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From: "Kelly Coleman" [kelly@teammoneytrees.com]
Sent: 08/03/2010 07:50 AM AST
To: John Pendergast
Subject: RE: Mitigated Damage

Mr. Pendergast,

Apparently, we are no longer Kelly & John.

I previously stated in my data that I had mitigated the damage. BASF has never raised the issue of Mitigating the Damage over the BASF commitment to replace any future failed sealant, timely and at no cost to me. One could draw the conclusion that this could be an tact where I might be lulled into inaction because of the assurances that all will be well as stated by Mr. Walsh and MR. Schoderbek.

It is apparent from your response , that you have overlooked the section of my data supplied, regarding my exercising reasonable diligence and ordinary care in attempting to prohibit interior damages once BASF attempted to dupe me into a full release of liability with more failure occurring. Once it was obvious that BASF was trying to force me into a non compromising position and not following through with the promised repairs, I proceeded to take action. In any event I did take steps short of the undue burden of complete sealant replacement.

I enacted steps to seal areas that had fallen out of the mortar joints, pictured in photos , that have been resealed with silicone as recommended by MR. Schoderbek. I have continued to

address and re-seal additional areas as fall out of BASF sealant occurs. I am not expected and/or required, under the circumstances, to undertake undue risk and burden by embarking on a complete replacement project, with someone else's failed product, because of a breach of promise made. I, of course, am referring to the many promises and re-assurances, by MR. Walsh, that BASF had committed to pay for any future sealant replacement and bound this promise with an agreement made with the outgoing sealant installers, to return and be paid by BASF to replace any future failed sealant. Bear in mind this sealant had a president set of past failure, at that point of assurance and agreement, since I learned near the end of the job that Mr. Walsh had already taken care, the replacing of 3 prior failures, Mr. Walsh had samples taken to test and told me that the sealant failure was bad batches of product. Mr. Walsh assured me, many times, that no other sealant would fail however if it did, it would be timely replaced at no expense to me. I remind you and will more times in the future that this product was purchased on the reliance and data stating, use as intended, for all climates and with a 20 year expected life. BASF has admitted that they do not have a suitable product and recommended something that they do not have in their line- SILICONE, like the silicone in the glass curtain-wall that has, so far weathered over 25 years of service without failure.

The root cause of the damage in the photos supplied is BASF failed products that was purchased, in good faith with a life expectancy of up to 20 years regardless I have taken steps and acted with reasonable dispatch to limit water infiltration. The problem in accomplishing this task to the fullest extent is that we are in Florida and we have a lot of wind driven rain that can blow through the thousands of cracks, therefore to eliminate 100% of the water infiltration, which was the job of the BASF sealant recommendation is not possible, short of, complete replacement, due to hundreds of thousands of dollars and thousands of cracks in the sealant which can no longer stop wind driven rain, under the circumstances it is not expected or required of me because it would impose an Undue burden.

I believe you are aware, or should be, that the settlement sum offered previously by BASF was in exchange for a complete release of liability. it was also a token amount to replace a small portion of the failed sealant, with a less expensive BASF product, less expensive to purchase and much less expensive to install or apply, than the Sonolastic 150 tint base. In spite of the fact that your team viewed samples of failed NP1 and NP2 used at the cant joints, in their field inspection prior to April 30, 2009, Pete Walsh still recommended replacement with NP1-NP2 on April 30, 2009 (under tab 2 of my data) products that had already been viewed, failed by BASF but not addressed as opposed to the SONOLASTIC 150 tint base used in the brick mortar joints for waterproofing. These NPI-NP2 products had not only been viewed as failed, but are also a single part, non color matched product that was not equal to the Sonolastic 150 tint base that was color matched. Switching to the cheaper and different color NP-1 NP2 would have looked unsightly, even if it was a product that would not fail.

The cost quote Walsh obtained for BASF, January 9, 2009 was for replacement of some areas that had failed, which were viewed by the BASF team, roughly 16%, had failed at the time of inspection which It did not include the greater amount of 84% of the Sonolastic 150 tint base

work that failed following the Field inspection. This 84% is the Sealant that Mr. Schoderbek stated :“ **We also feel that the remainder of the sealant that is in good shape will continue to perform and not pose any future issues**”. Immediately following the above statement, Mr. Schoderbek stated that silicone should be used, which BASF does not have.

So we have The territory manager **recommending an inferior product that had already been viewed as failed** and the sr. technical person stating that BASF did not have any product to use, to use SILICONE manufactured by others.

The downside of the offer made by BASF was due the fact that it was only \$15,515.00 to replace 16% of the Sealant work whereas, I have sent proof of actual Purchases of BASF Sealants in the amount of \$35,707.50 without regard escalations noted, and **\$202,660.58 in labor paid**, without regard to escalations noted. This ratio is approximately 6 to 1. The offer was \$15,515.00 and the labor quote to BASF was \$13,180.00 to install the **less expensive, to install, one part, non matching color products that had already failed.** The material allowance differential was \$2,335.00 in materials or about 1/6th of the BASF offer.

The Ratio supports three things:

- 1) That the paid labor vs Material cost of the original installation was the same ration of 1 to 6
- 2) The Ratio is proof positive of the fact that the area BASF was proposing to pay, to have replaced, was around 16% of the total.
- 3) The Ratio sets out that the, yet to fail areas, stated to perform with no future issues, that did, in fact, later fail, is 84% of the Sealant work and was not a part of the proposed settlement.

BASF attempted to tell me through MR. Walsh, at another home meeting, between Walsh and myself, that the plan was to replace the sealant in sections and this was phase one, since, at that time, Walsh was fully aware that the balance of 84% was failing. What he told me was a lie since that language was not included in the proposal which contained a complete release of liability and no provision, to cover the reaming 84% of the original sealant installation that Mr. Schoderbek said will continue to perform but began to fail, soon after his field inspection.

I later explained this fact to Steve Nickell, your claims man, and he agreed to come back within 2 weeks to verify this fact, but instead involved you which, in my opinion, suggest that he was told, don't bother, if Coleman claims it has since failed, it has. The follow through from Nickell was actually your first contact to me.

My Back to you,

Kelly R. Coleman