

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH CAROLINA
EASTERN DIVISION**

FREDERICK C. ROBERTIE, and)
VERONICA B. ROBERTIE, individually)
and on behalf of all others similarly)
situated,)

PLAINTIFFS,)

vs.)

GAF BUILDING MATERIALS CORP.)

DEFENDANTS.)

Case No. 4:14-cv-145

CLASS ACTION COMPLAINT

(JURY TRIAL DEMANDED)

Plaintiffs, Frederick C. Robertie and Veronica B. Robertie, by and through their undersigned counsel, on behalf of themselves and all other persons and entities similarly situated, alleges:

INTRODUCTION AND SUMMARY OF ACTION

1. Plaintiffs bring this action both individually and as a proposed class action against Defendants, GAF Building Material. (“Defendant” or “GAF”), on behalf of themselves and all other similarly situated persons and entities, who currently own, per the class definition, GAF Elk Cross Timbers decking. (hereinafter collectively referred to as the “Class” or “Class Members”).

2. Plaintiffs and the Class are owners of structures that currently contain GAF Elk Cross Timbers decking (hereinafter “Cross Timbers Decking”). Unknown to Plaintiffs and the Class, GAF’s Cross Timbers Decking contain defects that allow water to penetrate and leak into the interior of structures and behind cladding, resulting in premature deterioration of building components and other physical damage to both the decking and the surrounding structure. GAF’s acts and omissions in connection with its design, manufacture, marketing, advertising,

and sale of its Cross Timbers Decking constitute common law fraud/constructive fraud by omission/concealment, negligence, negligent misrepresentation, and breach of express and implied warranties.

PARTIES

3. Plaintiffs Frederick and Veronica Robertie are, and at all times relevant hereto, have been citizens and residents of Brunswick County, North Carolina. Specifically, Plaintiffs reside in Bolivia. Plaintiffs' home contains a deck and porch constructed of GAF Cross Timber Decking. The Cross Timber Decking contains defects which has caused the decking and porch framing to twist and warp, which affects the structural integrity and physical appearance of the deck, and damages the home. Moreover, a diagonal deck girder has pulled away from the house approximately an inch. Accordingly, Plaintiffs must replace their Cross Timbers Decking as well as repair the other property damage caused by Defendant's defective decking at a significant cost to Plaintiffs. True and correct photographs of Plaintiffs' deck and porch are reproduced below.





4. Defendant GAF Building Materials Corporation is a corporation organized and existing under the laws of the State of Delaware with its headquarters in Wayne, New Jersey.

5. Initially, Cross Timbers Decking was originally manufactured, marketed and sold by Elk Corporation and/or Elk Composite Building Products, Inc. (collectively "Elk"), but on or about February 23, 2007, Elk and GAF announced that they had officially merged and GAF was a mere continuation and/or successor in interest of Elk.

6. Further, upon merging with Elk, GAF continued to manufacture, advertise, market, distribute and sell Cross Timbers Decking, trade upon and benefit from the goodwill of Elk and held itself out to customers as continuing to manufacture, advertise, market, distribute and sell Cross Timbers Decking.

7. GAF is also a successor in liability for any claims that may have arisen prior to the merger between Elk and GAF. Therefore, at all times relevant hereto, GAF designed,

marketed, advertised, warranted, sold, distributed, and/or delivered Cross Timbers Decking in Indiana and throughout North Carolina and the United States.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the aggregate amount in controversy exceeds \$5,000,000, exclusive of interest and cost, and because GAF is a citizen of another State.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Plaintiffs and members of the proposed Class reside in this District. Furthermore, GAF regularly transacts and solicits business in this District.

COMMON FACTUAL ALLEGATIONS

10. GAF is a leading manufacturer of residential exterior building products in North America.

11. Until 2011, GAF designed, manufactured, marketed, advertised, warranted and sold its Cross Timbers Decking throughout much of the United States, including North Carolina.

12. In conjunction with each sale, GAF marketed and advertised that the Cross Timbers Decking:

- (a) satisfied the third-party certification and labeling requirements promulgated by the International Residential Code (“IRC”); and
- (b) were merchantable, were reasonably fit for the ordinary purpose for which such goods were to be used, were free from defects in materials and workmanship and were acceptable in trade for the product description.

13. GAF knew or should have known that its Cross Timbers Decking was defective in design, were not fit for their ordinary and intended use, were not merchantable, and failed to

perform in accordance with the advertisements, marketing materials and warranties disseminated by GAF or with the reasonable expectations of ordinary consumers.

14. GAF represented that its Cross Timbers Decking was in compliance with all industry standards and applicable building codes such as the IRC, ASTM codes, and the ICC.

GAF's Defective Cross Timber Decking

15. Upon information and belief, GAF has sold, directly or indirectly (through distribution/trade partners), Cross Timbers Decking that has been installed in hundreds or thousands of decks in the State of North Carolina.

16. Through various forms of media (including, by way of example, television, print ads, brochures, the Internet, on-site brochures and promotional documents, catalogs, and/or product labeling) as well as by oral affirmations, GAF marketed, advertised and warranted that the Cross Timber Decking was merchantable, fit for the ordinary purpose for which such goods were used and was free from defects in materials and workmanship.

17. The Cross Timbers Decking, however, contains defects that allow for the decking to warp, twist, shrink, and release an oily and unsightly residue to the surface of the decking. The warping, twisting, and shrinking of the Cross Timbers Decking is to the decks on which it is installed as well as to the home to which the decks are attached. The Cross Timbers Decking defects cause the deck to twist, buckle, and in some cases detach from the house or building to which the Cross Timbers Decking is attached. This condition reduces the effectiveness and performance of the Cross Timbers Decking and renders it unable for the ordinary purposes for which it is intended. Further, the defects allow for the Cross Timbers Decking to damage other surrounding property abutting the structures in which they are installed.

18. Plaintiffs, the Class Members, and/or their predecessors, builders, and/or

assignors would not have purchased and/or would not have authorized the purchase of the Cross Timbers Decking for installation in their homes had they known or been informed of the material defects in the Cross Timbers Decking.

19. GAF knew or should have known of defects existing within the Cross Timbers Decking and the potential for warping, staining, twisting, and shrinking from said defects.

20. Despite such knowledge, GAF continued to manufacture, distribute, market and sell the Cross Timbers Decking to unsuspecting consumers, builders and/or homeowners across the state of North Carolina as well as the country.

21. Further, despite such knowledge, GAF failed to notify all purchasers of the Cross Timbers Decking of the defects or provide uniform relief even though GAF can identify substantially all of its customers who have the defective Cross Timbers Decking (through the records of GAF and its distribution/trade partners).

22. Instead, GAF has concealed, suppressed, omitted, or otherwise knowingly and intentionally failed to disclose to Plaintiffs and the Class Members, whose homes contain GAF Cross Timbers Decking that the Cross Timbers Decking are defective as described herein and will not prevent water intrusion.

23. Consumers, including Plaintiffs and the Class Members, reasonably expect that their decking will not warp, twist, shrink, or stain itself due to defective design and manufacturing processes.

24. Further, consumers reasonably expect that if GAF knew it had an inherent defect/defects in its decking that would potentially result in warping, twisting, shrinking, or staining that it would disclose this defect to consumers.

25. Even though GAF can identify substantially all of its customers who have the

defective Cross Timbers Decking, GAF has never: (1) publicized the defective and dangerous nature of the Cross Timbers Decking; (2) taken affirmative steps to notify its customers that the Cross Timbers Decking was defective and could potentially cause significant damage to other property around the decking; and/or (3) recalled the defective Cross Timbers Decking.

26. In sum, GAF knew, prior to the sale to Plaintiffs and the Class Members that, for the indefinite future, there was a substantial defect and that its Cross Timbers Decking would warp, twist, shrink, stain, and cause consequential damage. Thereafter, the undisclosed defect materialized – Plaintiffs’ deck (and many others) have warped, twisted, shrunk, and stained – and Plaintiffs and the Class Members have been damaged in the amount it will cost, or they paid, to repair the condition.

27. Cross Timbers Decking were purportedly sold with a limited warranty that Plaintiffs and Class Members never saw or had an opportunity to negotiate. Therefore, since there was no meeting of the minds and/or assent to the terms of the purported limited warranty, Plaintiffs and Class Members disclaim the limited warranty and there is not a contractual agreement between Plaintiffs, Class Members and GAF regarding the terms of the limited warranty.

28. In addition, the Cross Timbers Decking have caused damage to other property within Plaintiffs’ and Class Members’ residences/structures because the decking allow for water intrusion into the interior building components surrounding the decking.

29. Plaintiffs and Class Members have not received the value for which they bargained for when they purchased the Cross Timbers Decking. There is a substantial difference in value between the Cross Timbers Decking as represented and the Cross Timbers Decking as purchased.

30. The value of structures containing the Cross Timbers Decking has diminished as a result of the Cross Timbers Deckings' defective condition. In order to sell their homes, Plaintiffs and Class Members would either have to disclose the present condition of the Cross Timbers Decking and accept a reduced sales price or pay for the cost to repair the Cross Timbers Decking.

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

31. GAF is estopped from relying on any statutes of limitation or repose by virtue of its acts of fraudulent concealment. Upon information and belief, GAF had knowledge its Cross Timbers Decking were defective for years and has actively concealed from purchasers/owners of the Cross Timbers Decking and/or failed to alert the purchasers/owners of the defective nature of the Cross Timbers Decking.

32. GAF had a duty to inform Plaintiffs and Class Members of the defects described herein, which it knew or should have known. Notwithstanding its duty, GAF never disclosed the defects or misrepresentations to Plaintiffs, the Class Members and/or their respective builders.

33. Despite exercising reasonable diligence, Plaintiffs and the Class Members could not have discovered the defective condition of the Cross Timbers Decking.

34. Given GAF's failure to disclose this non-public information about the defective nature of the Cross Timbers Decking – information over which it had exclusive control – and because Plaintiffs and the Class Members therefore could not reasonably have known that the Cross Timbers Decking was defective, GAF is estopped from relying on any statutes of limitations and/or repose that might otherwise be applicable to the claims asserted herein.

CLASS ALLEGATIONS

35. Plaintiffs bring this class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following Class:

Putative Class

All persons and entities that own a structure located within the United States and/or the State of North Carolina in which GAF's Cross Timbers Wood Decking is installed.

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

36. Plaintiffs propose the Class be divided into subclasses if and as necessary to align class interests.

37. *Numerosity:* The Class is composed of thousands of persons geographically dispersed throughout the State of North Carolina, the joinder of whom in one action is impractical. Moreover, upon information and belief, the Class is reasonably ascertainable and identifiable from GAF records, GAF's customer records, and/or identifying marks on the Cross Timbers Decking.

38. *Commonality:* Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

- (a) Whether the Cross Timbers Decking is defective;
- (b) Whether the Cross Timbers Decking does not conform to the Building Code;
- (c) Whether the Cross Timbers Decking has not performed or will not perform in

- accordance with the reasonable expectations of ordinary consumers;
- (d) Whether GAF knew or should have known of the defects of the decking;
 - (e) Whether GAF concealed from consumers and/or failed to disclose to consumers the defects of the decking;
 - (f) Whether Defendants have acted or refused to act on grounds generally applicable to the Classes;
 - (g) Whether GAF should be declared financially responsible for failure to notify all Class Members of the defective nature of the Cross Timbers Decking and to pay the full costs and expenses of repair and/or replacement of the decking;
 - (h) Whether GAF knew or became aware that its Cross Timbers Decking was defective, yet continued to manufacture, distribute and sell the decking without:
 - (1) informing consumers, purchasers, builders and/or homeowners of the material defects;
 - (2) recalling the defective decking; or
 - (3) otherwise repairing the defective decking that had already been purchased;
 - (i) Whether Plaintiffs and the Class are entitled to compensatory damages, including, among other things: (i) compensation for all out-of-pocket monies expended by members of the Class for replacement of Decking and/or installation costs as well as repair/replacement of other property damage caused by the defective decking; (ii) the failure of consideration in connection with and/or difference in value arising out of the variance between the Cross Timbers Decking as warranted and the Cross Timbers Decking as purchased; and (iii) the reasonable costs to remove and replace the decking and to repair consequential damages.
 - (j) Whether GAF negligently designed and/or manufactured the Cross Timbers

Decking;

- (k) Whether Plaintiffs and the Class are entitled to replacement of their defective Cross Timbers Decking with non-defective and/or legal decking;
- (l) Whether Plaintiffs and the Class are entitled to restitution and disgorgement from GAF; and
- (m) Whether Plaintiffs and the Class are entitled to prejudgment interest, attorneys' fees and costs from GAF.

39. *Typicality*: Plaintiffs' claims are typical of the claims of the members of the Class, as all such claims arise out of GAF's conduct in designing, manufacturing, marketing, advertising, warranting and selling the defective Cross Timbers Decking, GAF's conduct in concealing the defective condition of the Cross Timbers Decking, and Plaintiffs' and Class Members' purchasing residences/structures with the defective Cross Timbers Decking.

40. *Adequate Representation*: Plaintiffs will fairly and adequately protect the interests of the members of the Class and have no interests antagonistic to those of the Class. Plaintiffs have retained counsel experienced in the prosecution of construction defect claims and complex litigation, including consumer class actions involving product liability and product design defects.

41. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court and Courts throughout North Carolina would be confronted with a

multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

42. Plaintiffs have acted on grounds generally applicable to the Class. Class certification is appropriate because GAF engaged in a uniform and common practice. All Class Members have the same legal right to and interest in redress for damages associated with the defective GAF Cross Timbers Decking.

FIRST CAUSE OF ACTION
(Negligence)

43. Plaintiffs reallege and incorporate each of the preceding allegations as though fully set forth herein.

44. Since Plaintiffs and Class Members disclaimed the limited warranty, GAF was under a legal duty to exercise reasonable care to design, manufacture and distribute Cross Timbers Decking that would conform to all industry standards and codes.

45. GAF breached its legal duty and was negligent in its design and/or manufacturer of its Cross Timbers Decking described herein. GAF's design and/or manufacture of the Cross Timbers Decking is inherently defective, in that the decking does not provide a stable surface, and instead twists and warps, causing damage to Plaintiffs' and the Class Members' residences/structures.

46. As a result of the defects described herein, decking has warped, twisted, and separated from the house or other structure to which Cross Timbers Decking is attached, causing damages to the exterior finishes, columns, walls, and other property on Plaintiffs' and the Class Members' residences/structures.

47. As a result of GAF's practices, Plaintiffs' and the Class Members' residences contain defective Cross Timbers Decking that require replacement as well as repair of damages incidental thereto.

48. GAF knew or, in the exercise of reasonable care, should have known that its Cross Timbers Decking was negligently designed and/or manufactured to allow for twisting and warping, and that such twisting and warping will cause extensive deterioration to building components as well as damage to exterior building finishes and personal property and would not perform as expected by Plaintiffs, Class Members and/or a reasonable consumer.

49. GAF knew or, in the exercise of reasonable care, should have known that its Cross Timbers Decking was negligently designed and/or manufactured.

50. GAF possessed the knowledge to cure the defect in the Cross Timbers Decking, but it continued to sell, to market and to advertise defective Cross Timbers Decking.

51. As a direct, proximate, reasonably probable and foreseeable consequence of GAF's negligent acts and/or omissions in connection with its design, manufacture and distribution of its Cross Timbers Decking, Plaintiffs and the Class Members have suffered and will continue to suffer loss and damage.

SECOND CAUSE OF ACTION
(Violation of Unfair Trade Practices and Consumer Protection Laws)

52. Plaintiffs reallege and incorporate each of the preceding allegations as though

fully set forth herein.

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

54. By selling the Cross Timbers Decking throughout the State of North Carolina and making representations regarding its product, GAF has affected commerce and trade within the State. GAF engaged in unfair or deceptive acts or practices in violation of N.C. Gen. Stat. § 75-1.1 when, in selling and advertising the Cross Timbers Decking, GAF failed to give Plaintiffs and Class Members adequate warnings and notices regarding the defect in the Cross Timbers Decking despite the fact that GAF knew or should have known of the defects described herein, with the intent that Plaintiffs and Class Members would rely upon GAF's failure to disclose the defect when purchasing the Cross Timbers Decking. Thus, GAF knew of the defective nature of the Cross Timbers Decking yet continued to sell and distribute the Cross Timbers Decking. GAF's acts and omissions possessed the tendency or capacity to mislead or create the likelihood of deception.

55. GAF knew or should have known that its Cross Timbers Decking was defective, would fail prematurely, was not suitable for use as an exterior Cross Timbers Decking product, and otherwise was not as warranted and represented by GAF.

56. GAF also engaged in unfair or deceptive acts or practices in violation of N.C. Gen. Stat. § 75-1.1 when it inspected Plaintiffs' and Class Members' homes, yet stated that the defects in the Cross Timbers Decking were only the result of insufficient installation.

57. GAF's conduct and omissions described herein repeatedly occurred in GAF's trade or business and were capable of deceiving a substantial portion of the consuming public.

58. GAF's misrepresentations, concealment, omissions, and other deceptive conduct

were likely to deceive and cause misunderstanding and/or in fact caused Plaintiffs and other members of the Class to be deceived about the suitability of GAF's Cross Timbers Decking for use as a long-lasting exterior borne building product that would be backed by warranties of up to 20 years, and that those warranties would in fact be honored by Defendant.

59. GAF intended that Plaintiffs and Class Members would rely on their misrepresentations, concealment, warranties, deceptions, and/or omissions regarding the suitability, durability, and useful life of its defective Cross Timbers Decking.

60. The facts concealed or not disclosed by GAF are material facts in that Plaintiffs and Class Members and any reasonable consumer would have considered those facts important in deciding whether to purchase the Cross Timbers Decking or purchase homes or structures constructed with the Cross Timbers Decking. Had Plaintiffs and Class Members known the Cross Timbers Decking was defective and would fail prematurely, and they would not have purchased the Cross Timbers Decking.

61. GAF's unlawful conduct is continuing, with no indication that GAF will cease.

62. As a direct and proximate result of these unfair, deceptive and unconscionable commercial practices, Plaintiffs and Class Members have been damaged in an amount in excess of \$10,000, and are entitled pursuant to N.C. Gen. Stat. § 75-16 to recover treble damages as well as attorneys' fees and costs.

THIRD CAUSE OF ACTION
(Breach of Implied Warranties)

63. Plaintiffs reallege and incorporate each of the preceding allegations as though fully set forth herein.

64. When GAF designed, manufactured, marketed, sold, and distributed its Cross Timbers Decking for use by the Plaintiffs and Class Members, GAF knew of the use for which it was intended and impliedly warranted the product to be of merchantable quality and fit for such use and that its design, manufacture, labeling, and marketing complied with all applicable requirements.

65. Plaintiff and Class Members reasonably relied upon the Defendant's representations of the product's merchantable quality and that it was safe for its intended use, and upon Defendant's implied warranty, including that it was in compliance with all applicable codes and industry standards.

66. Contrary to such implied warranties, Cross Timbers Decking is not of merchantable quality or fit for its intended use pursuant to Ind. Code Ann. §26-1-2-314, because the product is defective, as described herein, and it is unsuitable for use as an exterior decking product.

67. As a direct and proximate result of breach of implied warranty, Plaintiffs and Class Members have been damaged, and are entitled to all damages, in addition to costs, interest and fees, including attorney's fees as allowed by law.

FOURTH CAUSE OF ACTION
(Declaratory Relief)

68. Plaintiffs reallege and incorporates by reference all foregoing allegations as though fully set forth herein.

69. Plaintiffs and the Class seek declaratory relief as to the following:

(a) Whether the Cross Timbers Decking is defective.

- (b) Whether Defendant knew or had reason to know that the Cross Timbers Decking was defective.
- (c) Whether Defendant has made deceptive or false representations regarding the Cross Timbers Decking.
- (d) Whether procedures are needed to preserve the rights of Class members whose Cross Timbers Decking fail.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated in North Carolina, prays the Court enter judgment against GAF as follows:

- (a) for an order certifying the North Carolina Class, pursuant to Rule 23 of the Federal Rules of Civil Procedure, appointing Plaintiffs as representative of the Class, and appointing the undersigned law firm representing Plaintiffs as counsel for the Class;
- (b) for actual and compensatory damages sustained by Plaintiffs and the North Carolina Class;
- (c) for punitive damages;
- (d) for equitable and/or injunctive relief for the North Carolina Class;
- (e) for payment of costs of suit herein incurred;
- (f) for both pre-judgment and post-judgment interest on any amounts awarded;
- (g) for payment of reasonable attorneys' fees and expenses as may be allowable under applicable law; and
- (h) for such other and further relief as the Court may deem just and proper.

This the 13th day of August, 2014.

WHITFIELD BRYSON & MASON LLP

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