THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable J. Mark Hayes, II

Case No. 2002-CP-07-1377

Ex parte: William Dixon Robertson III,
William M. Bowen, W. Jefferson Leath, Jr.,
Michael S. Seekings, and Timothy W. Bouch,.....Appellants

Timothy J. Treon and his wife, Frances Treon,
And P. Jennings Scearce, Steven Christian,
individually and on behalf of others similarly
situated in the State of South Carolina..... Respondents

v.

Dryvit Systems, Inc.....Defendant

MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS APPEAL

I. RESPONDENT'S INTRODUCTORY STATEMENT

Appellant's filing lacks a good faith basis in fact and law.[1] As will be set forth below, Appellant's filing (the Memorandum on Appealability) makes subtle but material misrepresentations of fact and makes material omissions of existing un-appealed orders. The Appeal lacks a good faith basis in law because its essence would require a trial court to abdicate

1 Respondents do not make such allegations lightly, but the serious nature of this matter as it relates to the integrity of the Court system. The unbounded and consistent lack of candor to the tribunal first by the Appellants and now being adopted by their counsel violates both Rule 407 of the SC Rules of Professional Conduct and Rules 3.1 and 3.3 of the ACR.

its authority under Rule 23, SCRCP and the inherent powers of a trial court to protect the unnamed members of the Treon Class. The assumption underlying this appeal is that the court below lacks the power to fulfill its obligations and duties under Rule 23, SCRCP to protect and maintain the integrity of the judicial process. Appellants claim lawyers who appear in court under Rule 23 cannot be held accountable by that court for their previous conduct after their withdrawal despite the fact that evidence of material misrepresentations come to light after their withdrawal. Furthermore, if Appellants' argument were correct, a Rule 23 court has no jurisdiction to determine the adequacy of representation of Class Counsel to oversee notice or exercise any other of the broad powers granted under Rule 23 without empanelling a jury. Equally egregious under Appellants' misguided and unsupported argument, a trial court in a class action would have no jurisdiction over the attorneys appearing before it nor the fees obtained while representing a class. Simply put, Appellants argue the court cannot answer a question that is circulating amongst the unnamed members of this class action and the public: "What exactly was that $850,000 for?" Exhibit 1.

Prior to the discovery of the conduct at issue in this matter, Appellants requested and agreed to the trial court retaining jurisdiction over fees. See Exhibits 2 & 3. Appellants failed to note this reservation in their statement of facts. In fact, the background presented is not only inaccurate, but meant to mislead this Court by obscuring the fact that the basis of the Rule to Show Cause proceeding they challenge is based on Appellants' own words, deeds and actions during their course of their representation of the class in this case.

This class action lawsuit was commenced with the filing of a summons and complaint on August 12, 2002. It was originally captioned John and Sally Cardamone, et al. v. Dryvit Systems, Inc., et al. Attorneys Timothy W. Bouch; William M. Bowen; Francis E. Grimball; W.

Jefferson Leath, Jr.; George E. Mullen; W. Dixon Robertson, III; Michael S. Seekings; and Robert L. Wylie, IV originally served as class counsel in this matter. Appellants moved for an order from the Honorable Thomas Kemmerlin, Jr. certifying a class in this action. As defined by the complaint, the Cardamone Class consisted of current and former owners of certain residential property in South Carolina clad with an Exterior Insulation and Finish System[2] manufactured by Defendant Dryvit Systems, Inc. who were also "members" of a purported nationwide class action settlement in a Tennessee action known as Posey, et al. v. Dryvit Systems, Inc., Tennessee Case No. 17,715.

After hearing the certification motion, Judge Kemmerlin certified the Cardamone class and specifically opted it out of the Posey action in Tennessee by Order dated September 3, 2002. (the "September 2003 Order"). That Order placed Appellants and the Original Class Representatives in a representative capacity for absent class members and at their request, imposed upon the duties and requirements imposed by Rule 23 of the SCRCP. The September 2003 Order also required that a notice plan be submitted within 30 days.

Upon order of the Court, Dryvit produced numerous documents including e-mails, letters, settlement agreements and other documents. The documents reflect the ongoing dialogue between Appellants, Posey Class Counsel and Dryvit Counsel. The emails, letters and transcript testimony too voluminous to include here, clearly show Appellants agreed to settle the individual lawsuits of certain Cardamone class members who were represented by Appellants and pay Appellants a significant attorneys' fee.

After the agreement to settle the Class Representatives' cases and to pay the attorneys' fees to Appellants, the underlying South Carolina class action lay essentially dormant as far as

2 Exterior Insulation Finish Systems are commonly known as "synthetic stucco" or by their acronym EIFS. EIFS is a relatively new building product that looks very similar to traditional concrete-based stucco, but incorporates an insulation lawyer that traditional stucco does not have.

Court filings because the Original Class Representatives and Appellants reached settlements with Defendant Dryvit. Despite Judge Kemmerlin's Order, these settlements took place outside of the requirements of SCRCP 23, without Court oversight and with no notice to the class.[3]

In Tennessee, the Posey settlement was the subject of two appeals, but was eventually finalized in September of 2005.[4] In an email dated September 29, 2005, Dryvit's counsel reaffirmed the agreement to pay Appellants a total of $825,000 as an attorneys' fee upon the ultimate dismissal of the Cardamone action. Shortly thereafter, Dryvit moved to Dismiss and Decertify the Cardamone action in South Carolina. What is clear now is that Judge Kemmerlin's Order had been violated in that no notice plan had been generated and the duties imposed on Appellants and the Original Class Representatives had been abandoned. Yet, Appellants argue the Court has no authority to review the conduct under SRCP 23.

After learning that Dryvit was attempting to decertify and dismiss the Cardamone action, in September 2005, Timothy and Frances Treon, and P. Jennings Scearce successfully moved to intervene in the action and became the named class representatives (hereinafter collectively and individually referred to as "Intervening Class Representatives"). Additionally, their attorneys, Richard R. Gleissner, Robert B. (Sam) Phillips, Gregory M. Alford, Thomas J. Finn, Thomas E. Williams, and Donald E. Jonas successfully moved to intervene as class counsel (hereinafter collectively referred to as "Intervening Class Counsel"). Intervening Class Representatives and

---

3 "It is now generally conceded that a plaintiff who sues on behalf of a class and the attorney representing the class assume a fiduciary obligation to absent members of the class." Premium Inv. Corp. v. Green, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct. App. 1984). The class representative and/or class counsel breach that obligation by using the class action they filed to obtain a benefit for themselves, even if the benefit received "is not at the expense of the class." Id. As our Court of Appeals explained, the assumption of this fiduciary obligation means "[t]he class representative also surrenders the right to settle the action in return for individual gain alone." Id. It goes without saying that class counsel, who is ethically prohibited from having a personal interest in the litigation, is similarly prohibited from settling a class action for individual gain.

4 Appellants appearance in Posey was based on a claim that they represented objectors William and Allison DeLoache. In sworn testimony, Mrs. DeLoache disavows any knowledge of the Appellants much less any attorney client relationship with Appellants. Appellants used Mrs. DeLoache's identity to deceive the Tennessee Court and attempted to deceive this Court prior to their scheme being exposed.

their counsel are the Respondents in this appeal. Although Appellants chose to voluntarily withdraw from this action at that time, their co-counsel George Mullen and Frank Grimball remained in the action. The court specifically maintained jurisdiction over Attorneys' Fees in its Order allowing intervention. (Exhibit 3). The existence of Exhibit 3 is a clear indication that this Appeal is strictly dilatory and has no good faith basis in law or fact.

The Appellants continue to attack the Court because the court is attempting to execute its Rule 23 function and duties.[5] The Court is seeking to inquire primarily about the monies obtained by or promised to Original Class Counsel.

Appellants seek to hide from their own words, writings and deeds. The Trial Court's record contains the following excerpts from email communications between various Appellants and Dryvit's counsel Peter Morgan and is illustrative of the arrangements Appellants sought leading up to the settlement of the instant action.

December 12, 2002
Message from SC class counsel Jeff Leath to Dryvit Counsel Peter Morgan and others:

> "I am currently awaiting word from Peter Morgan as to where this thing stands vis a vis our group."

Response from Peter Morgan to Jeff Leath:

> "We are arranging a call with our client."

December 13, 2002
Message from SC class counsel Jeff Leath to Dryvit Counsel Peter Morgan:

---

5 Premium Investment Corp. v. Green, 283 S.C. 464, 472, 324 S.E.2d 72, 77 (Ct. App. 1984) (noting that the proposed dismissal of a class action requires court approval and notice to unnamed class members). The trial court's obligation to unnamed class members was universally recognized when South Carolina adopted its modern rules Rule of Civil Procedure was adopted in July of 1985. Those Rules included a provision that prohibited a class action from being "dismissed or compromised without the approval of the [trial] court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Rule 23(c), SCRCP; see also Reynolds v. Beneficial National Bank, 288 F.3d 277, 280 (7th Cir. 2002) (noting the trend amongst courts "to term the district judge in the settlement phase of a class action suit a fiduciary of the class" and to impose on the trial court the same "high duty of care that the law requires of a fiduciary.").

"Peter, where are we? Do you think we will come to an agreement? Tenn. is approaching, and I don't have anything to take to our group one way or another, and they want to know what will be our positions in Tenn. and SC."

January 2, 2003

Message from SC class counsel Jeff Leath to Dryvit Counsel Peter Morgan:

> **"Subject: NEED SOME HELP. Peter, I know you have talked to Dickson Robertson. He of course is one of our team and I have promised him attention in an inventory settlement capacity as part of our agreement. I need to hold this group together especially pending Posey approval and dismissal of the SC class.** His case in No. 1 on the Greenville docket Monday: Randy Taylor v. Dryvit et al. He is looking for his historical average of $11/sq. ft (lower than mine) which would settle Dryvit out at about 32K. I really need you to call Nikki Perkins in [Dryvit corporate counsel's Ken] Notas office to get this done. I am concerned that if not, we may have some unfortunate repercussions with our group. I don't think any of us need this now, and this was clearly an integral part of our deal. Thanks!!" (emphasis added)

January 7, 2003

Message from SC class counsel Jeff Leath (by Dolores Catapano, Paralegal) to Dryvit counsel Peter Morgan:

> "Dear Peter, Attached is the list of cases we discussed. There may possibly be a few additions. The most important case to be resolved early is the Cardamone case with Mike Seekings and probably the settlement will need to be completed after Posey is certified in order to eliminate the SC class."

February 5, 2003

Letter from Dryvit counsel Charles Baker to class counsel Michael Seekings

> "You have acknowledged that the amount that Dryvit has agreed to pay includes a bonus reflecting Mr. Cardamone's status as a named plaintiff in the South Carolina class action. This settlement, of course, ends his participation in that class action, which it is anticipated will be entirely dismissed following resolution of the limited number of cases previously listed"

April 22, 2004

Message from SC class counsel Jeff Leath to Dryvit counsel Peter Morgan and Posey class counsel Everette Doffermyre:

"Hi to both of you. We are preparing to attend and agree to the motion to decertify the [Cardamone] class which will take place Monday in Beaufort, S.C. Some of my SC lawyers are concerned about not having any memorialization of the agreement Frank Grimball and I reached with the 2 of you in Tennessee about class counsel compensation, and I agree we should at least have an e-mail writing of it prior to Monday at 1 pm. Here is my understanding of it: Class counsel will earmark 600K of its national class fees for SC counsel and in addition Dryvit will contribute 225K which can be distributed by class counsel to the SC group. I would appreciate confirmation of this understanding."

April 25, 2004

Message from Dryvit counsel Peter Morgan to SC class counsel Jeff Leath and others:

"Per my voice mail to you both, I agree that S.C. counsel should receive a total of $825,000. Dryvit agree to help in this process in that [sic] total amount of $225,000 by agreeing to assist Posey class counsel, specifically, as follows ...."

April 26, 2004

Message from SC class counsel Jeff Leath to Dryvit's counsel Peter Morgan:

"We will reschedule [the April 26 hearing on Dryvit's motion to dismiss the Cardamone action]. I just was having some problems with my troops going forward until we had our deal memorialized. The e-mails received from you and Everette will do it as far as I am concerned. Thanks."

August 22, 2005

Message from SC counsel Jeff Leath to Dryvit's counsel Peter Morgan:

"Peter, in discussing this with everyone, as you know, we need to decertify the Cardamone class here. You will recall that the Finkel firm per Mr. Gleissner has attempted to intervene here, and we need to know if they are still milling around this issue or not. I feel certain that you worked something out with them to get them out of Posey, and this should have effected a global resolution with them. Do you have any memo. of that agreement sufficient to let me know that I don't have to have a hearing with notice to them in order to decertify – so that I can do this by consent order between Dryvit and the Plaintiffs?"

August 23, 2005

Message from Dryvit counsel Peter Morgan to SC class counsel Jeff Leath:

"Main point is that – while the Creasys settled – Finkel and Altman still have clients who are putative class members in Cardamone. As a result, they have clients with standing to object to decertification. For this and other reasons, we think there should be memos and affidavits [sic] supporting the dismissal/decertification. More later.

November 28, 2005

Message from Dryvit attorney Hada Haulsee to SC counsel Jeff Leath:

"Jeff, please e-mail me the brief."

Reply form Jeff Leath to Ms. Hauslee:

"Being done."

The brief being drafted by Mr. Leath and Ms. Haulsee was thereafter commented on by Mr. Morgan by Dryvit's lawyer:

Thanks, Hada, for the draft papers. It seems to me that they are very thorough and well done. I have only one substantive point which is basically one of emphasis (noted below). In addition, although I am sure you and Jeff will catch them, there are typos on brief p. 7 as to Jeff's name: someone typed it as "Leak" rather than "Leath" in three places.

Here's the substantive point:

I suggest emphasizing even more the Full Faith and Credit (FFC) argument by moving Argument IV.B up to (to become IV.A) so that we can emphasize the FFC argument as our first argument (as you do in the opening paragraph to the memorandum). It seems to me that the FFC point is game, set match and we ought to make crystal clear that we think so.

By the time the papers are filed, we will have secured—as you point out—a final judgment in TN. That judgment settles claims for all persons who did not opt out within its terms. Regardless of what might have happened if Cardamone had been prosecuted to completion (or even partial completion. . . with formal notice, etc.) it is now constitutionally required (as the SC Court has recognized) that Posey final judgment be given FFC in S.C. As a result, there is no longer a Cardamone class action to prosecute, and the case must be dismissed.

Then I'd move to the old Argument IV.A: specifically

> The above result would be correct at this stage for reasons of comity even if it were not constitutionally required. The Cardamone Action has been in the deep freeze for more than two years, precisely so that plaintiff's counsel could see if *Posey* benefits could be increased and result in enhanced benefits to South Carolinians. This has occurred. Under these circumstances, especially if no notice was ever provided to the Cardamone class members, it would be legal error even if *Posey* weren't yet final to move forward with a case that is premised on the notion that there sould be a mass opt-out of South Carolinians. {The I'd cite the cases that require that opt outs be done individually.} Since this is so, there can be no Cardamone Class action for the additional reason that the class is structured in an improper way.
>
> BUT, the Court need not reach this second question since Posey final judgment is now final and as the S.C. Court has held in an analogous context—this Court is therefore constitutionally required to enforce its terms.
> Hope this helps. Again, the papers look very good to me; my comment is basically one of emphasis, but I think we should make this as easy as possible for the local state court judge
>
> Peter[Morgan Dyvit Attorney]

The Appellants complain that Judge Hayes has been exposed to evidence of their conduct over the last seven years and has been effected by it. All the facts are based on the Appellants own writings, words and filings. For example, the Appellants appeared before the Court on December 5, 2005. In that appearance, they made numerous statements and representations to the Court. They then sought to be relieved and were so relieved on January 18, 2006 pursuant to Exhibit 2. Subsequently, Respondents sought documents and in response, Timothy Bouche, produced Exhibit 4 (letter dated December 1, 2006 stating no non-privileged documents exist). Thereafter, under subpoena, Mr. Bouche attended a hearing before the Court in Spartanburg wherein he agreed to produce all non-privileged documents. This he never did. Respondents have subsequently learned that Mr. Bouche withheld approximately 1900 documents from Respondents.

Despite the misleading assertion in Appellants Memorandum of Appealability regarding the adequacy of representation, it is undisputed that Appellants settled all the individual claims of the class representatives in 2003. It is also undisputed that Appellants settled the claims of all their inventory clients referenced in the "bonus" letter from Charles Baker to Michael Seekings dated February 5, 2003 referenced above. In fact, not only did Appellants settle all their clients' claims, they actively opposed the attempted intervention of the Creaseys, not to protect the class but to protect their own undisclosed financial interests.[6] Appellants made sure the class had no representation for over two years so that the Posey settlement in Tennessee could become final and they could collect their promised $825,000 dollars.

In their continued misrepresentation to the Court, Appellants assert that intervening Class Counsel are disqualified from prosecuting the Rule to Show Cause. However, in violation of SCACR Rule 407 and ACR Rules 3.1 and 3.3, the Appellants deliberately omit reference to the Amended Order of Marvin H. Dukes filed November 19, 2009 (Exhibit 6) which specifically states in pertinent part

> "1. It would be inequitable to allow the asserted conflict to impair the access of the class and class representatives in case # 1377 to the counsel who have represented them since December of 2005 with the full knowledge and acquiescence of counsel for Cardamone and Gianni (which counsel has also served as counsel to that class at the request of Cardamone and Gianni Since August of 2002).
>
> 2. There has been no actual impairment of the representation provided to Plaintiffs in this action as a result of the conflict."

On page 5 of Appellants' Memorandum of Appealability, they assert Judge Hayes dismissed the action with prejudice but retained jurisdiction "to interpret, enforce the terms and conditions and obligations of this Settlement Agreement consistent herewith". What Appellants

---

6 See Exhibit 5, Time Record produced by William Dixon Robertson, document No. Robertson 00015(produced in case # 2008-CP-07-1345), time entry dated June 17, 2003 "Telephone call to Mr. Francis E. Grimball-RE attorney's fee in Cardamone depends on dismissal of Finkel firm's appeal; Mike Seekings is to file motion to dismiss appeal and Supreme Court will rule on it someday. Telephone call to Mr. Robert L. Wylie IV--)

deliberately omit from this argument in order to mislead the Court is the following language contained in the Settlement Agreement which was adopted by the Court and unappealed by anyone:

> Under Definitions- "Settled Claim(s)": ".... Notwithstanding anything else to the contrary in this Settlement Agreement, the Parties do not intend to and do not release any Person other than the Released Parties. "Settled Claims" does not include any claim that may be asserted against Persons other than the Released Parties, including but not limited to, claims described in Section 17.4.
>
> 17.4 Notwithstanding anything to the contrary in this Settlement Agreement, nothing in this Settlement Agreement shall be construed to operate to release or compromise in any way (a) claims asserted against Persons other than Released Parties in that certain action known as Steven and Jeaneen Tucker, et al. v. Leath, Bouch & Crawford, LLP, et al., Beaufort County Case Number 2008-CP-07-03145, (b) the claims which remain against Persons other than Released Parties in Timothy J. Treon et al.. v. Dryvit Systems, Inc. et al., Beaufort County Case Number 2008-CP-07-00774, (c) **any request that Persons other than Released Parties account for or tender funds to this Court** or (d) any and all claims by any of the Parties against any other Persons who are not Release Parties, Class Representatives or Intervening Class Counsel including, but not limited to, other Persons such as builders, architects, subcontractors and other material suppliers. All claims described in this Section 17.4 expressly are not release and are reserved and preserved." (emphasis added)
> (Exhibit 7)

Leaving out these important and pertinent portions of the record is yet another violation of the duty of candor. Based on the above language, it is clear that the Trial Court retained jurisdiction over the matters contested herein.

II. ARGUMENT

They claim the judge in a class action setting can not inquire about their activities while they were class attorneys. The very words of SCRCP and the cases belie this assertion. Appellants impermissibly seek to impair the Court's authority to investigate those actions and is clearly violative of Rule 23 SCRCP which provides "[t]he court may at any time impose such

terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended." Rule 23(d)(2). This rule "specifically permits the trial court to maintain continual control over class action proceedings." Salmonsen v. CGD, Inc., 377 S.C. 422, 454, 661 S.E.2d 81, 88 (2008) "A trial court has a specific responsibility to account for the benefits derived by Cardamone Representatives and their Counsel in this action in accordance with Rule 23 SCRCP. Premium Investment Corp. v. Green, 282 S.C. 464, 324 S.E. 2d 72 (Ct.App. 1984) (recognizing the fiduciary duty owed by class representatives and their lawyers to unnamed class members and that a constructive trust is the appropriate remedy for a violation of that duty.).

Respondent moves pursuant to Rule260(a), SCACR for the immediate dismissal of the Appellants' appeal with a remand to the trial court so that it may conduct the Rule to Show Cause proceeding previously scheduled for the week of October 1, 2012. In this matter, Appellants appeal from an email sent by the trial court instructing Respondents to compose a proposed order denying the relief sought by the Respondents. Appellants urge this Court to ignore the trial court's ability to modify a proposed order by asking that the Judge's "intent," expressed in his email, be appealed. Such an appeal would be violative of well established South Carolina law and disrespectful to the trial court's ability to craft its own order for review. "An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of court, the judge retains control of the case." Upchurch v. Upchurch, 367 S.C. 16, 22, 624 S.E.2d 643, 646 (2006). For purposes of an appeal, "the effective date of an order is not when it is signed by the judge, but when it is entered by the clerk of court. Id. In this matter, Appellants discard the distinction between a judge's signature and a filing by the clerk to seek a review of what the trial court may put in some future order.

The instant appeal, even if filed from a properly signed and filed order, is interlocutory and not subject to an immediate appeal. Under the circumstance at issue in this matter, a party may only appeal from an "intermediate judgment" that involves the merits of an action or an order which affecting a "substantial right" that determines the outcome of the action. S.C. Code Sec. 14-3-330(1) & (2). The email/order appealed from does neither. More importantly, the email/order appealed from issues from trial court overseeing an action certified as a class action pursuant to Rule 23, SCRCP. Intermediate orders in a class action, while subject to the general appealablity requirements of Section 14-3-330, are also subject to the specific requirements of Rule 23. Our Supreme Court has combined those requirements and concluded that "[o]rders under Rule 23, SCRCP are interlocutory and thus, immediately appealable only in certain circumstances." Eldridge v. City of Greenwood, 308 S.C. 125, 417 S.E.2d 532, 534 (1992). This limited appealability of intermediate orders in a class action is a function of the broad grant of power to the trial judge that is necessary for the court to manage the action and ensure class counsel and class representatives fulfill their fiduciary duties to the unnamed class members. See e.g., Rule 23(d)(3), SCRCP ("Whenever the representation appears to the court inadequate fairly to protect the interests of the absent persons who may be bound by the judgment [i.e. unnamed class members], the court may at any time impose additional conditions on the representative parties."). The email/order appealed from merely establishes a procedure for fulfilling the court's Rule 23 obligation by inquiring into the conduct of the Appellants, who formerly represented the unnamed class members and received certain undisclosed fees as a result of that representation. Rule 23, SCRCP conveys such power on the court and is further bolstered by the inherent power of the court to compel the appearance of officers of court.

The Appellants invite this Court to put the proverbial appellate court before the horse by assuming that the effect of any ruling in this proceeding will harm the Appellants' rights in a pending legal malpractice action. As Justice Pleicones explained in Baldwin Construction Co. v. Graham, the appropriate analysis of appealability does not focus on the "ultimate" effect of an appealed ruling, but rather answers the question of whether the order "prevents a judgment from which an appeal might be taken or discontinues the action." 357 S.C. 227, 593 S.E.2d 146, 147 (2004). Appealability is therefore determined by whether the appellant has "arrived at the end of the road" by the entry of the order appealed from. By that standard, the Appellants clearly have not.

This principle is reflected in Woodard v. Westvaco Corp. wherein the Supreme Court held "an order denying a Rule 12(b)(1) motion to dismiss [for lack of subject matter jurisdiction]" was not immediately appealable. 319 S.C. 240, 460 S.E.2d 392, 393 (1995). The court acknowledge that the question of jurisdiction involved a "substantial right," but determined the appealed order did not meet the "substantial right" appealabilty standard of Section 14-3-330(2) because the order did not determine the outcome of the action, discontinue the action, nor prevent a judgment from which an appeal may be taken. "[W]hile such orders may involve a substantial right, they do not fall under Sec. 14-3-330(s)(a) because they do not **in effect** determine the action and prevent a judgment from which an appeal might be taken or discontinue the action." Id. (emphasis added). For the same reason, such orders do not 'involve the merits' under Sec. 14-3-330(1)." Id. at f.2.

As to the substance of Appellants' argument, there is no authority for the notion that they are entitled to a jury trial regarding the undisclosed attorneys' fee they received in this matter.[7]

7 At a hearing on July 18, 2012, Respondents addressed the Appellants' spurious jury trial argument and made a motion on the record that the trial judge empanel a jury to make factual determinations regarding the Rule 23

A trial court's authority over class counsel and the fees they may earn is widely recognized in Rule 23 jurisprudence. "It is now generally conceded that a plaintiff who sues on behalf of a class and the attorney representing the class assume a fiduciary obligation to absent members of the class." Premium Inv. Corp. v. Green, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct. App. 1984) (noting the similarity of the fiduciary duty of class counsel and class representatives). Class counsel breach their fiduciary obligation to unnamed class members by using the class action they filed to obtain a benefit for themselves, even if the benefit received "is not at the expense of the class." Id. As our Court of Appeals explained, the assumption of this fiduciary obligation means "[t]he class representative also surrenders the right to settle the action in return for individual gain alone." Id. It goes without saying that class counsel, who is ethically prohibited from having a personal interest in the litigation, is similarly prohibited from settling a class action for individual gain.

The prohibition against a class counsel or class representative pursuing his or her own self-interest while representing unnamed members of a Rule 23 Class is well grounded in South Carolina and Federal law. Our Supreme Court recognized this fundamental principle as early as 1916 with the observation that it only required "[a] moment's reflection without the citation of authority" to understand that "one cannot represent a class when his interest and that of the class are antagonistic." Sartor v. Newberry Land & Security Co., 104 S.C. 184, 88 S.E. 467, 468 (1916). This principle is universally recognized in modern class action litigation and is equally applicable to class counsel and class representatives. For example, all major treatises on the Federal Rules of Civil Procedure note that any conflict of interest or antagonism between unnamed class members and their representatives is sufficient grounds to disqualify the class

---

proceeding. Before the judge ruled on the motion, each Appellant (through its counsel) rejected the Respondents' motion thereby waiving any argument for a jury trial in this proceeding.

representatives.[8] Of all the different types of conflicts that can develop, the most fundamental is when a representative uses the prosecution of a class action to advance his or her own economic self-interest. "A class representative should never use a class action as leverage to procure a more favorable settlement of non-class claims." Moore's Federal Practice Explicit Condition: Representative Parties Must Fairly and Adequately Represent Class § 23.25 [2][b][vii].

To ensure that class representatives and class counsel do not abuse their fiduciary obligations, trial courts have "broad powers" under Rule 23 to "impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the [class] action is brought" so that the judicial system may not be used to abuse the rights of unnamed class members. Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992). Many courts have recognized that the trial judge must police the actions of class representatives and class counsel to ensure that they do not violate their fiduciary obligations. Our Supreme Court recognized that "the kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy" such as when the class representatives or their counsel have "a claim which conflicts with the economic interests of the class." Waller v. Seabrook Island Property Owners Ass'n., 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). Some courts have characterized the role of the trial judge in a Rule 23 action as that of a fiduciary because the court must be the guardian of the rights of absent class members at every stage of class litigation from pre-certification to settlement in order to guard against the inherent risk of conflict developing between class members and their representatives. See e.g., Shelton v. Pargo,

[8] E.g., Wright & Miller 7A Fed. Prac. & Proc. Civ. The Representatives Will Protect the Interests of the Class – Antagonistic or Conflicting Interests § 1768 (3d ed.) ("It is axiomatic that a putative representative cannot adequately protect the class if the representative's interests are antagonistic to or in conflict with the objectives of those being represented."); 1 Newberg on Class Actions Adequacy of Class Representative – Conflicts of Interest § 3:58 (5th ed.) ("All that is required—as the phrase "absence of conflict" suggests—is sufficient similarity of interest such that there is no affirmative antagonism between the representative and the class.").

Inc., 582 F.2d 1298 (4th Cir. 1978) (setting forth the duty of the trial court to unnamed class members prior to class certification) and Premium Investment Corp. v. Green, 283 S.C. 464, 472, 324 S.E.2d 72, 77 (Ct. App. 1984) (noting that the proposed dismissal of a class action requires court approval and notice to unnamed class members). The trial court's obligation to unnamed class members was universally recognized when South Carolina adopted its modern rules Rule of Civil Procedure was adopted in July of 1985. Those Rules included a provision that prohibited a class action from being "dismissed or compromised without the approval of the [trial] court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Rule 23(c), SCRCP; see also Reynolds v. Beneficial National Bank, 288 F.3d 277, 280 (7th Cir. 2002) (noting the trend amongst courts "to term the district judge in the settlement phase of a class action suit a fiduciary of the class" and to impose on the trial court the same "high duty of care that the law requires of a fiduciary.").

A trial court's obligation to the unnamed members of a Rule 23 class is especially critical when the court is asked to approve a class action settlement. In Stanton v. Boeing Co., the United States Court of Appeals for the Ninth Circuit set forth a lengthy explanation of the "real" and "inherent dangers" of class action settlement to unnamed class members. 327 F.3d 938, 959-60 (2003).

> [C]lass representatives have their own incentives to advance their interests at the expense of the class." Also, class counsel has their own "incentives ... to pursue their own self-interest and that of certain class members [which] can influence the result of the negotiations without any explicit expression or secret cabals. That is why [trial] court review of class action settlements includes not only consideration of whether there was *actual* fraud, overreaching or collusion but, as well, substantive consideration of whether the terms of the [settlement] decree are fair, reasonable and adequate to all concerned.

Id. at 960 (emphasis in original). Although the Ninth Circuit's policy is to let the trial judge decide whether a proposed class action settlement is **fair** to all concerned, the Court retains to itself the critical review of whether the terms of a class action settlement "directly lend themselves to **pursuit of self-interest** by class counsel and certain members of the class - namely, attorneys fees and the distribution of ... monetary relief among class members." Id. (emphasis added); see also Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 183 (3rd Cir. 2012) (recognizing "the linchpin of the adequacy [of representation] requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class.").

By concealing the agreement with Dryvit to pay Appellants a substantial attorneys' fee that was contingent on the dismissal of this action, Appellants have ignored the requirements of Rule 23(c), SCRCP and prevented the trial court from fulfilling it fiduciary duty to the unnamed class members. Specifically, Appellants failed to provide the trial judge with any information concerning the two areas thought most important by the Ninth Circuit regarding the pursuit of self-interest, namely: (1) payment of attorneys' fees to class counsel and (2) distribution of monetary relief to certain class members. Certainly, the trial judge had no way to, nor reason to, inquire whether the Appellants' interests conflicted with those of the unnamed class members. Certain evidence placed in the record during extensive litigation with Defendant Dryvit Systems, Inc. suggests Appellants' interests do conflict with the unnamed class members.

Appellants' argument suggests that a Rule 23 trial court lacks the authority to review attorneys' fees after they have been received by class counsel, regardless of whether they were disclosed to the trial judge or unnamed class members. This argument is disingenuous at its core because the trial court specifically reserved its right to review attorneys fees issue in two (2)

separate orders. The trial court first reserved its right to review fees in the final paragraph of the Order that relived the Appellants as class counsel filed on or about November 20, 2006 (attached hereto as Exhibit 3). The trial court renewed that reservation in paragraphs 11, 12, and 30 in its order granting final approval of the settlement Respondents negotiated with Defendant Dryvit Systems, Inc. (attached hereto as Exhibit 8). Even had the court not reserved the attorney fee issue in its November Order, it has the power to review fees already paid. In Rule 23 actions, a trial "court has broad equitable powers to deny attorneys' fees (or to require an attorney to disgorge fees already received) when an attorney represents clients with conflicting interests." Rodriguez v. Disner, 688 F.3d 645, 653 (9th Cir. 2012) citing Silbiger v. Prudence Bonds Corp., 180 F.2d 917, 920 (2d Cir.1950) ("Certainly by the beginning of the Seventeenth Century it had become a common-place that an attorney must not represent opposed interests; and the usual consequence has been that he is debarred from receiving any fee from either [client], no matter how successful his labors."); see also Premium Investment Corp. v. Green, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984) (imposing a constructive trust on benefits obtained by class representatives and counsel in violation of their fiduciary duty to unnamed class members). In an early Rule 23 case, the United States Court of Appeal for the Third Circuit recognized the expansive powers of a trial judge to perform a post-settlement review of an attorneys' fee award where class counsel had failed to inform the presiding judge of crucial information relevant to counsel's possibly self-serving motives. In re: E. Sugar Antitrust Litig., 697 F.2d 524, 533 (3rd Cir. 1982). In this matter, members of class counsel and counsel for the defense discussed a merger of their two firms toward the end of the litigation they were engaged in. The Third Circuit approved the disgorgement of all fees earned due to the potential conflict of interest. The court explained the sanction should include fees earned before the conflict developed in order "to

discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type." 697 F.2d at 533.

Because the appealed email/order is well within the scope of a Rule 23 trial court's authority, creates no right to a jury trial regarding the attorneys' fees they earned, and fails to meet the requirements of Section 14-3-330 the pending appeal should be dismissed and the matter remanded to the trial court.

III. CONCLUSION

The undersigned attorneys are offended by Appellants' attempt to deprive Judge Hayes of his authority under Rule 23(d)(3) and his efforts to safeguard the interests of the unnamed class members based on a spurious assertion that he is denying them their "ancient right to a jury trial." As explained above, Rule 23 courts of other states and the federal judiciary routinely review attorney fee awards in class action and sometimes order the disgorgement of those fees in equitable proceedings without affording counsel the right to a jury trial. Through more than seven (7) years of hard fought litigation with Defendant Dryvit Systems, Inc., evidence has been developed that clearly suggests that Dryvit and the Appellants reached undisclosed agreements intended to compromise this class action in exchange for personal financial gain without even a perfunctory nod to Rule 23(c)'s explicit requirement that a "class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Although Dryvit strenuously denied Respondents' allegation of impropriety involving those agreements, it did not challenge and affirmatively validated the authenticity of documents, transcripts, and other material that are now the subject of the proposed proceeding.

Appellants' arguments that the issues presented in this appeal affects their substantial rights and is appealable under S.C. Code Ann §14-3-330 (1976), lack merit. Appellants have failed to meet the strict requirements under which they may appeal. Therefore, Respondents respectfully request that their Motion to Dismiss this appeal be granted and allow the Trial Court to perform its duties and functions under SCRCP Rule 23.

Respectfully submitted,

Gregory M. Alford by Henry L. Goldberg with express permission

Gregory M. Alford , Esq.
Thomas E. Williams, Esq.
Alford, Wilkins & Coltrane, LLC
Post Office Box 8008
Hilton Head Island, SC 29938
843-842-5500
Attorneys for Respondents

Robert Phillips by Henry L. Goldberg with express permission

Robert "Sam" Phillips, Esq.
Finkle Law Firm, LLC
Post Office Box 1799
Columbia, South Carolina 29202

This 28th day of September, 2012
Hilton Head Island, South Carolina.

South Carolina Lawyers Weekly http://sclawyersweekly.com

EXHIBIT

tabbies

Stucco class action proves sticky

by Sharon McCloskey

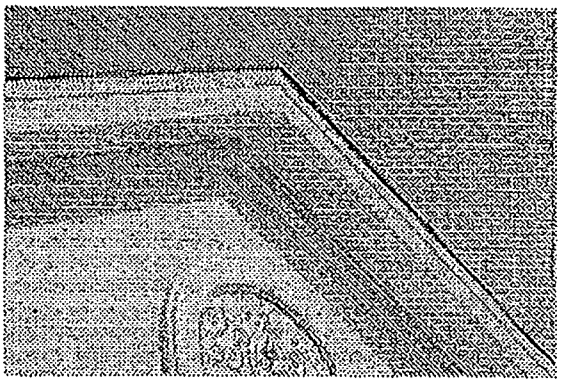
Published: August 10th, 2012

Some homeowners now suing others, along with lawyers who settled case

What exactly was that $825,000 for?

That's the question Court of Common Pleas Judge J. Mark Hayes III wants two Charleston law firms to answer at an October 1 hearing he's ordered them to attend.

Back in 2002, Leath Bouche & Crawford and Mullen Wylie acted as class counsel to South Carolina homeowners suing Rhode Island-based Dryvit Inc., the maker of synthetic stucco siding they said trapped water inside walls and caused moisture damage.



Years later, several of those homeowners accused the firms of taking sizable counsel fees — some $825,000, according to the court — and leaving the class hanging out to dry. They sued both the firms for malpractice and the original plaintiffs for breach of fiduciary duty in Beaufort County.

That has left the original Dryvit class action pending in Beaufort County for close to ten years and forced Hayes — who is handling both that action and the two homeowner actions against the former plaintiffs and their counsel — to try to unravel events that took place both here and in courts in Tennessee.

And what he's learned has him troubled.

"The record in this case is substantial in size," Hayes said in the June order directing the attorneys and class representatives to appear on Oct. 1, as he considers whether to impose a constructive trust on fees and benefits they received from Dryvit for the benefit of the class.

"The vast majority of the record in this case, however, does not relate to the [underlying] product liability claim . . . but rather . . . to the use of a South Carolina Circuit Court judge's order granting class certification as a sword against a sister states' attempt to finalize a nationwide class action settlement, and the subsequent conduct of original class counsel and original class representatives."

Take the money and run?

In April 2002, Dryvit agreed to settle a class action pending in Tennessee on a nationwide basis. A state court there preliminarily approved the settlement and notice of the pending settlement was sent to affected homeowners across the country.

A handful of South Carolina homeowners objected to the settlement and filed a separate class action against Dryvit in Beaufort County in August of that year. Within a month, Judge Thomas Kemmerlin had certified a class of all affected South Carolina homeowners, effectively opting them out of the nationwide settlement class. The judge also directed counsel to serve notice of the action to other potential South Carolina class members. That didn't happen.

Instead, according to Hayes, class counsel used the South Carolina action as a bargaining chip in Tennessee. At first counsel told the court there that the entire state of South Carolina had opted out of the settlement.

Two months later though, after settling the original South Carolina plaintiffs' individual claims against Dryvit and negotiating a sizable counsel fee award for themselves — conditioned, Hayes suspected, upon their delivering a dismissal of the case here — they told the Tennessee court that South Carolina homeowners were now on board with the settlement.

Nobody bothered to tell that to the pending South Carolina class of affected homeowners or the South Carolina court, however. The action here languished for close to three years, according to Hayes, while counsel waited for their fee checks to arrive after the Tennessee settlement received final approval.

That happened in April 2005. Dryvit then moved to dismiss the South Carolina action, claiming that the final judgment in the Tennessee action barred any new claims.

After several hearings in which he learned about the settlements by the original class plaintiffs and the fees paid to their counsel, Hayes denied Dryvit's motion to dismiss in 2009.

He would not honor the Tennessee settlement, Hayes said, because he was concerned that Dryvit had effectively bought the final judgment there by settling with the original plaintiffs in South Carolina – and not the entire class — and suspected that their counsel had promised to deliver a dismissal of the South Carolina action in exchange for sizable counsel fees.

"This court is compelled to ascertain why fees of $825,000 were promised to original class counsel, which the emails and other documents in the record say are conditioned upon the dismissal of this case," Hayes said in his recent order.

Breach of duty

Dryvit finally agreed to a settlement of the South Carolina action in June 2010, but the saga doesn't end there.

In 2008, the new class plaintiffs and other SC homeowners sued the original class representatives for breach of fiduciary duty, claiming that they put their personal interests ahead of the class, and original class counsel for legal malpractice.Motions to certify the classes in both actions have been stayed by Hayes, pending the Oct. 1 hearing.

M. Dawes Cooke, Jr., of Charleston, who represents the original class representatives, says his clients acted properly in settling claims against Dryvit and other defendants in cases that were pending in addition to the underlying class action.

"They had their own lawsuits individually before there even was a class action pending," he said. "When the class action was filed they were named class representatives, but they still had their individual cases pending against some defendants that weren't even a part of the class action. Dryvit was just one of them, and they didn't do anything to prejudice the class."

"What they're charged with in this case is having settled a class action without getting court approval, but they didn't settle a class action, they settled their individual cases," he added.

But what about original class counsel, who received hundreds of thousands of dollars in attorneys fees for a class action they seemingly abandoned?

Kent T. Stair of Charleston, who represents Leath Bouche and Crawford, did not respond to requests for comment, although he told the Beaufort Gazette that his clients "adamantly deny any wrongdoing and intend to vigorously defend themselves against all claims."

But Thomas Pendarvis, the Charleston attorney representing the homeowners, is confident his clients will prevail. "We look forward to the trial of these legal malpractice and breach of fiduciary duty cases at the earliest opportunity after Judge Hayes lifts the order temporarily imposing a stay," he said.

STATE OF SOUTH CAROLINA)
) IN THE CIRCUIT COURT
COUNTY OF BEAUFORT)

06 JAN 19 PM 12:42

CLERK OF COURT
BEAUFORT, S.C.

John Cardamone and his wife, Sally Cardamone, and Benjamin T. Clark and his wife, Diane M. Clark, and Ramona Gianni, and Nathan W. Gordon, individually and on behalf of others similarly situated in the State of South Carolina,

Plaintiffs,

vs.

Dryvit Systems, Inc., Estate Builders, Inc., and American Way Applicators of South Carolina, Inc.,

Defendants.

Civil Action No. 2002-CP-07-1377

CONSENT ORDER RELIEVING CERTAIN OF PLAINTIFFS' COUNSEL

COPY

This is an action seeking declaratory and injunctive relief and damages arising from the installation of artificial stucco siding manufactured by Dryvit Systems, Inc. It was commenced in August 2002. Over three years later, four of the original counsel for plaintiffs no longer have individual clients with an interest in the litigation. Those four—William M. Bowen, P.A.; Leath Bouch & Crawford; Michael A. Seekings; and William Dixon Robertson III—ask to be relieved as counsel for the plaintiffs and for the class previously certified. None of the remaining counsel for plaintiffs, nor counsel for defendants, object. Accordingly, it is hereby

ORDERED ADJUDGED AND DECREED that William M. Bowen, P.A.; Leath Bouch & Crawford; Michael A. Seekings; and William Dixon Robertson III, shall be and hereby are relieved as counsel for plaintiffs and for the class of plaintiffs previously certified. This order is without prejudice to any claim these lawyers may make for attorneys' fees, if any be awarded in this case, based on services rendered by them prior to this order.

IT IS SO ORDERED.

Spartanburg, South Carolina

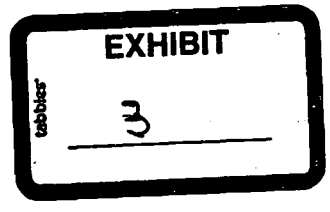
January 18, 2006.

J. Mark Hayes II
Circuit Court Judge

EXHIBIT
tabbies
2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
JOHN CARDAMONE and his wife, SALLY CARDAMONE, and BENJAMIN T. CLARK and his wife, DIANE M. CLARK, and RAMONA GIANNI, and NATHAN W. GORDON individually and on behalf of others similarly situated in the State of South Carolina,	)	Civil Action No.: 2002-CP-07-1377
Plaintiffs,	)	**ORDER ON MOTION TO INTERVENE TO SUBSTITUTE CLASS REPRESENTATIVES AND SUBSTITUTE AS CLASS COUNSEL**
v.	)	
DRYVIT SYSTEMS, INC., ESTATE BUILDERS, INC., and AMERICAN WAY APPLICATORS OF SOUTH CAROLINA, INC.,	)	
Defendants.	)	

This matter is before the Court for a hearing on December 5, 2005, upon a Motion to Intervene, to be substituted as Class Representatives and to be substituted as Class Counsel. The intervenors are Timothy & Jane Treon and P. Jennings Scearce (the "Intervenors") and are represented by Finkel & Altman, L.L.C., Alford & Wilkins, P.C., the Finn Law Firm, and Cotty & Jonas (the "Intervenors Counsel"). Also present at the hearing were Dryvit Systems, Inc. ("Dryvit") through its counsel from the law firms of Womble, Carlyle, Sandridge and Rice, P.L.L.C. and Tupper, Grimsley & Dean, P.A. ("Defense Counsel"), and the current class representatives through their counsel from the law firms of Mullen, Wylie & Seekings, LLC, Leath, Bouch & Crawford, LLP, and William Dixon Robertson, Esquire ("Current Class



Counsel").

Under Rule 24 of the South Carolina Rules of Civil Procedure, the burden on the Intervenors is to show a (1) timely motion to intervene, (2) a personal stake in the outcome of the litigation and (3) their interests are not being adequately represented by the current representatives. None of the parties argued that the motion to intervene was not timely. Through affidavits, the Intervenors have established that they have a personal stake in the outcome of the litigation. Lastly, at the hearing, Current Class Counsel informed this Court that the current class representatives have resolved their claims against Dryvit. Therefore, the current class representatives do not have a personal stake in this litigation and do not adequately represent the interests of the Intervenors. Therefore, this Court finds that it is appropriate for the Court to Grant the Motion to Intervene and the request for the Intervenors to be substituted as named class representatives.

During the hearing, Current Class Counsel indicated that they currently represented several other individuals that did have a personal stake in the outcome of this litigation of whom one or more of them may be willing to serve as additional named class representatives. During the hearing, Current Class Counsel orally moved before the Court to allow them to include these other individuals as class representatives (the "Substituted Client") and to allow Current Class Counsel to continue to represent the Class. Under Rule 23(d)(2), SCRCP, the "Court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended." With this discretionary authority in mind, this Court will allow Current Class Counsel ten (10) days from the entry of this Order to file an

affidavit from a Substituted Client that indicates the Substituted Client's willingness to serve as a named class representative in this action. With the filing of this affidavit, the Court grants the oral motion of Current Class Counsel to allow for the Substituted Client to be included as additional named class representatives.

Lastly, this Court must address the issue of Intervenors Counsel and their request to be substituted for Current Class Counsel. The South Carolina Supreme Court has found that the right to an attorney of one's own choosing is a substantial right. *See Hagood v. Sommerville*, Op. No. 25915 (Shearhouse Advance Sheet, January 4, 2005). Thus, the Intervenors have the substantial right to have Intervenors Counsel represent them. Similarly, with the filing of the affidavit from one or more Substituted Clients, these clients have the substantial right to have Current Class Counsel represent them. Thus, this Court finds that both Intervenors Counsel and, upon the filing of the affidavit, Current Class Counsel shall proceed forward as joint class counsel in this case.

This Court provides for this joint representation and expressly holds that ~~(1) Intervenors Counsel shall not be imputed with, responsible for, or liable for any action or inaction relating to this class action prior to the entry of this Order,~~ (1) Intervenors Counsel shall not be entitled to share in any compensation paid to any Current Class Counsel or to be paid to Current Class Counsel for the services that they rendered prior to the entry of this Order, and (2) this decision providing for joint representation may be revisited at any time if counsel is unable to work together in the best interests of the class members.

This Court is mindful that a trial court's power to manage a class action is fluid and

allows the court to redefine or subdivide the class as necessary. McCann v. Mungo, 287 S.C. 561, 570-71, 340 S.E.2d 154, 159 (1986). That power also allows the court to act whenever a person's interests are not being adequately represented by the existing parties. Berkeley Electric v. Town of Mount Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990).

It is therefore,

ORDERED, ADJUDGED AND DECREED,

(1) the motion to intervene is granted;

(2) the motion to substitute the Intervenors as named class representatives is granted;

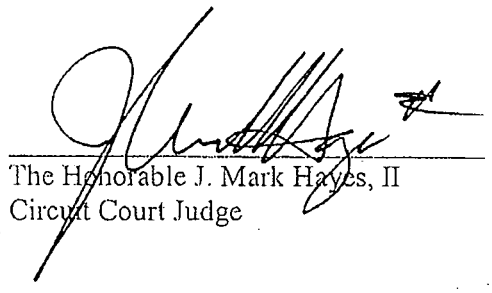
(3) the oral motion to allow for additional named class representatives with a personal stake in the outcome of this litigation is granted and Current Class Counsel has ten (10) days from the entry of this Order to submit an affidavit or affidavits from a Substituted Client or Clients evidencing their willingness to serve as named class representatives,

(4) the motion to allow Intervenors Counsel to serve as class counsel is granted;

(5) the motion to substitute Intervenors Counsel for Current Class Counsel is denied upon the condition that an affidavit from a Substituted Client of Current Class Counsel is filed within (10) days of the entry of this Order evidencing the their willingness to serve as named class representatives; and

(6) class counsel shall have twenty five (25) days to file an amended complaint substituting the Intervenors and any Substituted Client as named class representatives.

AND IT IS SO ORDERED.



The Honorable J. Mark Hayes, II
Circuit Court Judge

file Cardamone

LEATH, BOUCH & CRAWFORD LLP
PRACTICE LIMITED TO COMMERCIAL LITIGATION & CREDITORS RIGHTS
WITH EMPHASIS ON CONSTRUCTION & ENVIRONMENTAL LAW

December 1, 2006

REC'D DEC 4 0 2006

Gregory M. Alford, Esq.
Alford & Wilkins, P.C.
P. O. Drawer 8008
Hilton Head, SC 29938-8008

RE: John Cardamone et al v. Dryvit Systems, Inc.
Civil Action No. 2002-CP-07-1377

Dear Mr. Alford:

I am in receipt of your letter and subpoena dated November 22, 2006, in the above captioned matter. We have no non-privileged documents responsive to your subpoena save for the Order issued by the Jefferson County Tennessee Circuit Court, dated January 14, 2005, a copy of which I enclose for your convenience. That Order on page 5, paragraphs 14 and 15, makes reference to attorney's fees in the matter you discuss.

If you have any questions, please don't hesitate to contact me.

Thank you again and with best wishes, I am

Very truly yours,

LEATH, BOUCH & CRAWFORD, LLP

Timothy W. Bouch

TWB/lf

Enclosure

CHARLESTON: P.O. Box 59, Charleston, SC 29402 • 92 Broad Street • Charleston, SC 29401 • 843-937-8611 • Facsimile 843-937-0608
COLUMBIA: P.O. Box 4216, Columbia, SC 29240 • 1640 St. Julian Place, Columbia, SC 29204 • 803-790-2626 • Facsimile 803-790-1277

EXHIBIT
tabbies
4

Date: Tue Jul 29, 03
Billing rate type: Contingency
Client: John Cardamone
Matter: Dryvit Class Action suit
File ID: 712/712-01
Time: 0.20
This time entry has been posted to accounting
Activity: E-mail from Roberts, Stephanie.

Date: Fri Jun 27, 03
Billing rate type: Contingency
Client: John Cardamone
Matter: Dryvit Class Action suit
File ID: 712/712-01
Time: 0.20
This time entry has been posted to accounting
Activity: E-mail from Roberts, Stephanie.

Date: Thu Jun 26, 03
Billing rate type: Contingency
Client: John Cardamone
Matter: Dryvit Class Action suit
File ID: 712/712-01
Time: 0.20
This time entry has been posted to accounting
Activity: E-mail from Custer, Clay.

Date: Tue Jun 17, 03
Billing rate type: Contingency
Client: John Cardamone
Matter: Dryvit Class Action suit
File ID: 712/712-01
Time: 0.40
This time entry has been posted to accounting
Activity: Telephone call to Mr. Francis E. Grimball -- RE attorney's fee in Cardamone depends on dismissal of Finkel firm's appeal; Mike Seekings is to file motion to dismiss appeal and Supreme Court will rule on it someday. Telephone call to Mr. Robert L. Wylie IV --

Date: Thu Jun 5, 03
Billing rate type: Contingency
Client: John Cardamone
Matter: Dryvit Class Action suit
File ID: 712/712-01
Time: 0.20
This time entry has been posted to accounting
Activity: E-mail from Richard A. Harpootlian.

Date: Fri May 16, 03
Billing rate type: Contingency
Client: John Cardamone
Matter: Dryvit Class Action suit
File ID: 712/712-01
Time: 0.20
This time entry has been posted to accounting
Activity: E-mail from Ruth, Heather.

Date: Fri May 2, 03
Billing rate type: Contingency
Client: John Cardamone
Matter: Dryvit Class Action suit
File ID: 712/712-01
Time: 0.40
This time entry has been posted to accounting
Activity: E-mail from Custer, Clay. E-mail from Custer, Clay.

Robertson 00015

EXHIBIT
tabbies
5

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
)	
)	
)	CIVIL ACTION NO. 2008-CP-07-0774
TIMOTHY TREON AND P.J. SCEARCE individually and on behalf of Others similarly situated in the State of South Carolina,)	
)	
Plaintiffs,)	
v.)	
)	AMENDED ORDER
DRYVIT SYESTEMS, 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,)	

This matter comes before the Court on Plaintiffs' and Defendant, Dryvit Systems, Inc.'s, joint request for a dismissal of Dryvit Systems, Inc. pursuant to SCRCP 41(a)(2) and this Order amends and corrects this Court's order in this cause dated November 9, 2009. The Court held a hearing at the request of the parties at 9:00 a.m. on November 9, 2009 in chambers at the Beaufort County Courthouse. Present for this hearing were Plaintiffs, P.J. Scearce, and Plaintiff Timothy Treon as well as their counsel, Gregory M. Alford, Esq., and Thomas Williams, Esq. Present for Defendant Dryvit Systems Inc. ("Dryvit"), were Samuel Outten, Esq., and Robert Fields Esq. Present for the Defendants John and Sally Cardamone, Benjamin Clark, Diane Clark, and Ramona Giannani was M. Dawes Cooke, Esq. Defendant Nathan Gordon is deceased, has never been served and is not participating in this action. All other parties were represented at the hearing.

There is no opposition to dismissal without prejudice of all claims in this action against Dryvit so that those claims can be added by a Third Amended Complaint to the action styled Treon et al. v. Dryvit Systems, et al. Civil Action Number 02-07-CP-1377 and then settled. Case # 1377 is a certified state court class action between the Plaintiffs in this action and Dryvit. The parties in case #1377 have reached a settlement which they are in the process of documenting and submitting for preliminary approval. Pursuant to that settlement, the claims in this case are to be consolidated with the claims in case #1377 and then dismissed subject to the approval of the Honorable J. Mark Hayes, II.

The issue for determination by this Court is whether counsel for Plaintiffs are disqualified from representing Plaintiffs for purposes of this dismissal. Mr. and Mrs. Cardamone (among others), co-defendants of Dryvit in this case have asserted a claim of conflict of interest against counsel for these same Plaintiffs in another case pending before this Court entitled Treon et al. v. Leath, Bouch and Crawford, et al., case # 2009-CP-07-3145. The Court is in the process of resolving that claim and has announced to the parties in that other case that the Court is inclined to resolve the claim against the current counsel for Plaintiffs who are also counsel for Plaintiffs here and in case # 1377. As a result, the question arises as to whether these counsel are competent, qualified and permitted to advise the Plaintiffs in this action about the ramifications, implications and wisdom of the contemplated voluntary dismissal without prejudice or whether these counsel are disqualified from doing so. In the course of the hearing, the Court was afforded the opportunity to hear directly from Mr. Scearce and Mr. Treon and inquired of them as to the voluntariness of the decision to dismiss Dryvit here. The Court is mindful that while this case has not been certified as a class action, case #1377 has and these Plaintiffs have duties as class representatives in that case.

After hearing arguments from counsel and considering the record in this case and based upon the Court's knowledge of the facts and proceedings in case #3145 and the Court's knowledge obtained by inquires put to Mr. Scearce and Mr. Treon, the Court finds:

1. It would be inequitable to allow the asserted conflict to impair the access of the class and class representatives in case #1377 to the counsel who have represented them since December of 2005 with the full knowledge and acquiescence of counsel for Cardamone and Gianni (which counsel has also served as counsel to that class at the request of Cardamone and Gianni since August of 2002).
2. There has been no actual impairment of the representation provided to Plaintiffs in this action as a result of the conflict.
3. Because the claims which are being dismissed here will be reasserted in case #1377, the potential for harm to Plaintiffs as a result of this dismissal is remote and the decision is a reasonable and prudent one.
4. The Court further finds that the ends of justice are best served by the dismissal without prejudice of the claims against Dryvit in this case.

WHEREFORE, the claims of Plaintiffs in this case against Dryvit Systems, Inc. are dismissed without prejudice effective upon the granting of the motion to amend in case #1377 and the filing of the Third Amended Complaint in that case.

IT IS SO ORDERED.

The Honorable Marvin Dukes, III
Master In Equity and Special Circuit Judge
14th Judicial Circuit.

This 19 day of November, 2009

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No. 2002-CP-07-1377

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,

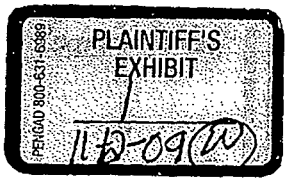
Plaintiffs,

v.

DRYVIT SYSTEMS, INC.

Defendants.

SETTLEMENT AGREEMENT BETWEEN
PLAINTIFFS AND DRYVIT SYSTEMS, INC.



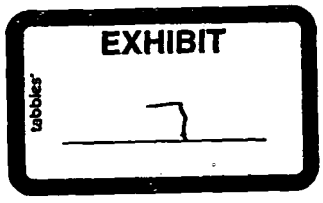


TABLE OF CONTENTS

3. Order and Judgment Granting Final Approval of Settlement Agreement (Proposed)

4. Order for Preliminary Approval (Proposed)

5. Request for Exclusion

6. Report Regarding Claims Administration

7. Property List

8. Inspection Protocol

9. Inspector Qualifications

THIS SETTLEMENT AGREEMENT is entered into this _____ day of _____, 2009 (the "Settlement Agreement"), by and among the named plaintiffs Timothy and Jane Treon, P. Jennings Scearce, and Stephen Christian ("Plaintiffs"), in the above captioned matter (the "Action") for themselves and on behalf of the Settlement Class, and defendant Dryvit Systems, Inc. (the "Settling Defendant") (collectively referred to as the "Parties").

WHEREAS, this Action was filed pursuant to the South Carolina Rule of Civil Procedure Rule 23, as a class action against Settling Defendant alleging damages relating to Settling Defendant's exterior insulation and finish systems ("EIFS") in certain residential properties;

WHEREAS, the Parties have investigated the facts and applicable law, conducted extensive and difficult work, and have engaged in extensive, arms-length negotiations;

WHEREAS, Plaintiffs have investigated and identified various factual and legal differences between certain Settlement Class Members, and have consulted with representatives of each sub-category;

WHEREAS, as a result of the investigation, work, negotiations, and consultations Plaintiffs have concluded that this Settlement Agreement is fair and reasonable, and is in the best interests of each Settlement Class Member;

WHEREAS, taking into account the burdens and expense of litigation (including the risks and uncertainties associated with protracted trials and appeals), as well as the fair, cost-effective, and assured method of resolving claims of the Settlement Class provided in this Settlement Agreement, Class Counsel, in conjunction with Plaintiffs, have concluded that this

Settlement Agreement provides substantial benefits to the Settlement Class, is fair and reasonable, and is in the best interests of the Settlement Class; and

WHEREAS, Settling Defendant has denied all allegations of wrongdoing (including the assertion that this Action could have been maintained as a class action through trial), has asserted affirmative defenses to Plaintiffs' claims, and also desires to compromise Plaintiffs' claims so as to avoid the substantial expense, inconvenience, and distraction of this litigation, and put to rest forever all claims that have or could have been asserted against the Released Parties arising from or in any way related to the acts, transactions, or occurrences alleged in this Action;

NOW, THEREFORE, the Parties, by and through their respective counsel, stipulate and agree that all Settled Claims of the Settlement Class shall be finally resolved on the terms and conditions set forth below, subject to the Court's approval of this Settlement Agreement as a good faith, fair, reasonable, and adequate settlement under Rule 23 of the South Carolina Rules of Civil Procedure.

1. DEFINITIONS

As used in this Settlement Agreement and the attached Exhibits, capitalized terms shall have the meanings set forth as follows:

"Actual Damage" means, with respect to the Structure, two or more moisture readings of greater than 22% behind the Dryvit EIFS at two distinct locations, or an area of two (2) square feet of wall with evidence of loss of structural integrity of the sheathing behind the Dryvit EIFS. Actual Damage does not include, and recovery cannot be based on, loss of structural integrity of sheathing directly attributable to harm to the Structure caused by foreign

objects, including, without limitation, falling trees, moving vehicles, flying debris or other physical impact.

"**Bar Order**" means that injunction described in Section 14.1 of this Settlement Agreement below, and set forth in Exhibit 3 hereto.

"**Benefits**" means the rights and remedies available to Settlement Class Members pursuant to Section 6 of the Settlement Agreement. In addition to these Benefits for Settlement Class Members, this Settlement Agreement includes other benefits for the Class including, but not limited to, those services described in Sections 4, 5, and 8 and those amounts described in Sections 7, 13 and 19 below. The term "benefits" is not capitalized herein when referring to benefits to the Settlement Class which go beyond those described in Section 6.

"**Claim**" means a request by a Claimant for a determination of eligibility for Benefits under this Settlement Agreement

"**Claim Form**" means the form (substantially in the form of Exhibit 1 hereto) that Class Members must complete in order to receive Benefits under this Settlement Agreement.

"**Claim Period**" means the two hundred and ten (210) Days from the Notice Date (as defined below) during which Class Members may file a Claim Form under this Settlement Agreement.

"**Claimant**" means any Person that claims to be a Class Member and who has timely filed a Claim Form with the Settling Defendant and has not filed a Request for Exclusion pursuant to Section 9 of the Settlement Agreement.

"**Class**" **or** "**Class Members**" means all Persons that, as of the Notice Date, own or owned a Structure, on which a Dryvit EIFS , was installed during the Class Period .

"**Class Counsel**" means the following counsel:

Intervening Class Counsel

Alford & Wilkins, P.C.
P. O. Drawer 8008
Hilton Head Island, SC 29938

The Finn Law Firm, P.C.
P. O. Box 6003
Hilton Head Island, SC 29938

Cotty & Jonas
1328 Blanding Street
Columbia, SC 29202

The Finkel Firm, LLC
1201 Main Street
P. O. Box 1799
Columbia, South Carolina 29202

Original Class Counsel
Mullen Wylie, LLC
171 Church Street, Suite 370
Charleston, SC 29401

"**Class Notice**" means the Court-approved notice of this Action including notice of the Settlement Agreement (substantially in the form of Exhibit 2 hereto).

"**Class Period**" means the period from January 1, 1989 through September 3, 2002.

"**Class Representatives**" means the named Plaintiffs.

"**Court**" means the Court of Common Pleas for Beaufort County, South Carolina.

"**Date of the Claim**" means the date on which the envelope enclosing the Claim Form is post-marked.

"**Day or Days**" means all calendar days, not just business days, provided however, that if in counting such Days a deadline for any items shall fall on a Sunday, or a United States

holiday on which there is no U.S. Postal delivery service, then the deadline shall be deemed to expire on the next Day.

"**Dryvit EIFS**" means either Dryvit Outsulation® or Dryvit Sprint ® non-drainable exterior insulation and finish system installed as a complete system (i.e., not as a Mixed Product) on the Structure of a Class Member. Dryvit EIFS shall not include any mechanical or adhesive application over CMU block, cement or fiber cement board, brick or other masonry unit; the application over any substrate with secondary weather barrier or with drainage or water management; Dryvit's Exsulation® system; or any direct application such as Fastrak® System 4000.

"**Fairness Hearing**" means the hearing to be conducted by the Court to determine the fairness, adequacy, and reasonableness of this Settlement Agreement under Rule 23 of the South Carolina Rules of Civil Procedure.

"**Final**" means, as applied to the Order and Judgment, that no timely appeals have been taken or that all appeals have been exhausted from the Order and Judgment approving this Settlement Agreement.

"**Inspection Protocol**" means the protocol for inspectors to perform inspections of Claimants' Structures substantially in the form of Exhibit 8.

"**Mixed Product**" means an EIFS that was not, in its entirety, sold, marketed or distributed by Settling Defendant (i.e. a non-proprietary EIFS system). Other sidings which are not Dryvit EIFS on other elevations do not indicate a Mixed Product. A proprietary system sold by Settling Defendant as to which Settling Defendant waived in writing, knowingly and expressly, use of one or more of its components as to a specific Structure is not a Mixed Product.

"**Notice Date**" means the Court-established date for the initial dissemination of Class Notice.

"**Notice Plan**" means the proposed plan for dissemination of the Class Notice, attached hereto as Exhibit 2.

"**Objection Date**" means the date by which Settlement Class Members must file any objections to the Settlement Agreement as set forth in the Preliminary Approval and specified in the Class Notice.

"**Order and Judgment**" means the Order to be entered by the Court, that is mutually agreeable to the Parties, approving this Settlement Agreement without material alteration, as fair, adequate, and reasonable under Rule 23 of the South Carolina Rules of Civil Procedure, and making such other findings and determinations as the Court deems necessary and appropriate to effectuate the terms of this Settlement Agreement, substantially in the form of Exhibit 3 hereto.

"**Person**" means both an individual and an entity, and their respective successors or assigns.

"**Preliminary Approval**" means the Court's order (substantially in the form of Exhibit 4 hereto) granting preliminary approval of this Settlement Agreement and approval of the Class Notice pursuant to Rule 23 of the South Carolina Rules of Civil Procedure.

"**Preliminary Approval Hearing**" means the hearing the Court conducts in connection with the Preliminary Approval of the Settlement Agreement.

"Preliminary Settlement Approval Date" means the date on which the Court signs the Preliminary Approval.

"**Released Party**" means the Settling Defendant and its insurers and includes any and all of their predecessors, successors, parents, subsidiaries, divisions, departments, affiliates, distributors, and counsel, as well as any and all of their past, present, and future officers, directors, stockholders, partners, agents, servants, employees, successors, subrogees, and assigns except that Released Party does not include any current party to the actions described in Section 17.4 other than Settling Defendant.

"**Request for Exclusion**" means the form (substantially in the form of Exhibit 5 hereto) that a Class Member must timely send to the Settling Defendant pursuant to Section 9 of this Settlement Agreement, if the Class Member wishes to be excluded from participation in the Settlement Class.

"**Settled Claim(s)**" means any claim, liability, right, demand, suit, matter, obligation, damage, award, payment, penalty, loss, fee or cost, action or cause of action, of every kind, nature, and description that any Settlement Class Member or any Settlement Class Member's heir, administrator, devisee, predecessor, successor, counsel, representative of any kind, shareholder, partner, director, owner of any kind, affiliate, subrogee, assignee, or insurer has or may have, whether known or unknown, asserted or unasserted, latent or patent, that is, has been, could have been or in the future might be asserted either in this Action or in any other action or proceeding in this Court or any other court or forum, regardless of legal theory, and regardless of the type or amount of relief, damage, fee, loss, penalty, or award claimed, against any Released Party including but not limited to (a) claims arising from or in any way relating to the manufacture, design, marketing, sale or installation or any defects or alleged defects of Dryvit EIFS, including, but not limited to, any compensation for repairs, remedial work, loss in value, punitive or exemplary damages or any other potential damages involving a Settlement Class

Member's Structure; (b) claims arising from or in any way relating to any allegations against Settling Defendant that Settling Defendant or any other Released Party engaged in conspiratorial actions or fraudulent concealment or induced or aided and abetted breaches of fiduciary duties by Persons, or others, whether in this Action or in any other class or individual action; and (c) any and all claims for damages, awards, payments, penalties, losses, costs, fees or expenses of any nature relating to or arising out of Settling Defendant's alleged conduct which is, has been or may be claimed as a basis for sanctions against the Settling Defendant in this Action or any other action. Notwithstanding anything else to the contrary in this Settlement Agreement, the Parties do not intend to and do not release any Person other than the Released Parties. "Settled Claims" does not include any claim that may be asserted against Persons other than the Released Parties, including but not limited to, claims described in Section 17.4.

"**Settlement Class**" means all Class Members except Persons who file a valid Request for Exclusion from the Settlement Class.

"**Settlement Class Member(s)**" means a Person (or Persons) who falls (or fall) within the definition of the Settlement Class.

"**Settlement Date**" means the date of entry of the Final Order and Judgment.

"**Special Master**" means the person selected by agreement of the Parties and appointed by the Court to preside over the resolution of any dispute relating to the implementation of Sections 4, 5 and 6 of the Settlement Agreement or any Claim.

"**Structure**" means any one- or two-family residential dwelling or townhouse located in South Carolina only, and specifically excludes any and all other structures, including but not limited to, condominiums, co-ops, apartments, time shares, and the like.

"**Summary Class Notice**" means the Court-approved summary of the Class Notice substantially in the form of Exhibit 2.A hereto.

2. SETTLEMENT PURPOSES ONLY

2.1. This Settlement Agreement is for settlement purposes only. Neither the fact of, nor any provision contained in this Settlement Agreement or its attachments, nor any action taken hereunder shall constitute, be construed as, or be admissible in evidence as, any admission of the validity of any claim or any fact, including without limitation product identification, alleged by Plaintiffs in this Action or in any other action or proceeding, or of any wrongdoing, fault, violation of law, or liability of any kind on the part of Settling Defendant, or any admission by the Settling Defendant of any claim or allegation made in this Action or in any other action or proceeding, or as an admission by Settling Defendant that class action status of this Action is lawful or appropriate against Settling Defendant, or as an admission by any of the Plaintiffs, Settlement Class Members or Class Counsel of the validity of any fact or defense asserted in this Action.

2.2. Notwithstanding Section 2.1, this Settlement Agreement may be admissible in any proceeding to enforce the rights, obligations, or effect of this Settlement Agreement's terms.

3. SUBMISSION FOR PRELIMINARY APPROVAL

3.1. Promptly after execution of this Settlement Agreement, the Parties shall jointly submit this Settlement Agreement to the Court, and shall move to obtain from the Court the Preliminary Approval which contains, *inter alia*, provisions that:

(a) approve this Settlement Agreement preliminarily, subject to the right of Settlement Class Members to be heard at the Fairness Hearing as to the Settlement Agreement's terms and reasonableness;

(b) approve the Notice Plan;

(c) direct Class Counsel to disseminate the Class Notice to those Class Members who can be identified through reasonable effort and to publish or cause to be published a Summary Class Notice in accordance with the Notice Plan;

(d) find that the Class Notice and Notice Plan constitute the best notice practicable under the circumstances, provide due and sufficient notice to the Class, and fully satisfy the requirements of due process, Rule 23 of the South Carolina Rules of Civil Procedure, and other applicable law;

(e) set a date for a Fairness Hearing, to be held by the Court to determine whether the Settlement Agreement should be approved as being a good faith, fair, reasonable, and adequate settlement for the Settlement Class, and judgment should be entered thereon;

(f) provide that any objection to the proposed Settlement Agreement, and any papers submitted in support of an objection, shall be received by the Court at the Fairness Hearing (unless, in its discretion, the Court shall direct otherwise), only if, on or before the Objection Date, the objecting Settlement Class Member files with the Clerk of the Court, notice of their intention to object and copies of such papers they propose to submit at the hearing and serves such papers in accordance with instructions contained in the Class Notice. In addition, any objection must (1) identify the Settlement Class Member's Structure, (2) provide proof of past or current ownership of the Structure, and (3) furnish *prima facie* evidence of product identification (in accordance with Section 5.3 of this Settlement Agreement);

(g) provide that Class Counsel may ask the Court to approve an award of attorneys' fees and expenses from the amounts provided in Section 13.1 below; and

(h) provide that the Fairness Hearing may be continued or adjourned by order of the Court, from time to time, without further notice to the Settlement Class.

4. CLAIMS ADMINISTRATION

4.1. Persons who claim to be Class Members and who wish to claim Benefits pursuant to this Settlement Agreement are required to file a Claim Form. Copies of the Claim Form, along with instructions on completing the Claim Form will be provided to anyone who requests such a Claim Form by contacting Class Counsel via telephone, email, regular mail, or through an internet site established by Class Counsel. Such Persons are required to forward their

completed Claim Forms to the Settling Defendant pursuant to the instructions provided with the Claim Form. The Settling Defendant will provide a copy of the Claim Form, along with any attachments, to Class Counsel within ten (10) Days of its receipt by Settling Defendant. Any Claim Forms, notices, reports and other information to be provided to Class Counsel by the Settling Defendant under any part of this Settlement Agreement, may be provided by email to one person who Class Counsel shall designate in writing on or before the Notice Date.

4.2. Settling Defendant agrees to provide an inspector or inspectors of its choosing ("Inspector") who meet the criteria set forth in Exhibit 9 hereto to inspect the Structures of Claimants for purposes of Section 5 of this Settlement Agreement. Settling Defendant also agrees to provide clerical personnel for purposes of handling, aggregating, tracking and reporting on Claims to Class Counsel and others.

4.3. Settling Defendant shall bear the following costs associated with administering the Claims: travel costs, expenses, and payment for time spent by an Inspector to inspect the Structures of Claimants for purposes of Section 5 of this Settlement Agreement; costs associated with clerical personnel either hired or selected by Settling Defendant for purposes of handling, aggregating, tracking and reporting on Claims to Class Counsel and others; and costs for Settling Defendant's mailings and telephone usage associated with the administration of the Settlement Agreement and communication with Claimants. Except as specifically provided herein, Settling Defendant is not responsible for any costs and expenses incurred by a Class Member or Class Counsel in connection with the filing and pursuit of any Claim or any appeal to the Special Master, or for the Special Master, except as provided in Section 18 of this Settlement Agreement.

4.4. Settling Defendant shall, as set forth in this Settlement Agreement, resolve Claims in a cost-effective and timely manner.

4.5. Settling Defendant shall have the power to implement reasonable procedures designed to detect and prevent payment of fraudulent Claims, and otherwise to assure an acceptable level of reliability and quality control in Claims processing.

4.6. Settling Defendant shall provide Class Counsel with a copy of a report substantially in the form of Exhibit 6 ("Report"), when requested by Class Counsel, but not more often than every thirty (30) Days. In addition a Report shall be provided to the Court within thirty (30) Days after the final Claim is processed.

4.7. Nothing in this Settlement Agreement shall be interpreted to make any documents collected as part of the Claims process public documents. Any such documents shall be considered part of the Settlement Agreement and shall be non-discoverable and non-admissible against the Settling Defendant. Settling Defendant shall use reasonable efforts to protect Claimants' personal, non-public information contained therein in a manner equivalent to the precautions the Settling Defendant takes to ensure the confidentiality of its own employees' personal, non-public information.

4.8. Any dispute as to the Settling Defendant's administration of Claims shall be resolved by agreement between the Parties or, if no agreement can be reached, by submission to the Special Master selected by the Parties or by submission to the Court, except for those non-appealable issues expressly identified in Sections 5.6 and 5.8 of this Settlement Agreement.

4.9. Upon termination of this Settlement Agreement for any reason or upon the conclusion of the claims payment program, all records maintained by the Settling Defendant

shall be maintained for three (3) years for the limited purpose of determining compliance with the Settlement Agreement's terms.

5. ELIGIBILITY FOR BENEFITS

5.1. To be eligible to recover under this Settlement Agreement, a Claimant must, among other things, timely request a Claim Form from Class Counsel, and submit timely a completed Claim Form to Settling Defendant. Claim Forms may be submitted by Claimants only during the Claim Period. The Claim Form shall contain an individual release of Settled Claims signed by the Claimant, which shall be effective even if this Settlement Agreement does not become final so long as the Claimant receives Benefits.

5.2. After the Order and Judgment becomes Final, Settling Defendant shall make the initial determination, based on information submitted with the Claim Form as to whether the Person submitting the Claim Form may be eligible to receive Benefits under this Settlement Agreement. This initial determination shall be based on a review of the Claim Form and any supporting documentation submitted therewith to establish whether the Claimant (a) has submitted documentation to establish initial product identification pursuant to section 5.3; (b) has provided proof of current or former ownership of a Structure on or before the Notice Date; (c) has provided proof of installation of the Dryvit EIFS on a Structure during the Class Period; and (d) is not otherwise properly excluded from Benefits under Section 6 of this Settlement Agreement. Settling Defendant shall notify the Claimant in writing as to its initial determination. If the Claimant does not agree to the initial determination by Settling Defendant, the Claimant may submit, as provided in Section 5.6 below, additional information and documentation to Settling Defendant to attempt to cure any defects in the Claim Form and documentation submitted, including report by an inspector hired and paid for by the Claimant. In the event that

the dispute cannot be resolved by the Parties by agreement, either Party may submit the dispute to the Special Master as provided in Section 18. Settling Defendant shall provide Class Counsel copies of notifications described in this Section to Claimants on a regular basis but no less often than within ten (10) Days of any notification.

5.3. The initial determination of product identification requires the Claimant to submit documentation with the Claim Form showing that the Structure is more likely than not clad with Dryvit EIFS. A showing of Dryvit EIFS may be made by a Claimant by submitting any one of the following: (a) Settling Defendant's warranty with respect to the Structure; (b) a report issued by Settling Defendant indicating that the Structure is clad with Dryvit EIFS; (c) bill of sale/purchase documents reflecting that Dryvit EIFS was purchased for the Structure; (d) correspondence from Settling Defendant indicating that the Structure is clad with Dryvit EIFS; (e) an affidavit by the builder, contractor, or applicator for the particular Structure stating, based upon personal knowledge, that the Structure is clad with Dryvit EIFS; (f) a report from a licensed engineer or architect stating that the Structure is clad with Dryvit EIFS, where this determination is based upon first-hand personal knowledge of the engineer or architect obtained through his or her inspection of the Structure and the report provides specific facts supporting that determination; or (g) a report from an inspector stating that the Structure is clad with Dryvit EIFS, where (i) this determination is based upon first-hand personal knowledge of the inspector obtained through his or her inspection of the Structure and, (ii) the report provides specific facts supporting that determination

5.4. Notwithstanding paragraph 5.3 above, the following shall constitute unacceptable proof of product identification: (a) statements that a contractor or builder generally used Dryvit EIFS during a particular period of time or in a particular geographic area; or (b)

proof of blue mesh color, standing alone. When other evidence of product identification as described in paragraphs 5.3(a) through 5.3(g) above is corroborated by blue mesh, a prima facia case is established.

5.5. In the event that it appears to Settling Defendant at any time that the product involved does not qualify as Dryvit EIFS, Settling Defendant nonetheless, at its option, may agree to accept the proof submitted as adequate proof of Dryvit EIFS.

5.6. The initial determination as to potential eligibility for Benefits shall be made by Settling Defendant within thirty (30) Days of receipt of the Claim Form or within thirty (30) Days of the date on which the Order and Judgment becomes Final, whichever is later. In the event that Settling Defendant notifies Claimant of an adverse initial determination, Claimant shall have thirty (30) Days to either provide Settling Defendant with further information or proof to cure any deficiencies, or of their intention to submit the dispute to the Special Master. If the Claimant provides Settling Defendant with additional information or proof to cure deficiencies, then Settling Defendant will review any additional information or documentation submitted by the Claimant and will notify Claimant as to whether the additional information or documentation has remedied any deficiencies. If the documentation still is not sufficient in Settling Defendant's opinion, then Claimant shall have one more additional thirty (30) day period to either submit further information or documentation or to submit the dispute to the Special Master. If there is a third denial by Settling Defendant after this submission, then Claimant's sole remedy shall be to submit the dispute to the Special Master within thirty (30) Days after receiving written notice from the Settling Defendant. In every Claim submitted to the Special Master, the Special Master will make a determination based solely on information contained in the Claim Form and in the documentation that the Claimant provided to Settling Defendant prior to their appeal to the

Special Master. The Special Master's decision on Claims submitted as described above shall be final and non-appealable. In the event that the Claimant does not either attempt to remedy the deficiencies in the Claim Form, or appeal to the Special Master within the time periods set forth above, the Claimant's Claim will be closed and the Claimant will be entitled to no additional Benefits pursuant to this Settlement Agreement, and will be bound by this Settlement Agreement, including without limitation, the release contained in Section 12 herein and in the Claim Form. Settling Defendant shall provide Class Counsel copies of notifications described in this Section to Claimants on a regular basis but no less often than within ten (10) Days of any notification.

5.7. If the Settling Defendant has made a favorable initial determination based on the Claim Form and supporting documentation as to the potential eligibility for Benefits, it shall notify the Claimant, then arrange for an Inspector to inspect the Structure pursuant to the Inspection Protocol to verify the presence of Dryvit EIFS, to conduct moisture inspections to determine if there are Actual Damages to the Structure, to verify such other information as is necessary to qualify for Benefits, and to measure, if necessary, the actual square footage of Dryvit EIFS. Settling Defendant will use its best efforts to schedule such inspection at a mutually agreeable time. By submitting a Claim Form, Claimant consents to the Inspector entering upon the property exterior to the Structure for purposes of this inspection Settling Defendant shall provide Class Counsel copies of notifications described in this Section to Claimants on a regular basis but no less often than within ten (10) Days of any notification.

5.8. The Inspector shall prepare an inspection report ("Inspection Report") pursuant to the Inspection Protocol. Settling Defendant shall provide a copy of the Inspection Report to the Claimant. If the Inspection Report confirms Claimant's eligibility for Benefits,

Settling Defendant shall include with the copy of the Inspection Report, a calculation of the amount, if any, of the Benefit.. If the Inspection Report demonstrates that the Claimant is not entitled to receive any Benefits, reveals that the property is not a Structure, that the cladding is not a Dryvit EIFS, or that the Claimants are not otherwise Class Members, Settling Defendant shall provide a copy of the Inspection Report to Claimant along with a statement, in writing, as to the basis for the determination. If the Claimant does not agree with the findings in the Inspection Report, the Claimant must notify the Settling Defendant in writing of the basis for the Claimant's dispute, within thirty (30) Days of receipt of the Inspection Report. In the event of such a dispute, the Parties shall endeavor to resolve the dispute among themselves within fifteen (15) Days of the Claimant's written notice of the dispute. If the dispute cannot be resolved by agreement within such fifteen (15) Days, then the Claimant must file a written appeal to the Special Master, with a copy to Settling Defendant, within an additional thirty (30) Days. Thereafter, Settling Defendant shall have (30) Days to respond in writing, with a copy to the Claimant. The Special Master's decision on the dispute shall be rendered within forty-five (45) Days after receipt of the Settling Defendant's response. The Special Master's decision shall be final and non-appealable. If the Claimant does not appeal timely to the Special Master such dispute, then the determination made by the Settling Defendant as to the eligibility for Benefits and the amount of monetary Benefits, if any, shall become final and binding on the Claimant. Settling Defendant shall provide Class Counsel copies of notifications described in this Section to Claimants on a regular basis but no less often than within ten (10) Days of any notification.

5.9. Benefits shall commence when the Order and Judgment becomes Final. Once a Benefits determination has become final and binding on both Claimant and Settling Defendant, the Settling Defendant shall request in writing and Claimant shall provide in writing

appropriate tax identification information. Settling Defendant need not provide Class Counsel with a copy of this tax identification information. Any payments that Settling Defendant must make to Claimants pursuant to this Settlement Agreement shall be paid by check made payable to the Claimant(s) and mailed to the address provided on the Claim Form after Settling Defendant has received tax identification information from the Claimant. Settling Defendant's obligation to make said payment to Claimant is completed upon the posting of the check to the United States Mail. Settling Defendant shall promptly provide Class Counsel with notice of such mailing, the amount of each check made payable to a Claimant, and the name and address to which the check was mailed.

6. BENEFITS FOR SETTLEMENT CLASS MEMBERS

6.1. As part of the alleged damages paid by the Settling Defendant hereunder, the Benefits set forth in this Section 6 are offered to Settlement Class Members. Only one Benefit shall be available per Structure to the extent that criteria for receipt of that Benefit are otherwise established. In the event of conflict between Class Members as to who should receive the Benefit for a particular Structure, the dispute shall be submitted to the Special Master designated pursuant to Section 18 for resolution.

6.2. The following Benefits shall be available to Settlement Class Members who timely submit a Claim Form to the Settling Defendant and otherwise meet the requirements set forth below and elsewhere in this Settlement Agreement:

(a) Settlement Class Members who purchased their Structure before January 1, 2003, who have not replaced the Dryvit EIFS on their Structure, who have Actual Damage to their Structure, and who can establish product identification pursuant to the requirements set forth in Section 5 of this Settlement Agreement shall receive $8.00 per square foot of the actual square footage of Dryvit EIFS on the Structure.

(b) Settlement Class Members who purchased their Structure before January 1, 2003, who have replaced the Dryvit EIFS on their structure on or after September 3, 2002, but who nonetheless can establish product identification pursuant to the requirements set forth in Section 5 of this Settlement Agreement, provide documentary evidence from the time of re-clad establishing Actual Damage, and provide documentary evidence of previous square footage of Dryvit EIFS on their Structure, as more specifically required in the Claim Form, shall receive $4.00 per square foot of actual Dryvit EIFS that was previously on their Structure.

(c) Settlement Class Members who purchased their Structure on or after January 1, 2003, who can establish product identification pursuant to the requirements set forth in Section 5 of this Settlement Agreement, and who do not opt out and who file (or have already filed) individual actions before expiration of the Claims Period as provided in this Settlement Agreement, shall receive from Settling Defendant a tolling of statute of limitation and statute of repose defenses in those individual actions for the period from the date of their purchase until the Notice Date, as well as waiver of any *res judicata*, settlement, release and collateral estoppel defenses based upon the Settlement Agreement in *Posey, et al. v. Dryvit Systems, Inc.*, Case Number 17,715-IV, in the Circuit Court for Jefferson County, Tennessee at Dandridge (hereinafter "*Posey*") (including any approval orders and other orders entered in conjunction with that settlement). Notwithstanding anything to the contrary herein, Dryvit expressly reserves and preserves any and all other defenses including any defense based upon actual notice from any source.

6.3. Notwithstanding the above, no monetary Benefits shall be available in the following instances:

(a) Claims by Settlement Class Members who are current or former owners of Dryvit EIFS Structures as to which Structures, Settling Defendant, previous to the Order and Judgment becoming Final, settled, obtained dismissal (voluntarily or involuntarily), or obtained release of claims against Settling Defendant relating to the Structures, by the current owner, former owner, or a third party who provided compensation to the current or a former owner for alleged damage to the Structures. These Claims include, but are not limited to, timely Claims by owners of Dryvit EIFS Structures who submitted a claim form pursuant to the settlement agreement in *Posey* or who purchased from owners who filed any such claims in *Posey*. Untimely claims in *Posey* and claims by Persons in *Posey* who purchased after June 5, 2002 are not included in this category of Claims unless otherwise settled, released or dismissed by a current or former owner as provided in this Section. Settling Defendant agrees to fund an "Equitable Claims Adjustment Fund" in the amount of $50,000 to be used by Class Counsel subject to the Court's supervision to provide some compensation to Persons who filed claims in *Posey* to the extent that individualized circumstances suggest that some compensation is appropriate under concepts of fairness and equity but no more than such Person would have received under Section 6.2 had they been eligible for such Benefits. Class Counsel shall provide periodic accountings to Settling Defendant and the Court as to the disbursement of the Equitable Claims Adjustment Fund and make a recommendation to the Court regarding any excess funds in the Equitable Claims Adjustment Fund;

(b) Claims by owners of EIFS Structures which do not satisfy the product identification criteria set forth in Section 5 of this Settlement Agreement or otherwise fail to meet the criteria set forth in paragraphs 6.2(a) and 6.2(b) above;

(c) Claims by any Person for a Structure, if such Structure was included in a claim in *Posey* that was denied based upon lack of product identification as determined in the *Posey* Settlement;

(d) Claims of Settlement Class Members who no longer own the Structure as of the Notice Date and who do not have a valid assignment of claims from the Settlement Class Member that owned the Structure as of the Notice Date;

(e) Claims of Settlement Class Members who assigned their Claim to others; or

(f) Claims of Settlement Class Members who fail to submit a Claim within the Claim Period.

6.4 Any Class Member may Opt Out of this Settlement Agreement as to any Structure they owned on or before the Notice Date pursuant to Section 9 of this Settlement Agreement. The effect of such Opt Out shall be to Opt Out all Class Members as to that Structure. Any Claim filed by a different Class Member as to that Structure shall not be a valid Claim under this Settlement Agreement.

7. FUNDING OF THE SETTLEMENT

7.1. Settling Defendant will wire to an escrow account specified by Class Counsel, upon receipt of suitable wiring instructions, the following payments:

(a) Within ten (10) Days of the date of the Preliminary Approval, Settling Defendant shall pay to Class Counsel, Eighty Two Thousand Dollars ($82,000.00) out of the amount to be paid for fees and expenses as provided for in Section 13.1. Such initial payment is to be used by Class Counsel to offset their expenses in providing Class Notice.

(b) Within thirty (30) Days of the Order and Judgment becoming Final, Settling Defendant shall pay (i) Fifty Thousand Dollars ($50,000) to be paid pursuant

to Section 6.3 (a); (ii) the remaining Nine Hundred Thirteen Thousand Dollars ($913,000) to be paid pursuant to Section 13.1; and (iii) Twenty Thousand Dollars ($20,000) to be paid pursuant to Section 19.

7.2. With the exception of the payment to be made pursuant to Section 7.1(a) above, the benefits offered to Settlement Class Members under of this Settlement Agreement shall commence upon the Order and Judgment becoming Final, and no other payments shall become due and owing by the Settling Defendant under this Settlement Agreement until such time.

8. NOTICE TO THE CLASS

8.1. Upon Preliminary Approval, Class Counsel shall disseminate Class Notice as provided in the Notice Plan attached hereto as Exhibit 2.

8.2. In order to offset some of Class Counsel's costs in connection with implementation of the Notice Plan, Settling Defendant shall make the payment set out in Section 7.1(a), of which Thirty Two Thousand ($32,000) Dollars shall be reimbursed to Settling Defendant by Class Counsel in the event the Settlement Agreement is terminated for any reason. Such reimbursement is to be paid within thirty (30) Days of the termination of the Settlement Agreement. Class Counsel shall be jointly and severally liable for the reimbursement amount. Otherwise, neither Settling Defendant nor Plaintiffs and Class Counsel shall have any responsibility or obligation to each other for any funds used or committed for costs incurred in connection with providing Class Notice and/or administration of this Settlement Agreement..

8.3. A Summary Notice shall be publicly disseminated, as provided in the Notice Plan.

8.4. Prior to the dissemination of the Class Notice, Class Counsel shall designate a toll-free telephone number to be used by Class Members to contact Class Counsel to obtain copies of the Class Notice or a Claim Form. Class Counsel shall maintain and provide to Settling Defendant a list of each Person to whom Class Notice or the Claim Form are provided indicating which documents were provided, the address to which it was directed and the date.

8.5. Prior to the dissemination of the Class Notice, Settling Defendant shall designate a toll-free number to be used by Claimants to contact Settling Defendant. This toll-free number shall be included on the Claim Form. The person(s) designated by Settling Defendant to receive such calls shall be capable of receiving such calls, instructing the caller on where to mail Claim Forms, and responding to questions about the Claims process based upon a written, generalized description of the process and a list of frequently asked question agreed to by the Parties. If a Claimant requires additional information, the Claimant will be referred to Class Counsel.

8.6. The Class Notice, in substantially the form included in Exhibit 2 and as approved by the Court, shall begin on the Notice Date and be disseminated throughout the Claim Period as additional Class Members are identified.

9. REQUESTS FOR EXCLUSION

9.1. A Class Member who does not desire to participate in this Action may elect to be excluded from the Class ("Opt Out") by completing the Request for Exclusion Form, attached as Exhibit 5, and mailing same to the Settling Defendant within ninety (90) Days of the Notice Date (the "Opt-Out Date"). Class Members (including Persons who have initiated lawsuits against Settling Defendant) who do not individually exclude themselves by the timely completion and mailing of the Request for Exclusion (measured by the date of postmark) shall be

Settlement Class Members, and shall be bound by the terms and conditions of this Settlement Agreement. If one joint owner of a Structure Opts-Out of this Action then all other owners of that Structure shall also be Opted-Out, regardless of whether they individually submitted a Request for Exclusion. If one Class Member Opts-Out with respect to a particular Structure then all other Class Members as to that particular Structure shall also be Opted-Out, regardless of whether they individually submitted a Request for Exclusion.

9.2. A Class Member that Opted-Out, shall be returned to the position they occupied before the Notice Date, shall be ineligible for any Benefits of this Settlement Agreement or membership in the Settlement Class, and shall have no standing to object to or otherwise be heard by the Court and/or on appeal with respect to any aspect of this Settlement Agreement.

9.3. Settling Defendant shall maintain all Requests for Exclusion received, and any correspondence or records of communications relating thereto. These records will be made available to Class Counsel upon request and reasonable notice.

9.4. Except as set forth in Section 10 of this Settlement Agreement regarding a limited tolling of the statute of limitations, Settling Defendant retains all available defenses, including statute of limitations, statute of repose, *res judicata*, collateral estoppel, release and settlement, spoliation, and any other applicable defense against Class Members that Opted-Out, and against Class Members who purchased after January 1, 2003, except as expressly provided to the contrary above in paragraph 6.2(c).

9.5 Any Class Member who has timely and properly elected to be excluded from the Action may request to revoke such election by mailing a letter to the Settling Defendant requesting to revoke a Request for Exclusion. At the sole discretion of the Settling Defendant,

the former Class Member may become a Settlement Class Member for all purposes. Any person who has elected to be excluded from the Action and as to whom Settling Defendant has not consented to such revocation, as provided in this Section, has no rights under the Settlement Agreement.

10. STATUTES OF LIMITATION AND REPOSE

10.1. A Settlement Class Member that has timely submitted a Claim Form, shall not be barred from obtaining Benefits under this Settlement Agreement because of application of any statute of limitation or repose.

10.2. Regardless of any tolling that may or may not accrue to the benefit of a Class Member by operation of applicable law, the defenses of statute of limitations and statute of repose shall be tolled from the Notice Date through the end of the Claim Period for a Class Member that is Opted-Out pursuant to Section 9 of this Settlement Agreement. No other tolling of any kind shall occur by operation of this Settlement Agreement except as set forth in this paragraph or paragraph 6.2(c).

11. EXCLUSIVE REMEDY, DISMISSAL OF ACTION; JURISDICTION OF COURT

11.1. This Settlement Agreement shall be the sole and exclusive remedy for any and all Settled Claims of Settlement Class Members against the Released Parties. Upon entry of the Order and Judgment by the Court, each Settlement Class Member shall be barred and enjoined from initiating, asserting, or prosecuting any Settled Claim against any Released Party and from receiving any additional benefit from any Released Party, except for actions filed or continued pursuant to Section 6.2(c) above.

11.2. No less than fifteen (15) Days after the Opt-Out Date, Class Counsel shall move to dismiss Settling Defendant from any other action of any Settlement Class Member for

Settled Claims pending in any court against any Released Party and for which any Class Counsel is counsel for the Settlement Class Member except for actions filed or continued pursuant to Section 6.2(c) above.

11.3. The Order and Judgment shall dismiss all claims in the Action against the Settling Defendant, with prejudice, on the condition that the Court shall retain exclusive and continuing jurisdiction of the Action, all Parties, and Class Members, to interpret and enforce the Settlement Agreement's terms, conditions, and obligations.

12. RELEASES AND ASSIGNMENTS

12.1. Upon the Order and Judgment becoming Final, Settlement Class Members on behalf of themselves, and any Persons claiming by or through them, as administrator, devisee, predecessor, successor, representative of any kind, shareholder, partner, director, owner of any kind, affiliate, subrogee, assignee, or insurer (the "Releasing Party") shall be deemed to and do hereby release and forever discharge all Released Parties as to any and all Settled Claims and related subrogation claims of the Releasing Party's subrogees or insurance carriers except for claims preserved by Section 6.2(c) of this Settlement Agreement.

12.2. With respect to any and all Settled Claims, upon the Order and Judgment becoming Final and without further action, for good and valuable consideration, all Settlement Class Members shall be deemed to have, and by operation of the Order and Judgment contemplated by this Settlement Agreement shall have, fully, finally, and forever expressly waived and relinquished, to the fullest extent permitted by law, any and all provisions, rights, and benefits conferred by the laws of South Carolina except as provided to Class Members pursuant to paragraph 6.2(c) of this Settlement Agreement.

12.3. Nothing in this Settlement Agreement shall prejudice or interfere in any way with the rights of the Parties to pursue all of their rights and remedies against Persons other than Released Parties (including without limitation builders, architects, subcontractors and other material suppliers) or their respective insurers, including without limitation claims for contribution and/or indemnity (subject to the provisions of Section 17 of this Settlement Agreement).

12.4. Nothing in this Settlement Agreement shall be interpreted to create any claim or right on the part of Settling Defendant or any of its agents as against any monies or recovery by a Settlement Class Member for claims against third parties or under any insurance policy.

12.5 Upon the Order and Judgment becoming Final and expressly conditioned upon the warranties made and obligations imposed upon Settlement Class Members, Class Representatives and Class Counsel under the terms of this Agreement, Settling Defendant, and its agents, attorneys, assigns, and insurers release Settlement Class Members who never were named parties to this Action, Class Representatives and Intervening Class Counsel from all claims arising out of the filing, assertion, prosecution or resolution of the Action.

13. ATTORNEYS' FEES AND EXPENSES

13.1. As part of the alleged damages paid by the Settling Defendant hereunder and subject to Court approval and the payment schedule described in Section 7, Settling Defendant shall pay attorneys' fees and expenses of Class Counsel, in the amount of $995,000.00.

13.2. The Settling Defendant's total maximum obligation for Class Counsel's fees, costs and expenses in this Action shall not exceed the amount stated in Section 13.1 of this Settlement Agreement.

13.3. The Settling Defendant shall have no liability or other responsibility for payment or allocation of attorneys' fees, costs and expenses among Class Counsel.

14. ENFORCEMENT OF THE ORDER AND JUDGMENT.

14.1. This Settlement Agreement is subject to and conditioned upon the issuance by the Court following the Fairness Hearing of an Order and Judgment, in substantially the form of Exhibit 3 hereto, granting final approval of the Settlement Agreement and expressly including a Bar Order that enjoins Settlement Class Members from pursing further litigation in any court, or from pursuing any other form of recovery against the Released Parties for any Settled Claim, except as specifically provided in Section 6.2(c).

14.2. In the event any Party fails to comply with its obligations under the terms of this Settlement Agreement, or is in default of this Settlement Agreement in any other respect, the non-defaulting Party shall first provide written notice of the default to the other side, allowing the defaulting Party twenty (20) Days to cure.

15. REPRESENTATIONS AND WARRANTIES

15.1. Settling Defendant represents and warrants that it has all requisite corporate power and authority to execute this Settlement Agreement and to consummate and perform the transactions contemplated herein; that this Settlement Agreement has been duly executed and delivered by Settling Defendant in good faith; and that it constitutes a legal, valid, and binding obligation.

15.2. Class Counsel and Class Representatives represent and warrant that they have the authority to enter into and execute this Settlement Agreement and to consummate and perform the transactions contemplated herein; that this Settlement Agreement has been duly executed and delivered by them in good faith; and that it constitutes a legal, valid, and binding obligation which shall be the sole and exclusive remedy against the Released Parties for Settled Claims as provided in Section 11.1.

16. TERMINATION OF THE SETTLEMENT AGREEMENT

16.1. The performance of this Settlement Agreement is expressly contingent upon the Court's issuance of the Order and Judgment by the Court and it becoming Final, except as specifically noted.

16.2. This Settlement Agreement shall be automatically terminated, without notice, if the Order and Judgment entered by the Court does not become Final.

16.3. The number of owners of certain known properties listed on Exhibit 7 to this Settlement Agreement who Opt-Out shall not exceed seventeen (17). If more than seventeen (17) of the owners listed on Exhibit 7 have opted out of the Class, Settling Defendant shall have the right to terminate this Settlement Agreement within fifteen (15) Days after the Opt-Out Date.

16.4. In the event of termination of this Settlement Agreement, this Settlement Agreement, other than Section 8.2, and all Orders and Judgments issued to implement it shall have no further force and effect as to the Released Parties, and shall not be admissible as evidence for any purpose in any pending or future litigation (in any jurisdiction) involving the Parties.

17. CONTRIBUTION FROM JOINT TORTFEASORS

17.1. Settlement Class Members' release of Settled Claims is a good faith Release, and if Settlement Class Members received Benefits, the amount of Benefits will reduce the amount of Settlement Class Members' judgment, if any, against third parties, pursuant to the South Carolina Contribution Among Joint Tortfeasors Act, S.C. Stat. Ann. § 15-38-50 so that Settling Defendant is discharged from other tortfeasors' claims.

17.2. Settlement Class Members, having fully released all Settled Claims, agree that they will not assert claims against other Persons for any alleged defects with Dryvit EIFS or due to any alleged conduct by Settling Defendant. To the extent Settlement Class Members have an existing claim against other Persons or subsequently assert claims against other Persons alleging defects with Dryvit EIFS or seeking relief due to alleged conduct by Settling Defendant, and subject to the provisions of Section 17.4, those Settlement Class Members agree that they will amend their existing claims as necessary to strike such claims. By and through this Settlement Agreement, the Settlement Class Members consent to any motion to strike any such allegations. The provisions of this Section shall not apply to claims properly asserted under Section 6.2(c) above.

17.3. Settlement Class Members specifically consent to an injunction against inclusion of product defect claims related to Dryvit EIFS, or allegations related to alleged misconduct or tortious conduct by Settling Defendant, in any suits or claims by Settlement Class Members against third parties.

17.4. Notwithstanding anything to the contrary in this Settlement Agreement, nothing in this Settlement Agreement shall be construed to operate to release or compromise in any way (a) claims asserted against Persons other than Released Parties in that certain action known as *Steven and Jeaneen Tucker, et al., v. Leath, Bouch & Crawford, LLP, et al.*, Beaufort

County Case Number 2008-CP-07-03145, (b) the claims which remain against Persons other than Released Parties in *Timothy J. Treon, et al., v. Dryvit Systems, Inc., et al.*, Beaufort County Case Number 2008-CP-07-00774, (c) any request that Persons other than Released Parties account for or tender funds to this Court or (d) any and all claims by any of the Parties against any other Persons who are not Released Parties, Class Representatives, or Intervening Class Counsel including, but not limited to, other Persons such as builders, architects, subcontractors and other material suppliers. All claims described in this Section 17.4 expressly are not released and are reserved and preserved.

18. SPECIAL MASTER

18.1 The Parties shall jointly propose a Special Master to be appointed by the Court, to preside over disputes between the Parties that they cannot resolve through agreement relating to implementation of Sections 4, 5 and 6 of the Settlement Agreement. The Special Master shall have power to make decisions in all matters pertaining to administration of Sections 4, 5 and 6 of the Settlement Agreement. The Parties will use their best efforts to agree on the Special Master to be proposed to the Court. In the event that the Parties are unable to agree upon the proposed Special Master, the Court shall appoint the Special Master from the list of recommended Special Masters.

18.2 The fees and expenses of the Special Master relating to determinations under Sectons 4, 5 and 6 of the Settlement Agreement shall be paid for by the non-prevailing Party. In the event that the dispute involves a determination of the square footage of Dryvit EIFS and the amount determined to be the correct amount by the Special Master does not match or better the amount claimed by either of the Parties, i.e., is in between that claimed by the Settlement Class Member and that claimed by the Settling Defendant, then the Special Master

shall apportion such fees and expenses between the Parties in accordance with the proportionate amounts their estimates were incorrect.

19. MISCELLANEOUS PROVISIONS

19.1. Subject to Court approval, the Settling Defendant shall pay to Class Representatives in this Action $20,000.00 total, separate and apart from any Benefits to which the Class Representatives may be entitled under the Settlement Agreement, in recognition of their efforts on behalf of the Class.

19.2. Subject to the terms hereof, the Court shall retain continuing jurisdiction over the Parties and this Settlement for any and all purposes related to this Settlement, including all rights, duties, and obligations arising herein.

19.3. This Settlement Agreement, including all exhibits attached hereto, shall constitute the entire agreement among the Parties with regard to the subject matters covered, shall supersede any previous agreements and understandings among the Parties with respect thereto, and may not be changed, modified, or amended except in writing signed by all Parties and approved by the Court.

[Space Left Blank Intentionally]

19.4. Except to the extent provided otherwise herein, all Parties shall bear their own costs, fees and expenses of this Action, including any appeals, and this Settlement Agreement.

19.5. This Settlement Agreement shall be construed under and governed by the laws of the State of South Carolina, applied without regard to its laws applicable to choice of law.

19.6. This Settlement Agreement may be executed by the Parties in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

19.7. This Settlement Agreement shall be binding upon and inure to the benefit of the Parties and their representatives, heirs, administrators, devisees, predecessors, successors, representatives of any kind, shareholders, partners, directors, owners of any kind, affiliates, subrogees, assignees, or insurers.

19.8. The headings of the sections of this Settlement Agreement are included for convenience only and shall not be deemed to constitute part of this Settlement Agreement or to affect its construction. The decimal numbering of provisions herein is intended to designate sub-sections where applicable. The definition of any capitalized term in this Settlement Agreement, shall also apply as appropriate to any form of that term in the singular, the plural, the masculine, the feminine, and/or the past, present or future tense of that term, when such form is also capitalized.

19.9. Any notice, request, instruction, correspondence, application for Court approval, application for Court Orders, or other information sought in connection with this Settlement Agreement shall be in writing and delivered personally or sent by facsimile, e-mail,

U.S. Mail, or if required by registered or certified mail, postage prepaid, if to the Settling Defendant, to the attention of Settling Defendant's respective representative, Kenneth J. Nota, Vice President and General Counsel, Dryvit Systems, Inc., One Energy Way, West Warwick, Rhode Island 02893, and if to the Class, to Robert B. Phillips, Finkel Law Firm, 1201 Main Street, P. O. Box 1799, Columbia, South Carolina 29202 on behalf of Class Counsel and Settlement Class Members, and to any other recipients as the Court may specify.

19.10. The Parties agree that information obtained from Claim Forms shall be maintained as confidential information, shall be used solely for purposes of this Settlement Agreement, and shall not be used for any other purposes, including any solicitation for sale of products or services. Further, the Parties agree that they shall not sell or furnish personal identifying information obtained from Claim Forms, or copies of Claim Forms, to any other Person for any reason other than compliance with or implementation of this Settlement Agreement or compliance with applicable law.

19.11. IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement to be executed by their duly authorized attorneys, as of the dates indicated, with the most recent date constituting the date of this Settlement Agreement.

CLASS REPRESENTATIVES:

DATE:

BY: _____
Timothy Treon

DATE:

BY: _____
Jane Treon

DATE: 11/11/09

BY: _____
P. Jennings Scearce

DATE: 11/11/09

BY: _____
Stephen Christian

CLASS COUNSEL:

DATE: 11/11/09

BY: _____
Gregory M. Alford, Esq.
Alford & Wilkins, P.C.
P. O. Drawer 8008
Hilton Head Island, SC 29938

DATE: 11/11/09

BY: _____
Thomas J. Finn, Esq.
Thomas Williams, Esq.
The Finn Law Firm
P. O. Box 6003
Hilton Head Island, SC 29938

DATE: 11/12/09

BY: Francis E. Grimball
Francis E. Grimball, Esq.
Mullen Wylie, LLC
171 Church Street, Suite 370
Charleston, SC 29401

DATE:

BY: _____
Donald Jonas, Esq.
Cotty & Jonas
1328 Blanding Street
Columbia, SC 29202

DATE: 12 Nov. 2009

BY: _____ for The Finkel Law Firm, LLC
Robert B. Phillips, Esq.
~~The Finkel Firm, PA~~
1201 Main Street
P. O. Box 1799
Columbia, South Carolina 29202

SETTLING DEFENDANT

DATE: 10/11/09

BY: _____
Dennis M. Dallman
Executive Vice President – Finance and Administration
Dryvit Systems, Inc.

SETTLING DEFENDANT'S COUNSEL

DATE:

BY: Samuel W. Outten
Samuel W. Outten, Esq.
Robert E. Fields, Esq.
Stephanie U. Roberts, Esq.
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
Post Office Box 10208
Greenville, SC 29603-0208

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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

INTRODUCTION[1]

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

[1]Capitalized 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.

EXHIBIT
tabbies
8

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 contentions 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 Courthouse[2] 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.

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 cases[3] 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 Scearce, 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 Scearce, $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

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 Scearce 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 pursing 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