EXHIBIT U

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Stephen and Jeaneen Tucker, Charles and Stephanie Davis, Timothy and Janie Treon, P. Jennings Scearce, and John Doe and Jane Doe, individually and on behalf of others similarly situated in the State of South Carolina,

Plaintiffs,

vs.

LEATH, BOUCHE & CRAWFORD, LLP, W. Jefferson Leath, Jr., William Dixon Robertson, III, Michael S. Seekings, Frank E. Grimball, MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC, William M. Bowen, John Cardamone, Sally Cardamone, Benjamin T. Clark, Diane M. Clark, Ramona Gianni, and Nathan W. Gordon,

Defendants.

CIVIL ACTION NO. 2008-CP-07-3145

MOTION FOR CLASS CERTIFICATION

Timothy Treon and P. Jennings Scearce individually and on behalf of Others similarly situated in the State of South Carolina,

Plaintiffs,

vs.

Dryvit Systems, Inc. John Cardamone and his wife, Sally Cardamone, Benjamin T. Clark and his wife Diane M. Clark, Ramona Gianni, and Nathan W. Gordon, John Doe and Mary Roe,

Defendants.

CIVIL ACTION NO. 2008-CP-07-0774

TO: JAMES L. BRUNER, J.D., M. DAWES COOKE, J.D., JOHN ARTHUR JONES, J.D., M. ELIZABETH JOWERS, J.D., SUSAN P. MCWILLIAMS, J.D., WARREN C. POWELL, JR., J.D., KENT T. STAIR, J.D., and SUSAN TAYLOR WALL, J.D., ATTORNEYS FOR DEFENDANTS:

EXHIBIT

NOTICE

YOU WILL PLEASE TAKE NOTICE THAT on the 10th day after service hereof, or as soon thereafter as counsel can be heard before The Honorable J. Mark Hayes, II at a location to be determined by Judge Hayes, Plaintiffs will move pursuant to Rule 23, SCRCP, before the Court for an Order granting class certification for the Plaintiffs in both of the above-captioned cases.

MOTION

Pursuant to Rule 23, SCRCP, the above-named Plaintiffs move this Court for an Order certifying both of these matters as class actions with the above-named Plaintiffs as representative parties on behalf of all Others similarly situated in the State of South Carolina.

The grounds for this motion include 1) Defendants are barred from arguing against the existence of a Class and for certification of the Class by this Court by the Doctrine of Judicial Estoppel based upon Defendants' conduct in obtaining an Order providing class certification for this very same Class in the underlying product liability matter; 2) Plaintiffs in this proposed Class are identical to the Class of similarly situated South Carolina Plaintiffs already recognized by a South Carolina court in the underlying product liability matter;[1] 3) Plaintiffs in this proposed Class meet all requirements under Rule 23(a), SCRCP; and 4) in the alternative, other available facts and evidence are available in support of Plaintiffs' motion.

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[1] With the exception, of course, of the particular Defendants who were former Class Representatives in the underlying product liability matter before withdrawing after breaching their fiduciary duties to the Class.

Plaintiffs respectfully request that this Court proceed with scheduling a hearing on Plaintiffs' motion at its earliest convenience. There simply is no need to conduct additional discovery and delay the ruling on this motion until 2011, which will be almost 9 years since the underlying *Cardamone* action was first certified as a class action.

MEMORANDUM IN SUPPORT

I. THE DOCTRINE OF JUDICIAL ESTOPPEL PRECLUDES DEFENDANTS' CHALLENGE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION.

Defendants should be judicially estopped from asserting positions inconsistent with, or in conflict with, the positions Defendants previously asserted, as the original Class lawyers and original Class representatives, to obtain class certification in the underlying matter originally styled *Cardamone et al. v. Dryvit Systems, Inc.*, Civil Action No. 2002-CP-07-1377 ("*Cardamone* action"). *See Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004). Plaintiffs brought these two cases as putative class representatives of "[t]he Class of the instant action is comprised of members of the Class created by the *Cardamone* Action" and as representatives "of the members of the Class created by the *Cardamone* Action and . . . includ[ing] those members of the *Cardamone* action:

> Who without formal notice, settled their claims against Dryvit for reduced compensation based on the assertion that the *Posey* settlement ended their right to make claims against Dryvit.

See p. 7 at ¶26 of the COMPLAINT filed in 2008-CP-07-0774 and p. 9 at ¶ 31 of the AMENDED COMPLAINT filed in 2008-CP-07-3145.

The legal malpractice and breach of fiduciary duty claims asserted in the above-captioned cases are based upon Defendants' acts and omissions as counsel and

Class representatives of the Class in the *Cardamone* action. Class discovery would be an unnecessary waste of the parties' judicial and financial resources given that the putative Classes in the above-captioned cases were previously certified as a Class, especially when that certification was accomplished based on the positions these Defendants previously asserted, and, in the alternative, the proposed Class meets all requirements under Rule 23(a), SCRCP.

A. Procedural Background and History.

Defendants previously satisfied a South Carolina court with their assertions that this identical Class of Plaintiffs satisfied the Rule 23 requirements. On August 12, 2002, Defendants filed the *Cardamone* action COMPLAINT asserting in ¶¶ 20 - 26 that the following Class certified all of the provisions of Rule 23, SCRCP:

> 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.
>
> 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 Defendants' continuing conduct is terminated (the "Class Period").

Cardamone action COMPLAINT at ¶ 20, copy attached and incorporated herein by reference as **Exhibit 1.** *See also*, ¶¶ 21 - 26 for additional allegations asserted by Defendants to obtain class certification.

On August 19, 2002, Defendants filed a MOTION FOR CONDITIONAL CLASS CERTIFICATION OR, IN THE ALTERNATIVE, FOR AN INJUNCTION, a copy of which is attached and incorporated herein by reference as **Exhibit 2**.

On August 27, 2002, Defendants filed a MEMORANDUM IN SUPPORT OF CLASS CERTIFICATION further asserting that proposed Class met all of the Rule 23, SCRCP requirements of numerosity, commonality, typicality, and adequacy. A copy of Defendants' memorandum is attached and incorporated herein by reference as **Exhibit 3**.

On August 27, 2002, Defendant W. Jefferson Leath, Jr. and Defendant William Dixon Robertson, III, both filed affidavits that they had signed in support of the motion for class certification. In Mr. Leath's affidavit and Mr. Robertson's affidavit, they both made statements under oath in support of the motion for class certification in the *Cardamone* action. A copy of Defendant Leath's and Defendant Robertson's affidavits are attached and incorporated herein by reference as **Exhibit 4** and **Exhibit 5** respectively. In further support of the motion for class certification, on August 27, 2002, Defendants also filed the AFFIDAVIT OF G. HAMLIN O'KELLEY, III, a copy of which is attached and incorporated herein by reference as **Exhibit 6**.

On August 28, 2002, Defendants filed PLAINTIFF'S (SIC.) REPLY MEMORANDUM, a copy of which is attached and incorporated herein by reference as **Exhibit 7**. In this REPLY MEMORANDUM Defendants told the Circuit Court the following:

- "If the Cardamone class is certified, all prospective members will have a full and fair opportunity to opt out following full and fair disclosure, supervised by this Court." – p. 2.

- "The South Carolina homeowner who opts out can be a member of the Posey class, or pursue his own action." – p. 2.
- "The record support for the Rule 23 class is uncontested. The position of these Plaintiffs that their proposed class satisfies the requirements of Rule 239(a): numerosity, commonality, typicality, adequacy, and amount in controversy is thus deemed and admitted. On the foregoing reasoning and authority the Plaintiffs respectfully request that is Motion for Class Certification be granted." – p. 6.

On August 29, 2002, Defendants filed their eighteen page MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION OR IN THE ALTERNATIVE FOR AN INJUNCTION, a copy of which is attached and incorporated herein by reference as **Exhibit 8**. This memorandum asserts among other things that ". . . Plaintiffs have established all Class action prerequisites and are entitled to class certification . . .." *See* Exhibit 8 at p. 2. On pages 11 – 17, Defendants took positions – ultimately adopted by the Circuit Court – that the proposed Class met all of the requirements of Rule 23. Defendants stated on page 17, "[a]s demonstrated above, class certification should be granted unconditionally" and that "[a]ll of the facts and circumstances of this case lead to the conclusion that Plaintiffs' class should be certified particularly in light of the fact that Plaintiffs only see conditional certification at this time." In addition, Defendants included additional affidavits with the memorandum including the affidavit of Peter Sherratt. Copies of those affidavits are included with Exhibit 8.

Particularly relevant to the instant motion for class certification is the memorandum Defendants filed on September 3, 2003, styled PLAINTIFF'S (SIC.) SUR-REPLY TO DEFENDANT'S (SIC.) THIRD SUBMISSION, a copy of which is attached and incorporated herein by reference **Exhibit 9**. As the Court will see in reviewing this SUR-REPLY, Defendants themselves asserted the Doctrine of Judicial Estoppel in an effort to convince the Circuit Court in the underlying *Cardamone* action to preclude Dryvit from taking inconsistent judicial positions regarding class certification. Defendants' own words against Dryvit in the underlying matter now describe Defendants' conduct in the above-captioned cases. With a few appropriate modifications to fit Defendants' history in the underlying *Cardamone* action and the positions taken in the above-captioned cases, Defendants' SUR-REPLY would now read:

> The perfidy of the Defendants' collusion is now only exceeded by their hypocrisy. These Defendants moved for and successfully obtained a Class in the underlying *Cardamone* action, and now oppose certification of the very same Class when faced with claims by those very same Class members. Thankfully, the South Carolina Supreme Court has dealt firmly with this kind of fraud on the Court. *Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2004); *Carrigg v. Cannon*, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001). These Defendants are judicially estopped from picking and choosing a position to seek current fashion.

By ORDER dated August 30, 2002 and entered on September 3, 2002, Judge Thomas Kemmerlin, Jr. certified a Class in the *Cardamone* action and designated the original Class Representatives as class representatives for the class defined as:

> all persons in South Carolina who were members of the *Posey* class and who own, or have owned a one- or two-family residential dwelling or townhouse (hereinafter "structure") in South Carolina on which an Exterior Insulation and Finish

> System (hereinafter "EIFS") have been installed or any previous owner of such structures who incurred any costs or expenses to inspect, repair, or replace the EIFS or other EIFS-related property damage from January 1, 1989 until the date Dryvit's continuing conduct is terminated.

ORDER dated August 30, 2002, attached and incorporated herein by reference as **Exhibit 10**.

After the ORDER certifying the class was issued, Defendants took many additional actions relying upon the fact that the Class in the underlying *Cardamone* action had been certified. For example, on September 3, 2002, Defendant Leath sent a letter to the Settlement Claims Administrator in the *Posey* lawsuit stating, "Enclosed please find an executed 'Request for Exclusion' form which has been completed on behalf of our clients in the above referenced matter. These clients have chosen to opt out of the Dryvit Systems' Class Action Settlement. Should you have any questions, please do not hesitate to contact me." A copy of the letter is attached and incorporated herein by reference as **Exhibit 11**. On that same day, September 3, 2002, Defendant Seekings also sent a letter to the Settlement Claims Administrator in the *Posey* lawsuit RE: Dryvit Class Action Lawsuit, Order from Judge Kemmerlin, Opt out form for Class" stating, "Enclosed please find and Order from Judge Kemmerlin signed today. Also enclosed is a signed Request for Exclusion form *for the Class listed in this Order.*" (Emphasis added). A copy of the letter is attached and incorporated herein by reference as **Exhibit 12**.

By Order dated November 17, 2009, a copy of which is attached and incorporated herein by reference as **Exhibit 13**, the Circuit Court re-certified the underlying *Cardamone* 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.

The Circuit Court further found 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 . . .." *Id.*

At the time the Circuit Court re-certified the Class, Defendant Francis E. Grimball remained as Class counsel and continued to seek recovery of attorney's fees.

By Order and Judgment Granting Final Approval of Settlement Agreement, filed June 10, 2010, in the underlying *Cardamone* action, a copy of which is attached and incorporated herein by reference as **Exhibit 14**, the Circuit Court concluded as a matter of law that "[p]ursuant 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."

Id. at p. 20, ¶ 2.

B. Application of the doctrine of judicial estoppel to Defendants' challenge to the motion for class certification.

In *Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2004), the Supreme Court set forth the requirements for the application of judicial estoppel as follows:

1. two inconsistent positions taken by the same party or parties in privity with one another;
2. the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;

3. the party taking the position must have been successful in maintaining that position and have received some benefit;

4. the inconsistency must be part of an intentional effort to mislead the court; and

5. the two positions must be totally inconsistent.

All of the foregoing elements are met by Defendants' past conduct and the positions Defendants are taking now in these above-captioned actions.

First, Defendants' position that the same Class was appropriate for class certification in the underlying *Cardamone* action is contrary and inconsistent with position Defendants are taking in these two cases opposing class certification for the identical Class of Plaintiffs. Second, the above-captioned cases are proceedings related to the underlying *Cardamone* action given that for proximate causation purposes Plaintiffs must establish that they would have obtained a better result if Defendants had exercised reasonable care in the underlying *Cardamone* action; Defendants are also the same parties (and are in direct privity with parties) and original class counsel in the underlying *Cardamone* action. Third, Defendants were successful in maintaining their position that this same proposed Class was appropriate for class certification in the underlying *Cardamone* action. Forth, Defendants' efforts to resist class certification in these above-referenced cases is clearly an intentional effort to mislead the Court – or at least to substantially delay and/or increase the costs and judicial resources devoted to the inevitable class certification. Finally, Defendants' positions in these two above-referenced cases are totally inconsistent with positions Defendants took in 2002 to obtain class certification of this same Class in the underlying *Cardamone* action.

The instant lawsuits claim that the Class members of the underlying *Cardamone* action were harmed by the negligent actions and omissions of the original Class attorneys and original Class Representatives. The members of the Class in the underlying *Cardamone* action are identical to the members of the putative Class in the instant lawsuits. The doctrine of judicial estoppel should be imposed to prevent Defendants from challenging class certification in these cases.

Plaintiffs respectfully request that this Court issue an Order judicially estopping Defendants from arguing against a certification of this Class, which is identical in person and nature to the Class Defendants established in the underlying *Cardamone* action and order an immediate certification of this proposed Class.

II. IMMEDIATE CERTIFICATION OF THIS CLASS IS PROPER BECAUSE PLAINTIFFS IN THESE PROPOSED CLASSES MEET ALL REQUIREMENTS UNDER RULE 23, SCRCP.

The same basis for class certification in the underlying *Cardamone* action exists for class certification in the two above-referenced matters. In addition, based on 1) the findings of fact and conclusions of law contained in the Order and Judgment Granting File Approval of Settlement Agreement, filed June 10, 2010, in the underlying *Cardamone* action, and 2) the allegations contained in Plaintiffs' Complaints filed in the two above-reference actions, both of the proposed Classes satisfy all requirements of Rule 23, SCRCP.

A certification of a Class of Plaintiffs in the above-captioned cases is necessary in that (1) the Class of injured persons in South Carolina is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the Class;

(3) the claims of the representative parties are typical of the claims of the Class; (4) the representative parties will fairly and adequately protect the interests of the Class; and (5) the amount in controversy exceeds one hundred dollars for each member of the Class. *See* Rule 23(a), SCRCP.

A. Numerosity – Rule 23(a)(1), SCRCP.

The proposed Class easily satisfies the numerosity requirements given that the same Class satisfied the numerosity requirements in underlying *Cardamone* action for the initial conditional class certification in August 2002 and remained certified through the final settlement approval in June 2010. See, Order and Judgment Granting File Approval of Settlement Agreement, filed June 10, 2010, in the underlying *Cardamone* action. The numerosity requirement is satisfied if the record gives rise to a reasonable inference that the number of class members is "so numerous that joinder of all members is impracticable." *See In re: Alcoholic Beverages Litigation*, 95 F.R.D. 321 (E.D.N.Y. 1982). Identification of the precise number of class members known to exist is not necessary. *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925 (11th Cir. 1983).

Because the proposed Classes are identical to the Class approved and certified in the underlying *Cardamone* action, it clearly satisfies the numerosity requirement of Rule 23(a)(1), SCRCP.

B. Commonality – Rule 23(a)(2), SCRCP.

Common issues predominate Plaintiffs' legal malpractice, breach of fiduciary duty, and related claims against Defendants in the two above-captioned actions. Defendants, as Class representatives and certainly attorneys representing the Class had obligations of

undivided loyalty not only to the named plaintiff-class representatives, but also to each unnamed member of the Class, which included all of the members of the proposed Class in the two above-referenced lawsuits. *See Janik v. Rudy, Exelrod & Zieff*, 119 Cal.App.4th 930, 14 Cal.Rptr.3d 751 (2004) (class member in underlying class action lawsuit brought legal malpractice action against attorneys who had represented the class; attorneys owed duties to all class members); *Bachman v. Pertschuk*, 437 F. Supp. 973(D.D.C. 1977) (class counsel of undivided duties of loyalty to all members of the class); *Smith v. McCleskey, Harriger, Brazill, & Graf, L.L.P.*, 15 S.W.3d 644 (Tex. App. 2000) (former class members bought legal malpractice lawsuit against lawyers representing the class based upon alleged breach of duties to the class).

In the Order and Judgment Granting File Approval of Settlement Agreement, filed June 10, 2010, in the underlying *Cardamone* action, the Circuit Court recognized that "*[s]ince the intervention* [by Intervening Class Representatives and Intervening Counsel], the Parties have contested this case vigorously; that there had been *"numerous ongoing disputes regarding the conduct of Original Class Counsel*"; and that the Court made "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.*" (Emphasis added).

The commonality requirement of Rule 23(a)(2), SCRCP is satisfied because the conduct alleged to have caused injury to the Class occurred while Defendants were serving as Class Counsel and Class Representatives of the underlying Class in the *Cardamone* action. Therefore, the legal malpractice, breach of fiduciary duty, and related claims

asserted in the two above-referenced actions are issues of law common to all proposed Class members because the Defendants all owed identical duties as either class counsel or class representatives to the Class. See *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F. Supp. 1196, 1212-17 (Tex. App. 1992) (class member in underlying class action lawsuit brought legal malpractice action against attorneys who had represented the class); *Scholes v. Stone, Maguire & Benjamin*, 143 F.R.D. 181 (N.D.Ill. 1992) (same).

C. Typicality - Rule 23(a)(3), SCRCP.

Similar to the commonality analysis, Plaintiffs' legal malpractice, breach of fiduciary duty and related claims are typical of the other proposed class members. For example, in *Masztal v. City of Miami*, 971 So.2d 803 (Fla. 3d DCA 2008), a group of property owners' brought class action against the City of Miami challenging proposed fire rescue assessment, and seeking refund for all who had paid such assessments. Prior to class certification, the trial court issued a partial summary judgment in favor of the plaintiffs. After the original parties reached a $7M settlement agreement, however, additional property owners intervened and moved to vacate and set aside settlement agreement. The motion was based upon allegations of breach of fiduciary duty by the original class representatives and class counsel. The trial court granted the motion on the grounds of breach of fiduciary duty and collusion and ordered the original plaintiffs to disgorge first $3.5M installment under the agreement, appointed intervenors as class representatives and certified the class. *Id.* at 808. Inherent in the *Masztal* opinion is a finding that the intervenors claims were typical of the remaining members of the class. Plaintiffs in these two above-reference cases are similarly situated with typical claims.

"[T]ypicality does not require that the claims or defenses of the class representatives be identical or perfectly coextensive with the claims and defenses of the members; substantial similarity of legal theory will be sufficient even in the face of differences of fact." *Haywood v. Barnes*, 109 F.R.D. 568, 576 (E.D.N.C. 1986).

D. Adequacy - Rule 23(a)(4), SCRCP.

The Circuit Court in the underlying *Cardamone* action found as a matter of fact and concluded as a matter of law 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.

The same Plaintiffs,[2] with the addition of Plaintiffs, Stephen Tucker, Jeaneen Tucker, Charles Davis, and Stephanie Davis, remain ready and able to fairly and adequately protect the interests of the Classes proposed by this motion. Plaintiffs' counsel have substantial experience in handling legal malpractice claims, breach of fiduciary duty claims, and class actions. If the Court desires, counsel for Plaintiffs are prepared to submit their curriculum vitae in further support of the adequacy component of the motion for class certification. "In class action context, adequacy of legal counsel focuses on whether counsel is competent, dedicated, qualified, and experienced enough to conduct litigation

[2] Plaintiffs will be seeking leave to amend their Complaint to add Mr. Stephen Christian as an additional Class Representative.

and whether there is assurance of vigorous prosecution." *McGlothin v. Connors*, 142 F.R.D. 626, 633-634 (W.D.Vir. 1992). Plaintiffs and their counsel remain prepared to adequately represent the proposed Classes in these two cases.

E. Amount in Controversy- Rule 23(a)(5), SCRCP.

Plaintiffs respectfully submit that the amounts in controversy for each proposed Class member substantially exceeds $100.

III. PRIVITY AND THEREFORE STANDING TO SUE EXISTS BETWEEN PLAINTIFFS AS CLASS MEMBERS OF THE UNDERLYING *CARDAMONE* ACTION AND DEFENDANTS AS CLASS COUNSEL AND FORMER CLASS REPRESENTATIVES.

Because Plaintiffs are and were members of the Class certified in the underlying *Cardamone* action, they have standing to sue Defendants. This is important because any person who opted out of the underlying *Cardamone* action would not have standing to assert these claims against Defendants, and therefore could not satisfy the commonality and typicality requirements of Rule 23, SCRCP.

Defendants either admit or have not denied in their Answers that they all were in privity with Plaintiffs, either as class counsel or as former class representatives. "Before a claim for malpractice may be asserted, there must exist an attorney-client relationship." *Rydde v. Morris*, 381 S.C. 643, 647, 675 S.E.2d 431, 433 (2009) (citing *Am. Fed. Bank, FSB v. No. One Main Joint Venture*, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996) and *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) ("[A]n attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.")

IV. THE PROXIMATE CAUSE REQUIREMENTS OF PLAINTIFFS' CLAIMS REQUIRE PROOF THAT DEFENDANTS' ACTIONS IN THE UNDERLYING MATTER CAUSED THEM HARM.

A component of the above-captioned cases is a legal malpractice claim against the original class attorneys who represented the Class members in the underlying Dryvit product liability case, the underlying *Cardamone* action. In South Carolina, to prevail in a legal malpractice lawsuit, a plaintiff must prove (1) the existence of the attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the plaintiff's damages by the breach. *See Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions,* ___ S.C. ___, 697 S.E.2d 551 (2010); *Rydde v. Morris*, 381 S.C. 643, 647, 675 S.E.2d 431, 433 (2009).

The fourth element is what has been described as the case-within-the-case doctrine. In the instant legal malpractice action, the case-within-the-case is the underlying *Cardamone* action. Plaintiffs are claiming that their attorneys committed malpractice and the former Class Representatives breached their duties causing substantial damages to the Class in the underlying matter. Plaintiffs are identical. Therefore, since Plaintiffs in the case-within-the-case are a certified Class, it stands uncontroverted that the same Plaintiffs and putative Class members in the instant malpractice and breach of fiduciary duty lawsuits should be a certified Class.

> The client's burden of establishing proximate cause in a legal malpractice action requires that he prove that he would have obtained a better result in the underlying matter if the attorney had exercised reasonable care. The burden does not necessarily compel the client to demonstrate that he would have won the underlying case. Rather, it is enough for the legal malpractice plaintiff to show that he has lost a valuable right; e.g., the settlement value of the underlying case. Stated

> otherwise, the client need not show a perfect claim. But the client must show at least that he has lost a probability of success as a result of the attorney's negligence.

Doe v. Howe, 367 S.C. 432, 446, 626 S.E.2d 25, 32 (Ct. App. 2005) (internal quotations omitted).

After obtaining class certification for the Class in the underlying *Cardamone* action, it is absurd for Defendants to argue that the same Class cannot be certified a second time to pursue legal malpractice and breach of fiduciary duty claims while at the same time arguing that Plaintiffs are required prove proximate cause, *i.e.*, a better result in the underlying matter.

V. FULL DISCOVERY ON THE MERITS IS APPROPRIATE IN THE EVENT THE COURT DELAYS ITS RULING ON THE FOREGOING MOTION.

In the alternative, if the Court finds that an additional period of discovery is permissible, to the extent any additional facts are necessary to support the foregoing motion, Plaintiffs propose that full discovery on all issues relevant to the claims in these cases be allowed by the Court. The additional information obtained through full discovery will be submitted to the Court in further support of the motion.

A period of class certification discovery is needless and would be an unnecessary waste of time, money, and judicial resources to confirm the obvious: Plaintiffs in the proposed Classes meet all requirements of a representative class under Rule 23(a) of the South Carolina Rules of Civil Procedure.

Plaintiffs respectfully request that this Court recognize the superfluous delay tactic that a period of class certification discovery would entail and order an immediate certification of this proposed Class.

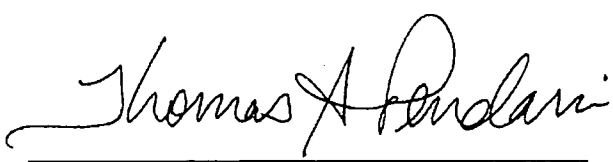
CONCLUSION

Plaintiffs therefore move this Court, pursuant to Rule 23(a), SCRCP, to issue an Order certifying a Class of Plaintiffs to include the above-named Plaintiffs and all Others similarly situated in the State of South Carolina described as follows:

> All members of the Class created by the *Cardamone* Action including those members who without formal notice, settled their claims against Dryvit for reduced compensation based on the assertion that the *Posey* settlement ended their right to make claims against Dryvit.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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