge that the prolonged exposure to ultra-violet light would destroy the PILT preservative, and that it was otherwise defective, yet continued to use the PILT preservative on the wood portions of its aluminum and wood products.

21. Defendant Kolbe is negligent in the design and manufacture of the Windows for a number of reasons.

22. The Windows are plagued by design flaws that prevent them from being properly sealed.

23. Water infiltration through the window assembly causes wood portions of the Windows, including the sill, sash, and trim, to rot, warp, grow mold and mildew, and otherwise decay.

24. Additionally, because wood portions of the Windows are not adequately protected, condensation, which builds on the interior window assembly and glass, causes interior wood portions of the Windows, including the sill sash, and rim, to rot, warp, grow mold and mildew, and otherwise decay.

25. The Windows also are plagued by additional design flaws that cause water to

drain into the home, rather than outside.

26. Defendant Kolbe knew or should have known that the foregoing defects made the Windows susceptible to premature failure through various processes.

27. Kolbe's design and materials choices have created a product that fails, even if perfectly installed in its intended environment.

28. Because of the defective design and manufacture, Defendant Kolbe's Windows failed in their intended purpose.

29. Because of the defective design and manufacture, Defendant Kolbe's Windows are inherently defective and are substantially certain to fail within the express warranty provided by Kolbe and/or the useful life of the Windows.

30. Persons or entities who own Windows that already have failed, or are in the process of failing prematurely, have suffered, or are reasonably certain to suffer, actual injury well in advance of the warranted and expected life of their windows.

31. Despite customer complaints and failed water tests conducted by Kolbe after the Windows already were available for sale on the market, Kolbe failed to implement any changes to its Windows or warranty procedures to remedy the defects.

### **Inadequate Testing of Kolbe Windows**

32. On information and belief, prior to selling the Windows to the public, Defendant Kolbe failed to adequately test the Windows in their anticipated environments.

33. On information and belief, prior to selling the Windows to the public, Defendant Kolbe failed to test under conditions that they knew or should have known would lead to premature failure of the Windows.

34. On information and belief, prior to selling the Windows to the public, Defendant

Kolbe failed to adequately investigate or test whether well-known and expected water conditions and temperature variations would lead to premature failure of the Windows.

### **Defendant Kolbe's False Representations and Omissions**

35. Defendant Kolbe falsely advertised that the Windows were durable and reliable despite both failing to conduct adequate testing before selling the Windows on the market, and conducting unsuccessful water tests after the Windows were available for sale to the public. Specifically, Kolbe represented to consumers that it uses what it touts as a “specially-formulated K-Kron/Flexacron finish” on its Windows to “protect[] against weathering, chemical attack, ultra-violet deterioration, and chalking.” According to Kolbe, this “finish is formulated to resist industrial acids, alkalis and salts, as well as erosion from wind, sleet and snow.” Kolbe further advertised that its Windows are immersed in PILT, “which provides resistance against water and insects and includes a fungicide to prevent rotting.” Kolbe told consumers that its wood windows are “durable and corrosion resistant,” that the Windows are sealed on both sides, are properly preserved using PILT, and are low-maintenance. Likewise, Kolbe promoted its aluminum and wood windows as being “the ultimate in low maintenance.” Kolbe represented that the sash joints on its aluminum cladding are “overlapped and sealed for moisture resistance, making [Kolbe's] clad windows both weathertight and attractive.” Kolbe further represented that the wood portions of its aluminum and wood products are preserved using PILT, “which provides resistance against water and insects and includes a fungicide to prevent rotting.”

36. Defendant Kolbe further warranted the Windows as being free from defects in materials and workmanship for a period of ten years from the date of purchase.

37. Defendant Kolbe falsely represented that it would stand behind its warranties when, in fact, it routinely refuses legitimate claims expressly covered by its warranties.

38. Defendant Kolbe misrepresented the Windows with the intent and purpose of inducing suppliers, builders, and consumers to purchase and install the Windows in residential and commercial structures.

39. Defendant Kolbe also made numerous material omissions in its literature and uniformly withheld important information relating to the design, reliability, and performance of the Windows.

40. Despite the fact that Kolbe knew its product was defective and that its Windows would not perform as advertised, warranted, or otherwise expressly represented, Defendant Kolbe continued to sell the product to the public without correction.

41. In fact, Kolbe has engaged in a course of deception designed to conceal from consumers the fact the Windows are plagued with design and/or manufacturing defects, and routinely and systematically blames window failures on allegedly improper installation.

42. Defendant Kolbe knew that the cause of premature failures was not improper installation, yet has concealed from and misrepresented to Plaintiffs and the Class the true nature of the problems with the Windows.

43. Defendant Kolbe continues to conceal from the public the fact that the Windows are defective, not durable, and will fail.

44. Had Kolbe not withheld and misrepresented important information about the design, reliability, and performance of the Windows, Plaintiffs and the members of the Class would not have purchased those products and/or installed them in their properties.

#### **Defendant Kolbe's Warranty Misconduct**

45. In response to the warranty claims of its customers, Kolbe adopted a uniform company policy not to pay customers their full measure of damages.

46. In instances where Kolbe purports to honor its warranty, in fact, Kolbe offers knowingly temporary solutions in piecemeal fashion. These purported solutions do not make Kolbe's customers whole in that Kolbe's customers are forced to pay third-parties to install replacement parts or windows. Despite purported cures, Kolbe Windows continue to fail to operate as expected and warranted.

47. Kolbe systematically rejects repeated complaints from its customers to provide a permanent cure to known defects in the Kolbe Windows.

48. On information and belief, Defendant Kolbe has received numerous claims and reports that the Windows that it was manufacturing, distributing, and advertising were subject to premature failures, problems, and deterioration.

#### **Kolbe's General Liability Insurance Policy**

49. Upon information and belief, Defendant Kolbe carries a general liability insurance policy issued by Defendant John Doe, that provides coverage for, *inter alia*, negligence.

#### **The Haley Plaintiffs' Windows**

50. The Haley Plaintiffs installed 36 Kolbe Ultra Series cladmed casement windows in their home in mid-2010.

51. The Haleys' prior home had Kolbe windows that developed some mold on the outside of the windows. Prior to installing Kolbe windows on their current home, the Haleys addressed this issue with Kolbe. Kolbe represented that the Windows are now treated with preservatives and other chemicals or finishes that prevent the wood from developing mold.

52. In late 2010, the Haley Plaintiffs informed Kolbe that their Kolbe windows were defective in that they were leaking, and in that condensation formed and collected on the window

assembly, causing the frames and sashes to warp, rot and grow mold, and causing a decrease in thermal efficiency.

53. Kolbe represented to the Haley Plaintiffs that only the inner seal – not the outer seal – of the Windows is meant to be waterproof, and that they should expect water to accumulate on the exterior water assembly. Kolbe further told the Haleys that only the inner seal is important with respect water management and moisture control. While the Haleys had expected both the inner and outer seals to be waterproof, neither seal is waterproof.

54. The Haleys informed Kolbe that water and moisture had accumulated on the inner seal of the Windows causing the wood portions to rot. Kolbe responded that the rotting was caused by the use of an improper sealant. Despite the Haleys having used a proper sealant, they have voluntarily, and at their own expense, re-sealed (with proper sealant) all the wood components of the Windows, and the Windows continue to deteriorate.

55. Kolbe has refused to replace the Haley Plaintiffs' windows and has further refused to provide them with the name of the sealant that Kolbe alleges should have been used during installation.

56. Of the 36 Kolbe windows installed on the Haleys' home, six were egress windows required by the local construction code. These windows, due to deterioration, are frozen shut and cannot be opened, thereby limiting their ability to be used as forms of egress. The Haleys informed Kolbe of this serious safety concern and Kolbe refused to repair or replace these windows.

57. The Haleys also informed Kolbe that the deterioration of the windows has caused the outer aluminum seams to split and open. Kolbe refused to honor its warranty and address this defect because they claim that the "split" is not wide enough to warrant repair and/or

replacement under the warranty.

58. Condensation continues to form on the Haley Plaintiffs' Kolbe windows and they continue to leak, causing the frames and sashes to warp, rot and grow mold.

### **The Banks Plaintiffs' Windows**

59. The Banks Plaintiffs installed 23 Kolbe Ultra Series cladded casement windows in their home in late-2003.

60. Within the first two years of installation of the Windows, the Banks Plaintiffs noticed that the window sashes were rotting and contacted Kolbe regarding the rot. Kolbe replaced the defective sashes in a piecemeal fashion as they rotted.

61. In April 2006, water testing performed by Gulf Coast Inspection and Restoration ("GCIR") revealed a leak in the window installed in the Banks Plaintiffs' home-office. Kolbe did not replace the window but instead paid for a sealant to be applied to the exterior of the window.

62. The sashes continue to rot. In 2007, Kolbe replaced all of the defective sashes installed in the Banks Plaintiffs' home. The Banks Plaintiffs subsequently discovered that 25 of the replacement sashes were defective because the aluminum cladding did not cover 100% of the wood sash. Kolbe replaced the 25 defective sashes because the sashes "had the aluminum cladding cut short, exposing the wood substrates beneath."

63. In or about December 2007, the Banks Plaintiffs noticed that the window in the office that was previously repaired by Kolbe with a sealant application was leaking. In January 2008, upon of testing the windows (by both Kolbe and GCIR), Kolbe agreed to replace this window because it did not meet "strict quality assurance standards and failed the water test."

64. Despite these repairs, the Banks Plaintiffs' windows continued to leak. In April

2010, the Banks Plaintiffs discovered water leaking into the kitchen, and informed Kolbe of the leak. The Banks Plaintiffs again hired GCIR to conduct water testing. GCIR tested the window in the second-floor office, as well as a window in the kitchen. Kolbe hired Water Management Consultants & Testing (“WMCT”) to be present for the testing on Kolbe’s behalf. Kolbe agreed to replace both windows that were tested because the windows failed the water testing.

65. In or about August 2011, the windows installed in the Banks Plaintiffs’ second-floor bedroom began leaking. Kolbe retained WMCT to test the windows, and the Banks Plaintiffs retained GCIR on their behalf. The testing revealed that the windows in the first-floor living room and the second-floor bedroom had been leaking to the wall cavity for a prolonged period. During the testing, it was also discovered that two windows in the second-floor office were leaking into the wall cavity and causing visible damage.

66. Kolbe admitted that the testing showed “leaking at the mullion joints and minor leaking between the sashes and frame weatherstripping,” but refused to replace the defective windows. Instead, Kolbe offered to reseal the joints of all the Banks Plaintiffs’ windows – a temporary solution that would not permanently resolve the windows’ defects.

67. In 2012, the Banks Plaintiffs replaced seven Kolbe windows with Andersen windows at a cost of approximately \$27,000. To date, the Andersen windows have not leaked.

#### **The Buinewicz Plaintiffs’ Windows**

68. The Buinewicz Plaintiffs installed approximately 60 Kolbe all-wood windows when they built their home in 1997. They selected Kolbe Windows for their new home because they believed them to be a superior product.

69. In approximately 2003 or 2004, the windows in their son’s room and other south-facing windows began rotting. They contacted the distributor that had installed the windows

and, because they were still under warranty with the distributor, the distributor replaced several sashes on their son's window, as well as various parts of the Kolbe windows in their study, laundry room, and living room.

70. In 2007, the Buinewicz Plaintiffs noticed that all of their windows were beginning to fail. As a result of extensive rotting and leaking between the window frames and the façade of their house, the entire façade began to slide off and had to be taken down and replaced. Ms. Buinewicz made a warranty claim and Kolbe agreed to replace some sills, sashes and trim pieces on the defective windows, but declined to cover any other expenses. The Buinewicz's and the builder of their home shared the cost of replacing the façade.

71. Within the past year, the Buinewicz's noticed that all of their Kolbe windows (including those that previously had been replaced) were leaking and rotting. Ms. Buinewicz again notified Kolbe that her windows were defective.

72. In October 2013, the Buinewicz Plaintiffs replaced 13 of their Kolbe windows with Anderson windows at a cost of approximately \$70,000. They are scheduled to replace 12 more of their Kolbe windows with Anderson windows in February 2014. The Buinewicz Plaintiffs plan to replace all of their remaining Kolbe windows with Anderson windows in the coming months.

#### **Plaintiff Samuels' Windows**

73. Mr. Samuels installed 33 Kolbe Ultra Series windows in his house in November 2011.

74. That winter, he began noticing black mold and fungus on the wood portion of his windows. When the temperature approached freezing, moisture collected in the bottom of all of his windows. When the temperature was below zero, ice formed on the inside of his windows.

75. Mr. Samuels contacted Kolbe, and was told that the humidity in his house was too high. As a result, in late-2013, Mr. Samuels purchased a dehumidifier.

76. Nevertheless, moisture and ice continues to collect on Mr. Samuels' Kolbe windows. In January 2014, he contacted Kolbe about his defective windows and, in response, received a packet of information about excessive humidity. One of the suggested remedies was to purchase new storm windows to replace all of his defective windows.

### **Plaintiff Deller's Windows**

77. Mr. Deller installed approximately 20 Kolbe Ultra Series windows in his home in 2004.

78. In early 2013, he noticed that his windows were rotting. He notified Kolbe that his windows were leaking and that the leaks had caused four sashes (on two sets of double windows) to become completely rotted, and had caused visible water damage on all other sashes.

79. Kolbe inspected the windows and admitted that they were "sagging," but informed Mr. Deller that there was not much they could do.

80. In October 2013, Kolbe replaced four of Mr. Deller's window sashes (two per double window).

81. Mr. Deller has since noticed that several other windows in his home are beginning to rot and show increased signs of water damage.

### **Experience of Class Members**

82. Plaintiffs' experiences are by no means isolated or outlying occurrences. The following represents a small sampling of internet postings by Kolbe product purchasers and installers describing their experiences with the defective windows:

We have the same problem but our windows are still under warranty. They want to replace some of the sashes but I know the entire window needs to be replaced.

My contractor and my husband who is an engineer both feel it is the sill that is the problem. There is little to no angle on the sill which allows standing water to be wicked up into the aluminum clad sash. Kolbe pushed me off on their distributor who pushes me back to Kolbe. No one wants to take responsibility. It is infuriating.

I built custom house 12 years ago with Kolbe and Kolbe windows and doors. I have had repeated rotting of sashes and frames and Kolbe and Kolbe makes it seemed like our fault, like we are to yearly sand, repair and paint these windows. I had a contractor recaulk every window and it still has issues. This will be the 4th time I have had people out to work on these windows. Do not waste your money buying these windows.

...

We built our home in 2001 and used Kolbe Windows, which have the wood rotting. One whole window blew out of the home from a rainstorm from the rotting situation. If there is a class action lawsuit regarding these faulty windows, please advise! Thank you.

...

Of the 30 plus windows in my newly constructed home, all but 5 have had to have some type of repair work to fix damage caused by water rotting the wood these windows are made of. The damage began a year after installation and continues 13 years later. Kolbe representatives blamed the damage on improper installation which makes no sense because they are the only thing that is rotting in my house. These windows had a factory baked finish and a 10-year warranty. Please beware and avoid this product.

...

Kolbe & Kolbe window sashes defective. Seems to be an overall manufacture problem. You would think they would provide new sashes to fix the problem, & install them properly.

I really wished I upgraded to cedar from finger jointed pine. I had the rep out and all they'll do is give me some more finger jointed crap. Nothing on labor. They should bed the casing down in some silicone to seal up that end grain.

<http://www.pissedconsumer.com/reviews-by-company/kolbe-and-kolbe/kolbe-and-kolbe-windows-are-awful-20120626327293.html>

### **CLASS ACTION ALLEGATIONS**

83. Plaintiffs seek to bring this case as a class action, pursuant to Rule 23 of the Federal Rules of Procedure. The proposed class is defined as follows:

All individuals and entities that have owned, own, or acquired homes, residences, buildings, or other structures physically located in the United States, in which Kolbe Windows are or have been installed since 1990. Excluded from the Class are Defendants, any entity in which either Defendant has a controlling interest or which has a controlling interest of either Defendant, and Defendants' 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.

Additionally or alternatively, Plaintiffs seek to bring this case on behalf of the following Wisconsin subclass:

All individuals and entities that have owned, own, or acquired homes, residences, buildings, or other structures physically located in the Wisconsin, in which Kolbe Windows are or have been installed since 1990. Excluded from the Class are Defendants, any entity in which either Defendant has a controlling interest or which has a controlling interest of either Defendant, and Defendants' 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.

84. Plaintiffs reserve the right to re-define the class and/or subclass (collectively "the Classes") prior to class certification.

#### **Numerosity**

85. Defendant Kolbe has harmed and continues to harm the proposed Class members' homes, offices, buildings and other structures through the installation of the Windows. The members of the proposed Classes are so numerous that joinder of all members is impracticable.

86. The exact number of Class members is unknown as such information is in the exclusive control of Defendant Kolbe. However, due to the nature of the trade and commerce involved, Plaintiffs believe the Classes consist of thousands of consumers, making joinder of Class members impracticable.

### **Common Questions of Law and Fact**

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

88. The harm that Defendant Kolbe has 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:

- (a) Whether Kolbe sold and entered a defective product into the stream of commerce;
- (b) Whether Kolbe failed to prevent damages which occurred because of the defective product it designed, manufactured and sold into the stream of commerce;
- (c) Whether Kolbe failed to warn consumers about the reasonably foreseeable dangers of installing the Windows;
- (d) Whether Kolbe was unjustly enriched by the sale of the defective product;
- (e) Whether Kolbe breached the warranties it represented as existing;
- (f) Whether Kolbe engaged in fraudulent, false, deceptive and/or misleading misconduct with respect to the handling of warranty claims; and
- (g) Whether Kolbe intentionally or negligently misrepresented or concealed information regarding the characteristics or quality of the Windows.

### **Typicality**

89. The claims and defenses of the representative Plaintiffs are typical of the claims and defenses of the Classes.

### **Adequacy of Representation**

90. The representative Plaintiffs will fairly and adequately assert and protect the interests of the Classes:

- (a) They have retained attorneys who are experienced in prosecuting class action claims and will adequately represent the interests of the classes; and

- (b) They have no conflict of interest that will interfere with the maintenance of this class action.

### **Superiority**

91. 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 above predominate over any questions affecting only individual class members;
- (b) The Classes are so numerous as to make joinder impracticable. However, the Classes are not so numerous as to create manageability problems. There are no unusual legal or factual issues which would create manageability problems;
- (c) Prosecution of a separate action by individual members of the Classes would create a risk of inconsistent and varying adjudications against Defendants when confronted with incompatible standards of conduct;
- (d) Adjudications with respect to individual members of the Classes 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;
- (e) 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.

**COUNT I**  
**Breach of Express Warranty**  
**(Against Defendant Kolbe)**

92. Plaintiffs incorporates by reference all preceding paragraphs as if fully set forth herein and further allege as follows:

93. Defendant Kolbe marketed and sold the Windows into the stream of commerce with the intent that they would be purchased by Plaintiffs and members of the Classes.

94. Defendant Kolbe expressly warranted that the Windows were free from defects in the workmanship or materials for a period of ten years from the date of purchase by the

consumer. Kolbe's written warranties regarding the quality of the Windows created express warranties that became part of the basis of the bargain Plaintiffs and members of the Classes entered into when they purchased the Windows.

95. Defendant Kolbe breached its express warranties to Plaintiffs and the Classes in that the Windows are not free from defects as promised. Rather, the Windows are prone to chronic air and/or water infiltration, causing the Window to leak, rot, crack, warp, and otherwise fail. These defects prevent the Windows from performing as warranted, and have caused or are causing damage to Plaintiffs' and Class members' homes.

96. Defendant Kolbe's warranties fail their essential purpose because they purport to warrant that the Windows will be free from defects and will perform their basic intended and essential functions for at least ten years when, in fact, the Windows fail far short of the applicable warranty period, requiring costly repairs or replacement.

97. Defendant Kolbe has received notice of the breaches of warranty alleged herein by virtue of complaints made by purchasers of the Windows. Upon information and belief, Defendant Kolbe has received scores of claims, complaints and other notices from its consumers advising Kolbe of the defects in the Windows. In addition, Plaintiffs have brought this Complaint to give notice to Defendant Kolbe of Plaintiffs' and Class members' claims, including breach of express warranties.

98. Defendant has repeatedly denied, failed to pay in full, or failed to respond to the warranty claims made by Plaintiffs and members of the Classes.

99. As a result, Plaintiffs and members of the Classes have suffered actual damages in that they purchased and installed a product that is defective and that has failed or is failing prematurely. This failure has required or is requiring Plaintiffs and the Classes to incur

significant expense repairing or replacing their windows or parts thereof, and repairing damage caused by the defective windows to the structures or interiors of their homes.

100. As a direct and proximate result of Defendant Kolbe's breach of warranty, Plaintiffs and the Classes have suffered and will continue to suffer damages and losses in an amount to be determined at trial.

**COUNT II**  
**Breach of Implied Warranty**  
**(Against Defendant Kolbe)**

101. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein and further allege as follows:

102. At all times during the Class period, Defendant Kolbe was a commercial manufacturer and supplier of the Windows at issue in this case. Kolbe designed, developed, manufactured, distributed, and marketed the Windows for eventual sale to retail buyers.

103. Defendant Kolbe expected its Windows to, and they did in fact, reach consumers without substantial change in the condition in which they were supplied.

104. Defendant Kolbe impliedly warranted that the Windows were properly designed, developed, manufactured, distributed, and marketed; that the designs and materials were proper and of first-class and workmanlike quality; and that the Windows were fit for their intended use.

105. Plaintiff and members of the Classes relied on Defendant Kolbe's skill and judgment in selecting the Windows to purchase. Plaintiff and members of the Classes likewise relied upon the promises contained within Defendant Kolbe's warranties and believed that the Windows were free from defects in workmanship or materials and fit for their intended use and purpose.

106. Defendant Kolbe breached its warranties by failing to provide adequate and

proper designs and/or materials for the Windows, failing to inspect and identify windows and/or materials with defects, and failing to provide defect-free windows to Plaintiffs and the Classes.

107. Defendant Kolbe's windows were and are defective and not of merchantable quality, and were and are unfit for their intended use.

108. The Windows fail to perform in accordance with the reasonable expectations of Plaintiffs and the Classes, and the benefits of the design of the Windows do not outweigh the risk of their failure.

109. Defendant Kolbe had a duty to disclose to the consuming public the foreseeable risks associate with the use of the Windows. Defendant Kolbe further had a duty not to put defective products on the market.

110. Defendant Kolbe breached its duty to Plaintiffs and the Classes by failing to disclose the defects associated with the Windows and by allowing the sale and use of the Windows when they knew they would not perform as intended.

111. Defendant Kolbe has received notice of the breaches of warranty alleged herein by virtue of complaints made by purchasers of the Windows. Upon information and belief, Defendant Kolbe has received scores of claims, complaints and other notices from its consumers advising Kolbe of the defects in the Windows. In addition, Plaintiffs have brought this Complaint to give notice to Defendant Kolbe of Plaintiffs and Class members' claims, including breach of implied warranties.

112. But for Defendant's breach of its implied warranties, Plaintiff and the Classes would not have suffered the damages and losses alleged herein in an amount to be determined at trial.

**COUNT III**  
**Negligent Misrepresentation**  
**(Against Defendant Kolbe)**

113. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein and further allege as follows:

114. Because installation of the Windows relates to the habitability of persons' homes, Kolbe had a duty to consumers and to the public to disclose the defective nature of its Windows and not to conceal and misrepresent material information about the design, reliability and performance of the product.

115. Nevertheless, Kolbe engaged in a scheme to cover up the true nature of the problem with the Windows.

116. In making misrepresentations and omissions of material facts regarding the characteristics and capabilities of the Windows in its advertising and product information and on its internet website, Defendant Kolbe knew or should have known that Plaintiffs and the Classes would rely on Kolbe's representations to their detriment and damage.

117. Plaintiffs and the Classes were unaware of the falsity of Defendant Kolbe's representations and, as a result, justifiably relied on them in purchasing and/or installing the Windows.

118. Defendant Kolbe made false representations and omissions in the course of its business with the intent that Plaintiffs and Class members would rely on them and purchase and/or install the Kolbe Windows.

119. As a direct, proximate, and foreseeable result of Kolbe's misrepresentations and omissions of material fact, Plaintiffs and the Classes suffered damage.

120. As a result of Defendant Kolbe's misconduct, Plaintiffs and the Classes have

suffered actual damages in that they purchased and installed defective Windows in their homes.

121. As a result of Defendant Kolbe's misconduct, Plaintiffs and the Classes have suffered and will continue to suffer damages that include not only the full cost to attempt to clean or repair but, ultimately, to replace windows or materials, which includes, without limitation, consequential and incidental damages.

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

**COUNT IV**  
**Negligence**  
**(Against Defendant Kolbe)**

123. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein and further alleges as follows:

124. Defendant Kolbe owed a duty to Plaintiffs and the Class members to exercise reasonable care in the design, manufacture, quality control, and marketing of the window products.

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

126. Defendant Kolbe was aware, or reasonably should have been aware, that the Windows were defective and did not perform their intended use.

127. When they purchased the Windows, Plaintiffs and the Classes were not aware of their defective nature.

128. As a direct and proximate cause of the foregoing, Plaintiffs and the Classes have suffered and will continue to suffer damages and economic loss described fully above, in an amount to be proven at trial.

129. Plaintiffs and the Classes are entitled to damages in an amount to be determined at trial.

**COUNT V**  
**Unjust Enrichment**  
**(Against Kolbe)**

130. Plaintiffs incorporate by reference all preceding paragraphs, except those alleging the existence of a contract between them and Defendant Kolbe, as if fully set forth herein, and further allege as follows:

131. Plaintiffs allege in the alternative to their contract claims that Kolbe, through deliberate misrepresentations or omissions in connection with the advertising, marketing, promotion, and sale of the Kolbe Windows, reaped benefits, which resulted in Defendant Kolbe's wrongful receipt of profits. Accordingly, Defendant Kolbe will be unjustly enriched unless it is ordered to disgorge those profits for the benefit of Plaintiffs and the Classes.

132. Equity demands disgorgement of Kolbe's ill-gotten gains.

133. As a result of Kolbe's wrongful conduct, Plaintiffs and the Classes are entitled to restitution from and institution of a constructive trust disgorging all profits, benefits, and other compensation obtained by Defendant Kolbe.

**COUNT VI**  
**Violation of Wisc. Stat. Ann. § 100.18: Fraudulent Representations**  
**(Against Defendant Kolbe)**

134. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein and further allege as follows:

135. Wisconsin Statutes Annotated § 100.18 makes it unlawful to, *inter alia*, make any representation or statement of fact in connection with the sale of any merchandise that is “untrue, deceptive or misleading.”

136. Defendant Kolbe violated Wis. Stat. Ann. § 100.18 by representing to consumers that its products were of a particular quality while Kolbe knew or should have known that they were of another. Specifically, Kolbe represented that the Windows were free from defects in workmanship or materials during the warranty period when the representations were untrue, deceptive and misleading.

137. As a direct and proximate result of Defendant Kolbe’s false representations, Plaintiffs and members of the Classes have suffered and will continue to suffer damages and losses as alleged herein in an amount to be determined at trial.

#### **COUNT VII**

#### **Violation of Wisc. Stat. Ann. § 632.24: Direct Action Against Insurer (Against Defendant John Doe)**

138. Wisconsin’s “direct action” statute, Wisc. Stat. Ann. § 632.24, provides:

Any bond or policy of insurance covering liability to others for negligence makes the insurer liable, up to the amount stated in the bond or policy, to the persons entitled to recover against the insured for the death of any person or for injury to persons or property, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

139. Upon information and belief, Defendant John Doe issued an insurance policy to Kolbe, which covers liability for negligence, and which policy was in effect during the Class period.

140. Because Defendant Kolbe acted negligently in designing, manufacturing, selling, advertising, and warranting a defective product to Plaintiffs and the Classes, as alleged herein, Plaintiffs and members of the Classes are entitled to recover economic and compensatory

damages from Defendant Kolbe, in an amount to be determined at trial.

141. Pursuant to Wisc. Stat. Ann. § 632.24, Defendant John Doe is, in turn, liable to Plaintiffs and Class members, up to the amount stated in the policy issued to Kolbe. Plaintiffs and Class members are entitled to recover such amount directly from John Doe, Kolbe's insurance carrier.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray that this case be certified and maintained as a class action and for judgment to be entered upon Defendants as follows:

1. For economic and compensatory damages on behalf of Plaintiffs and all members of the Classes;
2. For restitution;
3. For actual damages sustained or treble damages;
4. For punitive damages, as otherwise applicable;
5. For injunctive and declaratory relief, as claimed herein;
6. For reasonable attorneys' fees and reimbursement of all costs for the prosecution of this action; and
7. For such other and further relief as this Court deems just and appropriate.

### **JURY DEMAND**

Plaintiffs hereby demand a trial by Jury on all issues so properly triable thereby.

Dated: February 12, 2014

Respectfully submitted,

/s/ Dixon R. Gahnz

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*Attorneys for Plaintiffs*

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Wisconsin

MARY and MICHAEL HALEY, et al.

Plaintiff

v.

KOLBE & KOLBE MILLWORK CO., INC. and JOHN DOE INSURANCE CARRIER

Defendant

Civil Action No. 14-CV-99

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) KOLBE & KOLBE MILLWORK CO., INC. c/o MICHAEL SALSIEDER 1323 SOUTH 11TH AVENUE WAUSAU , WI 54401

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Dixon R. Gahnz LAWTON & CATES, S.C. Ten East Doty Street, Suite 400 Madison, WI 53701 Telephone: 608-282-6200 DGahnz@lawtoncates.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: \_\_\_\_\_

Signature of Clerk or Deputy Clerk

Civil Action No. 14-CV-99

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_ .

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_ , who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify):* \_\_\_\_\_ .

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00 \_\_\_\_\_ .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Mary & Michael Haley, Leslie & James Hal Banks, Annie & Brian Buinewicz, Gary Samuels and Matthew Deller, on behalf of themselves and all others similarly situated

(b) County of Residence of First Listed Plaintiff Antrim County, Michigan (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

See Attached

DEFENDANTS

Kolbe & Koble Millwork Co., Inc. and John Doe Insurance Carrier

County of Residence of First Listed Defendant Marathon County (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Property, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from another district (specify), 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. §1332(d)(2)

Brief description of cause: Consumer class action regarding defective windows that fail before the life of their warranties

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23, DEMAND \$, CHECK YES only if demanded in complaint: JURY DEMAND: X Yes [ ] No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE 02/12/2014 SIGNATURE OF ATTORNEY OF RECORD s/ Dixon R. Gahnz

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**

## Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

**I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, (except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

**II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

**III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

**IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

**V. Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

**VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.**

Example: U.S. Civil Statute: 47 USC 553  
Brief Description: Unauthorized reception of cable service

**VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

**VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.

*Mary and Michael Haley et al. v. KOLBE & KOLBE MILLWORK CO., INC. and JOHN DOE  
INSURANCE COMPANY*

**ATTACHMENT FOR CIVIL COVER SHEET**

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