

EXHIBIT E

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

2010 JUN 10
IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
Civil Action No.: 2002-CP-1377

TIMOTHY TREON and his wife, JANE TREON,)
P. JENNINGS SCEARCE, and STEPHEN)
CHRISTIAN, individually and on behalf of others)
similarly situated in the State of South Carolina,)
Plaintiffs,)
v.)
DRYVIT SYSTEMS, INC.,)
Defendants)

**ORDER AND JUDGMENT
GRANTING FINAL
APPROVAL OF SETTLEMENT
AGREEMENT**

INTRODUCTION¹

This is a complex products liability action filed pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. By Order dated November 13, 2009 and filed November 17, 2009, the Court granted the Plaintiffs' Motion for Preliminary Approval of Settlement and scheduled a Fairness Hearing for June 7, 2010. The purposes of the Fairness Hearing were to determine whether the proposed settlement between the Class through its Class Representatives and Dryvit Systems, Inc. (the "Settling Defendant") is fair, reasonable, and adequate under the circumstances, to hear and determine any objections to the Settlement Agreement, to receive evidence on the basis and rationale for the Settlement Agreement and the ability of the Parties to practically implement the terms of the Settlement Agreement, to receive evidence on implementation of the Notice Plan and information about its actual effectiveness and adequacy and compliance with Due Process and applicable law under Rule 23, to determine whether the

¹Capitalized terms used in this Order and Judgment have the meanings set forth in the "Definitions" section of the Settlement Agreement or as defined in this Order and Judgment.



requirements of Rule 23 and applicable law have been met for the discontinuance and dismissal of the class action claims against Settling Defendant, to appoint the Special Master as provided for in the Settlement Agreement and to otherwise provide for implementation of the Settlement Agreement, to consider requests for compensation for expenses and service of Class Representatives, and to consider any other matters raised by the Parties. The Court will also consider and address the allocation of compensation and expenses to the Class Representatives.

The Court also set for consideration at the Fairness Hearing, any application or request for attorneys' fees as well as litigation costs and expenses of Class Counsel. The Court will address issues relating to allocation among Class Counsel for fees, costs and expenses by separate order.

Upon convening the Fairness Hearing at the appointed time in the Beaufort County Courthouse, the case was called in accordance with statutory requirements and objections to the Proposed Settlement were invited, but none were raised. Therefore, having heard from the Parties, the Parties' submissions, the settlement documentation, considered the evidence presented at the hearing, considered the rules, applicable law, arguments of counsel and deliberated thereon, the Court grants Final Approval to the Settlement Agreement and makes such other orders as appropriate to implement its terms as set forth herein.

BACKGROUND

Since a hearing conducted on December 5, 2005, the Court has presided over extensive hearings and has conducted settlement conferences under Rule 16 of the South Carolina Rules of Civil Procedure. The Parties have engaged in hard fought litigation, extensive and thorough document and other discovery, and participated in time consuming and often contentious arms length negotiations for a period of more than four (4) years. The Court observed and presided



over sufficient discovery, motions practice, legal arguments, briefing and other proceedings to determine that the Parties were sufficiently informed about the facts and the law to make reasonable decisions regarding settlement and the alternatives to settlement. During the negotiations the Parties kept the Court well informed of the status of the negotiations and the difficulties they confronted in reaching a settlement. The Parties were aided, from time to time, in their negotiations by mediators and by this Court.

The Settling Defendant, Dryvit Systems, Inc. and Class Representatives entered into a Settlement Agreement (the "Settlement Agreement"), effective November 12, 2009, intended to resolve this litigation pending in South Carolina. Class Representatives filed a Motion for Preliminary Approval of the Settlement Agreement with attached exhibits. On October 8 and 9 and November 12 and 13, 2009, the Parties appeared before this Court in the Spartanburg County Courthouse² to explain the Settlement Agreement to the Court in support of the request for preliminary approval of the settlement. The Court considered the Settlement Agreement and exhibits, the argument of counsel, the voluminous filings, and the Court's thorough knowledge of the case in deciding to grant the Motion for Preliminary Approval of the Settlement Agreement. By Order dated, November 13, 2009, this Court granted Preliminary Approval, authorized Notice to the Class pursuant to the Notice Plan and scheduled the Fairness Hearing.

The Settlement Agreement, together with the exhibits attached thereto, set forth the terms and conditions for the settlement and dismissal with prejudice of this Action against the Settling Defendant. This Action is one in which the Court first presided over vigorous litigation between the Parties including both discovery and motions practice, then presided over a period of negotiations between the Parties which resulted in this Settlement Agreement and now has presided over a period of Notice to the Class, opportunity for Class Members to exclude

² See Order dated August 31, 2006.



themselves and opportunity for Class Members to object to the Settlement Agreement or any of its terms. As a result, the Court has extensive knowledge of the facts and procedural history of this Action. That knowledge has given the Court a unique vantage point from which to evaluate the reasonableness and fairness of the terms and conditions of the Settlement Agreement and its overall fairness to the Class.

FINDINGS OF FACT

1. This action was commenced on August 12, 2002. A Third Amended Complaint was filed by Intervening Class Counsel on November 17, 2009 and presents not only Plaintiffs' initial allegations in this Action but also allegations asserted in a separate civil action brought by intervening Class Counsel entitled, *Treon, et al. v. Dryvit Systems, Inc., et al.*, 2008-CP-07-0774 also filed in the Beaufort County Circuit Court. The claims against Dryvit in the 0774 case were dismissed without prejudice by Order of Judge Marvin Dukes dated November 9, 2009 (amended by Order dated November 19, 2009).

2. In these actions and currently in the Third Amended Complaint, Plaintiffs sought recovery for alleged damages to Structures owned now or formerly by Plaintiffs and by similarly situated Class Members as well as other relief and damages from Settling Defendant. The claims asserted by Plaintiffs include negligence, breach of warranty, Unfair Trade Practices, fraudulent concealment, conspiracy, and aiding and abetting a breach of fiduciary duty.

3. Defendant Dryvit Systems, Inc. denies and disputes the material allegations in this Action, the 0774 action and each of the various Complaints, and denies that it owes any damages, compensation or other relief to Plaintiffs or Class Members.

4. On September 3, 2002, this Action was certified as a class action, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure, by the Honorable Thomas Kemmerlin in the Court of Common Pleas for Beaufort County, South Carolina. The Class Certification Order, dated August 30, 2002, *nunc pro tunc*, defined the class as:

"All persons who own or have owned a one- or two-family residential dwelling or townhouse (hereinafter 'structure') in the State of South Carolina who would be a member of the Class purportedly created in the action pending in Tennessee, Posey, et al. v. Dryvit Systems, Inc."

and

"All persons who own or have owned a structure in the State of South Carolina on which an Exterior Insulation and Finish System ('EIF system') has been installed or any previous owner of such structures who incurred any costs or expenses to inspect, repair or replace the EIF system or other property damages by the EIF system at any time from January 1, 1989, until the date the Defendants' continuing conducts is terminated (the 'Class Period')."

5. By Order dated November 17, 2009, the Court re-certified this Action with a settlement Class consisting of:

All Persons who, as of the Notice Date, own or owned a Structure on which a Dryvit EIFS was installed during the Class Period.

This Class is more fully described in the Settlement Agreement and includes Structures upon which Dryvit EIFS was installed between January 1, 1989 and September 3, 2002.

6. The Court notes that the various class definitions in this action use similar but different wording. The Court finds that the current Class definition as set forth in the Settlement Agreement encompasses all of the class members of the class originally certified by this Court on September 3, 2002 or thereafter and that the Notice to the current Class as more fully described below was effective as Notice to all members of previously defined classes in this Action.

7. The Court has previously found and reaffirms that the named Plaintiffs are adequate Class Representatives for the Class. Mr. and Mrs. Treon and Mr. Scearce have served as Class Representatives since intervening in December of 2005. The Court has observed these representatives, either directly or through their counsel, vigorously and ably prosecuting this case



on behalf of the Class. Mr. Christian joined as a Class Representative as part of the Settlement process. While the Court has had less opportunity to observe Mr. Christian, his shorter service has also been able and beneficial to the Class and to the settlement process.

8. The following counsel were designated by the Court as Class Counsel: (a) Gregory M. Alford, Esq., (b) Thomas J. Finn, Esq., (c) Thomas E. Williams, Esq., (d) Donald Jonas, Esq., (e) Robert B. (Sam) Phillips, Esq. of the Finkel Law Firm, LLC (Intervening Class Counsel), and (f) Francis E. Grimball, Esq. of the Mullen Wylie law firm (an Original Class Counsel); and pursuant to the Order for Preliminary Approval of Settlement, this Court ordered submission of Class Counsel's application for an award of attorneys' fees and costs to be presented as part of the June 7, 2010 Fairness Hearing.

9. Since December 5, 2005, this Court has had numerous opportunities to directly observe these lawyers and the Court finds that the Class has been provided outstandingly diligent and prompt representation by these attorneys, in the aggregate.

10. The Court finds that the Class has been adequately represented as to this Settlement Agreement and its terms and otherwise sufficiently for an attorney's fee in the amount contemplated by the terms of the Settlement Agreement.

11. Even though this Court makes the finding in paragraph 9 as to the representation by Class Counsel "in the aggregate" since December 5, 2005, this Court is aware that the attorneys have numerous ongoing disputes regarding the conduct of Original Class Counsel including (i) the pending Intervening Class Counsels' Motion to Disqualify, and (ii) an Opposition by Intervening Class Counsel on behalf of the Class Representatives to the appropriateness of Mullen Wylie, LLC being apportioned a part of the herein approved attorney fees. These disputes have not been resolved and the Court does not resolve them by this Order.



The Court simply finds here that the Class has been adequately represented as to the Settlement and that these disputes have not prevented the Settlement achieved from being fair and adequate to the Class under all the circumstances. The Court makes no specific finding here as to the adequacy or inadequacy of representation in this case by any individual attorney or attorneys reserving those issues for later determination. The Court is informed that there is no dispute among existing Class Counsel that Intervening Class Counsel's representation has been adequate and materially beneficial in reaching a Settlement for the benefit of the Class, even though, again, dispute does exist as to the appropriateness of one present class counsel being allocated an award and distribution from the attorneys fees and costs approved herein.

12. The Court further specifically holds that this Order is without prejudice to the rights of Intervening Class Counsel and Original Class Counsel to present any fact and make any argument concerning the distribution of fees and costs. In support of this finding, the Court notes that Class Counsel, collectively, have stipulated that with the exception of paragraph 30, nothing stated or omitted from this Order may be used in any subsequent motion or hearing in support of or in an effort to prevent the award or distribution of attorneys fees and costs.

13. Subject to paragraph 11, the Court finds that Class Counsel in the aggregate has adequately represented the Class as to the Settlement Agreement and its terms and otherwise sufficiently for an attorney's fee in the amount of \$995,000.00 contemplated by the terms of the Settlement Agreement. Of that amount, the Court finds that \$82,000.00 was advanced by Dryvit to Class Counsel to defray a portion of the cost of the Notice Plan.

14. Since the intervention, the Parties have contested this case vigorously. Class Counsel has engaged in extensive discovery and motions practice related to the many issues presented in the Complaints and by Defendants' defenses. As to other issues, EIFS litigation is



mature and ripe litigation which has been the subject of many individual lawsuits both in South Carolina and elsewhere as well as the subject of a number of class actions. This process has informed the Parties and the Court sufficiently about the facts and law pertaining to Plaintiffs' claims to allow the Parties to negotiate an arms length settlement of this Action and all issues presented herein and to provide Class Representatives with sufficient basis to knowingly and voluntarily evaluate and agree to settlement terms on behalf of the Class. The process also has provided the Court with sufficient knowledge and understanding of the applicable facts and law to allow for its review and evaluation of the fairness and adequacy of a settlement of this Action and to otherwise undertake those tasks required of the Court.

15. As a result of arm's length intensive, lengthy, hard fought, and often contentious negotiations between the Parties, beginning in early 2009 and spanning months, the Parties reached a settlement that, under the circumstances, provides substantial benefits to Class Members, in return for a release, a Bar Order, and dismissal of all the claims at issue in this Action against the Settling Defendant. On November 13, 2009, the Court preliminarily approved the resulting Settlement Agreement subject to review and evaluation at a Fairness Hearing with the benefit of comments and objections from Class Members as well as from the presentation of supporting evidence and argument from counsel for the Parties.

16. On June 7 and 8, 2010, the Court held a Fairness Hearing at the Beaufort County Courthouse, Courtroom 2 as provided in the Notice and in this Court's Order dated November 13, 2009. At that hearing counsel for all Parties, the Class Representatives, and other Persons appeared and were heard. The Court heard evidence as detailed more fully below and arguments from counsel and others desiring to speak to the terms of the Settlement Agreement, the resolution of this Class Action, the adequacy of the Notice and other pertinent matters.



17. In the Court's November 13, 2009 Order, a deadline for objecting was set and a procedure for communicating objections was established. As of the deadline for the filing of objections, no objections were filed.

18. In the Order Granting Preliminary Approval of the Settlement Agreement, this Court approved a Notice Plan, Class Notice and a Summary Class Notice, designed to provide Class Members with Notice of this Class Action lawsuit and the Settlement Agreement. The Court approved Notice Plan provided for access to the Notice and Claim Forms, through direct mail, a website, newspaper and other advertising, and a toll-free number to provide the best notice practicable under the circumstances to reach current and former owners of Dryvit EIFS clad Structures in South Carolina.

19. At the Fairness Hearing, the Court received evidence about the implementation of the Notice Plan and its actual effectiveness. That evidence was provided by the Affidavit of Sara DiGiusto Sewell, employed by Post No Bills, a national media company, as an expert in the mass dissemination of information to consumers and identifiable groups. Based upon her testimony on November 12, 2009 and the evidence of her qualifications and experience, the Court has previously qualified her as an expert in this field and found that her opinion testimony would be of assistance to the Court as the finder of fact.

20. Rather than relying on "traditional" notice in the legal classified section of a newspaper, the Notice Plan, as implemented, in this matter relied on print ads run in the main body of select newspapers and "banner ads" placed on those newspaper's websites that linked to the Settlement's website, www.SCstucco.com. The Notice Plan was designed to attract the attention of the target audience and direct them to the Settlement's website to pursue additional information they needed to understand and assert their legal rights. This approach was especially

important in this matter because the average homeowner may not be able to either determine the manufacturer of a home's EIFS or determine if there is any latent moisture damage behind the EIFS.

21. The Court finds that Post No Bills designed a Notice Plan to reach the largest possible number of Treon Class Members in a cost effective manner by: (1) a direct mailing of the court-approved Short Form Notice to more than 8,000 known or potential class members, (2) providing notice of the Treon settlement to professional organizations whose membership may include, or be in contact with, possible class members, (3) development of a professional interactive website to disseminate notice to the Class, answer their questions, and assist them in the settlement process, and (4) placement of a compelling notification and call to action in the print and on-line versions of the following local newspapers:

Statewide > The State (www.thestate.com)
Charleston > Post and Courier (www.postandcourier.com)
Florence > The Morning News (www.scnow.com)
Greenville > The Greenville News (www.greenvilleonline.com)
Myrtle Beach > The Sun-News (www.thesunnews.com)
Spartanburg > Spartanburg Herald Journal (www.goupstate.com)
Low Country > Beaufort Gazette/Island Packet (www.islandpacket.com),

22. The Court finds that the ¼ page advertisement designed by Post No Bills for placement in the main body of the seven (7) newspapers listed above was effective in reaching the primary and secondary targets of the Notice Plan. Unlike the circulation of most local newspapers which is not independently audited, the Notice Plan relied on what are known as Audit Bureau Circulation ("ABC") audited newspapers because their readership can be quantified and an opinion can be rendered about who will likely receive a particular message. The Notice Plan's ¼ page newspaper ad ran in the following newspapers on the indicated days:

Florence Morning News – Florence, SC > 1/10/10, 1/17/10
Greenville News – Greenville, SC > 1/10/10, 1/17/10

Island Packet/Beaufort Gazette – Low Country > 1/10/10, 1/17/10, 1/24/10, 1/31/10
Myrtle Beach Sun News – Myrtle Beach, SC > 1/10/10, 1/17/10
Post and Courier – Charleston, SC > 1/10/10, 1/17/10
Spartanburg Herald-Journal – Spartanburg, SC > 1/10/10, 1/17/10
The State – Statewide circulation > 1/10/10, 1/17/10, 1/24/10, 1/31/10.

To catch the attention of potential class members and direct them to the Treon settlement's website, www.SCstucco.com, Post No Bills designed and posted a banner ad for use on the following sites. The number of times and the date the banner was displayed on the site (impressions) are indicated below:

Florence Morning News (www.scnow.com) 160,000 impressions, Jan. 4-18, 2010
Greenville News (www.greenvilleonline.com) 150,000 impressions, Jan. 4-18, 2010
Island Packet (www.islandpacket.com) 140,000 impressions, Jan. 4-18, 2010
Myrtle Beach Sun News (www.thesunnews.com) 100,000 impressions, Jan. 4-18, 2010
Post and Courier (www.postandcourier.com) 140,000 impressions, Jan. 4-18, 2010
Spartanburg Herald (www.goupstate.com) 140,000 impressions, Jan. 4-18, 2010
The State (www.thestate.com) 555,700 impressions, Jan. 4-31, 2010.

Post No Bills created a professional website for the Treon Settlement which provided class members with detailed information about both the settlement and litigation that lead to it. The website provided class members with all of the forms necessary to file a successful claim along with answers to the most frequently asked questions. To help class members understand the settlement and the claims dispute resolution process, the website contained an easy to use email link so that class members could ask their question directly to the lawyers who represent the Class. A toll free number and fax contact number were also provided for those who wished to ask a question by a more traditional method.

23. Based upon this evidence, Ms. Sewell's prior testimony and its extensive knowledge of this case, the Court finds that Notice to the Class exceeded the Notice ordered and described in the Notice Plan and that the Notice was reasonably calculated to provide, and was effective in providing, the best practicable notice to the Class of both this Class Action lawsuit



and the Settlement Agreement. The Court further finds that the Notice adequately explained a Class Member's right to exclude himself or herself from the Class and provided a reasonable means of doing so. The Notice also informed Class Members of their right to object to the Settlement Agreement and provided an effective means of doing so.

24. Any person who wished to be excluded from this Class Action was provided an opportunity to exclude themselves by mailing a Request for Exclusion to Settling Defendant. The Court was provided a copy of all such Requests for Exclusion as part of an affidavit filed by Settling Defendant. The Court has reviewed the Request for Exclusion forms and the evidence. Based upon this review, the Court finds that those persons and Structures listed on Exhibit A timely, properly and validly excluded themselves from this Action and from any and all Benefits provided by the Settlement Agreement. The Court further finds that all other purported Requests for Exclusion were ineffective and are disallowed.

25. Those Persons who timely, properly and validly excluded themselves from this Action have no rights under the Settlement Agreement, are not bound by the Settlement Agreement and shall receive no Benefits from the Settlement Agreement or this Action. Settlement Class Members do not have any further opportunity to exclude themselves from this Action or to avoid being bound by the results of this Action except with the express consent of the Settling Defendant to be provided or not in Settling Defendant's sole discretion. The Settlement Agreement provides that an excluded former Class Member may request to revoke his or her election to be excluded by mailing a letter to the Settling Defendant requesting to revoke a Request for Exclusion. Any Person who elected to be excluded from this Action and as to whom Settling Defendant does not consent to revocation, as provided in the Settlement Agreement, has no rights under the Settlement Agreement.

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26. The Settlement Agreement provided that Settling Defendant had the option of terminating the Settlement Agreement in the event the number of timely, proper and valid Requests for Exclusion exceed a specified number. That number was not exceeded and the Settling Defendant cannot terminate the Settlement Agreement on this basis.

The Fairness of the Settlement Agreement

27. At the Preliminary Approval Hearing and the Fairness Hearing, Class Counsel submitted evidence to the Court regarding the terms of the settlement, the fairness and adequacy of that settlement to the Class, the risks of litigation as an alternative to the settlement, the evaluation of the Settlement Agreement by the Class Representatives, the ability of Settling Defendant to comply with the settlement terms, the ability of the Class to comply with the settlement terms, the ability of the settlement to be practically and fairly implemented, the science which supports the settlement terms and the Inspection Protocol, and other matters pertinent to the Court's evaluation of the Settlement. Class Counsel also explained their rationale for recommending to the Class Representatives that they accept the Settlement Agreement in full, final and complete resolution of this Acton. This evidence and rationale included and supported the following factors relating to the fairness, reasonableness and adequacy of the Settlement Agreement:

Factors Applicable to Qualifying Claimants who purchased their Structures before January 1, 2003

- a. There are numerous liability issues which can and will be disputed by Settling Defendant including issues such as the claim that Dryvit EIFS is unfit for its intended purpose. There are general issues relating to this issue and issues which depend upon the knowledge of individual Class Members. This Settlement Agreement eliminates these liability issues for qualifying Claimants who purchased their homes before January 1, 2003 with the exception of product identification which is still required under the terms of the Settlement Agreement. As to product identification, a simplified procedure and objective standard has been established by the Settlement Agreement.

- b. There are numerous causation and damages issues which can and will be disputed by Settling Defendant with regard to any particular Structure which implicate not only the performance of Dryvit EIFS but also the performance of other products, the conduct of other Persons in the construction process, environmental factors and the extent to which current and former owners have maintained their Structures properly. The burden of proof on these causation and damage issues lies with the Plaintiffs. The Settlement Agreement eliminates these issues for qualifying Claimants who purchased their homes before January 1, 2003 in exchange for a simplified and objective Actual Damage standard. Causation is not an issue in the Settlement Agreement as to such qualifying Claimants.
- c. There are numerous issues relating to Dryvit's conduct both in selling and marketing its EIFS and with respect to claims that Dryvit conspired with others to improperly impair the prosecution of this Action. Dryvit, and others, deny and dispute these conduct based allegations. An effect of this Settlement Agreement is, to resolve all disputes between Dryvit and the Class through a voluntary settlement of the allegations presented in the complaints filed in this Court. The Settlement Agreement specifically reserved and recognized that claims against third parties who are alleged to have injured the Class are preserved and in no way affected by this Order or Settlement.
- d. All other liability issues in this Action are denied and will be vigorously contested as well. Further litigation about each of these issues will result in significant additional delay in Class Members obtaining relief, if any, from Settling Defendant. Class Counsel expressed concerns about the effect of these delays on the Class. The Court shares these concerns. The Settlement Agreement provides Class Members an opportunity for immediate resolution of their claims against Dryvit, and substantial Benefits without further delay. This advantage is available to those Class Members with pending individual EIFS cases³ against Settling Defendant as well as Class Members who never filed suit and likely would otherwise be barred by statutes of limitations or repose.
- e. This settlement provides Structure owners the opportunity for a substantial cash benefit. At the same time, pursuant to the South Carolina Contribution Among Joint Tortfeasors Act, S.C. Stat. Ann. § 15-38-50, Plaintiffs' good faith release of claims against Settling Defendant should discharge Settling Defendant from all liability for contribution to any other potential tortfeasors for damages to Class Members' Structures. *Cowden Enterprises, Inc. v. East Coast Millwork Distributors*, 611 S.E.2d 259 (S.C. App. 2005), *rehearing and certiorari denied*.
- f. The Inspection Protocol, Inspector Qualifications and the Claim Form exhibits to the Settlement Agreement as well as the agreement's terms address scientific issues related to detection of water intrusion and its effects, determining product

³ The Court is aware that there are several individual EIFS cases pending against Settling Defendant before the various Courts in South Carolina, most of which also involve claims against contractors and parties other than Settling Defendant.



identification and calculating the amount of product installed on a Structure. These procedures and terms were reviewed by David Bennett, a construction professional trained and skilled in forensic investigation of buildings and construction materials as well as water intrusion into buildings who testified by affidavit as to his observations and opinions about the procedures and terms at the request of Class Counsel on behalf of the Class. The Court finds him to be an expert qualified to review and opine about the practicality and effectiveness of the Inspection Protocol, Inspector Qualifications, Claim Form and Settlement Agreement from a scientific and forensic perspective. The Court recognizes that in the event of a trial in this case, Settling Defendant would have offered other testimony from other experts and would have disputed some or all of the testimony of this expert. Yet, for present purposes of evaluating whether the Settlement Agreement is fair, reasonable and adequate as to the Class, the Court views this testimony in the light most favorable to the Class and its claims, does not find it necessary to adjudicate any dispute between the Parties as to which view is in fact accurate and does not do so.

- g. Based upon the expert testimony as well as the other evidence and the description provided to the Court by Class Counsel of their professional evaluation of the Settlement Agreement, its terms and litigation alternatives, the Court finds, for purposes of evaluating and approving the Settlement Agreement in this case and only for this purpose, that:
- i. the 22% moisture level and the two square feet of deteriorated sheathing standards for Actual Damage are susceptible of ready determination using available inspection methodologies and are suitable for use in determining eligibility for Benefits under the Settlement Agreement;
 - ii. the documentation required by the Claim Form is sufficient for fair consideration of Claims and for making determinations required by the Settlement Agreement; and
 - iii. the Inspection Protocol is a reasonable and practical guideline for making the determinations required by the Settlement Agreement;
 - iv. the format for the Inspection Report provides a means for fairly and accurately recording and reporting inspection results;
 - v. the methodologies for calculating square footage of EIFS on a Structure are capable of implementation and verification with sufficient accuracy to satisfy the needs of the Settlement Agreement;
 - vi. the qualifications for Inspectors are sufficient to allow for reasonable compliance with the Inspection Protocol,
 - vii. the monetary consideration provided to individual Claimants under the Settlement Agreement (eight dollars and four dollars per square foot)



is net of litigation costs and under the applicable facts and circumstances is fair and reasonable.

- viii. the monetary consideration provided by Settling Defendant in the Settlement Agreement has been evaluated by Class Counsel as a fair settlement amount under all the circumstances and in light of applicable law and potential defenses available to the Defendant, and the Court concurs.

Factors Applicable to Qualifying Claimants who purchased their Structures on or after January 1, 2003

- h. For Class Members who purchased their Structures on or after January 1, 2003, Settling Defendant asserts various individualized notice defenses based upon not only specific disclosures which may have been provided to these Class Members at the time of their purchase but also based upon changes in applicable building codes and real estate disclosure requirements which had become effective as of January 1, 2003. The Parties were unable to resolve these defenses in the context of the Settlement Agreement and Settling Defendant was not willing to waive these defenses.
- i. As a result, Class Counsel negotiated for these Class Members a waiver of certain defenses based upon the *Posey v. Dryvit Systems, Inc.* class action settlement in Tennessee and a tolling of applicable statutes of limitations and repose. These benefits to these Class Members enable them to pursue actual resolution of their individual actions in South Carolina courts and give them the benefit of the filing date in this Class Action for statutes of limitation and repose purposes. These concessions by the Settling Defendant squarely present the products liability and notice issues for efficient resolution in a manner similar to how individual EIFS cases have been handled in South Carolina for a number of years.

Generally Applicable Factors

- j. The Settling Defendant has settled two prior class actions including one in North Carolina, *Ruff, et al. v. Parex* and a class action with a national scope in Tennessee, *Posey v. Dryvit Systems, Inc.* These class action settlements are in addition to a number of individual settlements undertaken by Settling Defendant in the state of South Carolina including individual settlements with individual clients of a number of the Class Counsel in this Action. Class Counsel reports that Settling Defendant satisfactorily implemented those prior settlements and has the capacity to fund and implement this Settlement Agreement. Settling Defendant has already funded \$82,000 in benefits to the Class for use in paying costs associated with Notice.
- k. The Settlement Agreement is clearly, and the Court so finds, a result of hard-fought litigation between the Parties and not a result of any collusion on the part of

Class Counsel, Class Representatives, Settling Defendant, Counsel for the Settling Defendant or any other Persons.

- l. Class Members retain the right to pursue claims against other Persons whom they believe may be responsible for damages to their Structures based upon the conduct, actions or products supplied or installed by those other Persons, as distinguished from Settling Defendant's actions, conduct, fault or products.
- m. The claims procedure established under the Settlement Agreement is fair, a simplified process and workable. In any event, this Court will retain jurisdiction to work out any unanticipated problems.
- n. This litigation, like most litigation, is fraught with risk including the risk that a trial of this Action would result in the Class Members receiving nothing and with Settling Defendant paying nothing. The Settlement Agreement on the other hand provides all Parties and Class Members with a known resolution which is the result of voluntary negotiations and agreements. The law prefers that Parties resolve their own disputes.
- o. The decision of the Court to approve this settlement is supported by the fact that no objections were filed or presented at the Fairness Hearing.

28. This Court received testimony from each of the following Class Representatives Timothy Treon, P. Jennings Scarce, and Stephen Christian, with regard to their services as Class Representatives, their understanding of the facts, issues, defenses and disputes. Each of these Class Representatives testified that under all of the facts and circumstances, they believe that the Settlement Agreement is a fair, adequate and reasonable compromise of disputed claims. Each of these Class Representatives testified about his involvement in the prosecution of this Action and the settlement negotiations. This Court finds that the Class Representatives have fulfilled their obligations in representing the Class fully and adequately and therefore approves the payment of \$20,000 fee described in this Order as follows: \$10,000 to P. Jennings Scarce, \$5,000 to Timothy and Janie Treon, and \$2,500 to Stephen Christian with the balance of \$2,500 used to reimburse the personal expenses of the Class Representatives that are related to his matter with any excess funds being distributed to the Class Representatives on a pro rata basis.



29. The Court finds that Intervening Class Counsel and Settling Defendant are capable of implementing the terms of the Settlement Agreement without a third-party administrator, especially in light of the continuing jurisdiction of this Court. The Court further finds that the Settlement Agreement resolves disputes between the Class and the Settling Defendant in a way which does not unfairly or unconstitutionally favor resolution of common issues over individual issues and as a result of both concessions by the Settling Defendant and the claims administration process, including use of a Special Master, affords individual Class Members a fair opportunity to present and resolve material individualized issues of import to the claims against the Settling Defendant. The Court further finds that to the extent there is any impairment of Class Member ability to present and obtain resolution of individual issues, it is de minimus in light of applicable law and the facts presented here. The Court notes that all Class Members had the means to exclude themselves from this Class Action and this settlement to pursue their claims and issues individually.


30. Settling Defendant agrees to contribute, or already has contributed in contemplation of this settlement, the following as consideration for the Settlement Agreement and in full settlement for all Claims asserted in this Action: (a) \$8.00 per square foot of Dryvit EIFS for Class Members who timely file a Claims Form and who meet other eligibility requirements set forth in Section 6(a) of the Settlement Agreement; (b) \$4.00 per square foot of Dryvit EIFS for Class Members who timely file a Claims Form and who meet other eligibility requirements set forth in Section 6(b) of the Settlement Agreement; (c) \$50,000 for the Equitable Claims Adjustment Fund as set forth in Section 6(c) of the Settlement Agreement; (d) \$20,000 for the Class Representatives, (e) \$82,000 for compensating Intervening Class Counsel for a portion of the cost of implementing the Notice Plan, and (f) \$913,000 for use in compensating

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Class Counsel and Class Representatives and to defray their costs and expenses of implementing the Settlement Agreement and assisting Claimants in the Settlement process. The Court recognizes that the Mullen Wylie firm has applied for 20% of the \$913,000 or \$182,600 as a fee in this matter and that Intervening Class Counsel has opposed the Mullen Wylie application. This Court therefore orders that \$182,600 be escrowed in the trust account of Alford & Wilkins, L.L.C. until such time as this Court issues an order regarding the Mullen Wylie application. Having received no other applications for fees or costs after having provided prior original class counsel with notice of the need to submit any requests for fee allocations now, and having been informed by counsel for certain prior original class counsel that they make no claim as to amounts described in this paragraph, the Court finds that the balance of the \$913,000 fee, or \$730,400, is available for immediate distribution, upon receipt of funds as provided in the Settlement Agreement, to Intervening Class Counsel and does not prejudice any claim they may make in the future regarding additional fees in this matter.

31. Based upon all of the factors discussed above, the able service of Class Representatives and Class Counsel as described in paragraphs 8 through 13 above, the arm's length negotiations, the Court's observations about the complexity and difficulty of the issues presented, the certainty of further delay in any recovery for the Class in the absence of this settlement, and the inherent risks of litigation, the Court finds that the Settlement Agreement presents a fair and reasonable compromise and is adequate under all the circumstances.

32. Class Counsel's intent to seek compensation, fees and expenses was stated adequately in the Class Notice and Summary Class Notice. Submissions in support or opposition to allocation requests were due by June 7, 2010.



33. Class Counsel and counsel for Defendant conducted a search for suitable candidates to serve as the Special Master as provided in the Settlement Agreement. Two candidates were presented to the Court and each is well qualified and well suited for this responsibility. The two candidates are Bonum Wilson of Charleston, South Carolina and Francis Mack of Columbia, South Carolina. Each candidate has over twenty five years of experience practicing law, is duly licensed as an attorney in the State of South Carolina, has a practice which includes significant work as a neutral in either mediation or arbitration, has prior experience with EIFS litigation and the issues presented in this litigation, has a reasonable hourly rate for service as a neutral, and is willing and available to serve. The Parties are directed to select one of these two candidates and make arrangements for him to serve as the Special Master. In the event the Parties cannot agree or otherwise fail to make suitable arrangements, the Court will choose one of these two candidates to serve in this capacity.

NOW, THEREFORE, ON THE BASIS OF THE FOREGOING FINDINGS OF FACT, THE COURT HEREBY MAKES THE FOLLOWING:


CONCLUSIONS OF LAW

1. This Court has jurisdiction over the Parties and the subject matter of this proceeding.

2. Pursuant to Rule 23(a) and (c) of the South Carolina Rules of Civil Procedure, the conditional certification of the settlement Class is made final with the Class defined as:

All Persons who, as of the Notice Date, own or owned a Structure on which a Dryvit EIFS was installed during the Class Period.

3. The Court finds that by virtue of the Settlement Agreement and concessions and agreements of the Parties therein, the requirements of Rule 23(a) of the South Carolina Rules of Civil



Procedure are satisfied and a class action is an appropriate method for resolving the disputes in this litigation.

4. The named Class Representatives are Timothy and Jane Treon, P. Jennings Scarce and Stephen Christian.

5. A Bar Order is necessary and appropriate to implement the terms of the Settlement Agreement. The consideration provided by the Settling Defendant to the Class in the Settlement Agreement constitutes adequate consideration for a full Release of Settling Defendant by the Class and entitles Settling Defendant to complete peace to the extent practical as to those Class Members who do not exclude themselves or pursue claims pursuant to Section 6.2(c) of the Settlement Agreement. Moreover, this Court already has devoted considerable resources and time to address the claims of the Class. As a result, the Parties and the Court wish to avoid further litigation and desire full, final and complete resolution of this Action. A Bar Order will facilitate this result and is a reasonable means for doing so.

6. The Court grants final approval to the Settlement Agreement as being fair, reasonable and adequate, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure.

NOW, THEREFORE, ON THE BASIS OF THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Motion for Final Approval of the Settlement Agreement is **GRANTED**.
2. This Court authorizes distribution directly to Class Members by Settling Defendant of those amounts calculated by reference to square footage of Dryvit EIFS installed on individual Structures as provided in the Settlement Agreement. Except for costs and expenses incurred directly by Settling Defendant, the remainder of the consideration, described in Paragraph 30 above, shall be paid to Class Counsel c/o Gregg Alford, Esq. for distribution as authorized by this Court pursuant to a separate order from this Court. This Court has previously



authorized distribution of \$82,000.00 to Intervening Class Counsel by Settling Defendant. This amount will be credited by the Court to Class Counsel in considering any amount awarded for compensation, fees and expenses.

3. Those Structures listed on Exhibit A to this Order and Judgment are excluded from this Class Action and the Settlement Agreement.

4. Except as provided to the contrary in the Settlement Agreement, costs and expenses of the Special Master shall be borne equally by Plaintiffs and Settling Defendant.

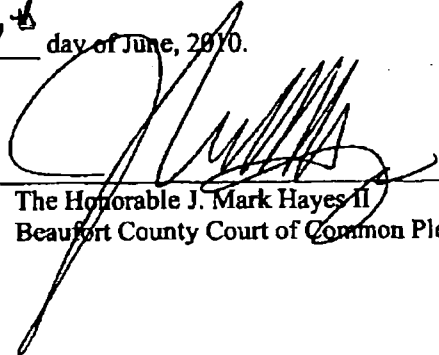
5. The Motion for a Bar Order is **GRANTED**. Except for claims filed pursuant to Section 6.2(c) of the Settlement Agreement, all Settlement Class Members are permanently barred and enjoined from (i) filing, commencing, prosecuting, intervening in, participating in as Class Members or otherwise, or receiving any benefits or other relief from any other lawsuit, arbitration or administrative, regulatory or other proceeding or order in any jurisdiction based on Settled Claims against Released Parties, and (ii) organizing, or attempting to organize, Settlement Class Members, or any of them, into a separate class for purposes of pursuing as a purported class action (including by seeking to amend a pending complaint to include class allegations, or by seeking class certification in a pending action in any jurisdiction) any lawsuit or other proceeding of any kind against a Released Party based on Settled Claims. The Court finds that issuance of this permanent injunction is necessary and appropriate in aid of the Court's jurisdiction over the Action and to protect and effectuate the Court's Final Order and Judgment.

6. This Action and all claims, rulings and motions against the Settling Defendant are dismissed with prejudice, but the Court shall retain exclusive and continuing jurisdiction of the Action, all Parties, and Settlement Class Members, to interpret and enforce the terms, conditions and obligations of this Settlement Agreement consistent herewith.



7. Except as provided to the contrary in the Settlement Agreement or this Order and Judgment, all Parties are to bear their own costs.

AND IT IS SO ORDERED this 9th day of June, 2010.



The Honorable J. Mark Hayes II
Beaufort County Court of Common Pleas

Exhibit A
Excluded Structures (Opted Out)

1. **McClean, Gordon**
72 Full Sweep
Hilton Head Island, SC 29928
2. **Torjussen, Martin P.**
7 Buckfield Lane
Hilton Head Island, SC 29928
3. **Thorne, Katherine F. and John C.**
15 Ashley Court
Columbia, SC 29204
4. **Oppenheimer, Stanton T.**
360 Long Cove Dr.
Hilton Head Island, SC 29928