

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
Case No.: 2002-CP-07-1377

John Cardamone and his wife, Sally)
Cardamone, and Benjamin T. Clark and)
his wife, Diane M. Clark, 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.)
_____)

DEFENDANT DRYVIT SYSTEMS, INC.
ANSWER TO PLAINTIFFS' COMPLAINT

06 MAY 15 PM 4:43
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

The Defendant, Dryvit Systems, Inc. (hereinafter referred to as "Dryvit"), answers the Complaint of the Plaintiffs as follows:

FOR A FIRST DEFENSE

1. Dryvit denies each and every allegation contained within the Plaintiffs' Complaint not hereinafter specifically admitted, qualified, and/or explained.

FOR A SECOND DEFENSE

2. Dryvit lacks specific knowledge or information upon which to form a belief as to the allegations contained within paragraph 1 of the Plaintiffs' Complaint, and therefore denies same.

3. Dryvit admits only so much of the allegations contained within paragraph 2 of the Plaintiffs' Complaint as could be construed to allege that Dryvit is a Rhode Island corporation with its principal place of business in West Warrick, Rhode Island; that Dryvit designs, manufactures and distributes EIFS to various locations throughout the United States of America; that Dryvit is a subsidiary of RPM, Inc.; and that Dryvit is a member of EIMA; but denies the



remaining allegations contained within said paragraph inconsistent with or in addition to this admission.

4. Dryvit lacks specific knowledge or information upon which to form a belief as to the allegations contained within paragraphs 3 and 4 of the Plaintiffs' Complaint, and therefore denies same.

5. Dryvit admits the allegations contained in paragraph 5 of the Plaintiffs' Complaint.

6. The allegations contained within paragraph 6 of the Plaintiffs' Complaint do not purport to state a claim against Dryvit. To the extent any such allegations do or could be construed to state a claim against Dryvit, however, they are denied.

7. Dryvit admits only so much of the allegations contained within paragraph 7 of the Plaintiffs' Complaint as could be construed to allege that Rule 23 of the South Carolina Rules of Civil Procedure pertains to, among other things, class action lawsuits, but denies the remaining allegations contained in said paragraph inconsistent with or in addition to this admission, specifically denying the existence of a plaintiff's class or that this case is appropriate for class certification.

8. Dryvit denies the allegations contained within paragraph 8 of the Plaintiffs' Complaint.

9. Dryvit denies the allegations contained within paragraphs 9, 10, 11, 12, 13, 14, 15, and 16 of the Plaintiffs' Complaint. Dryvit specifically denies those allegations contained within these paragraphs of the Complaint which refer to "the Class", allege the existence of a class, or could otherwise be construed to allege the existence or propriety of a plaintiff's class in this case.

10. Dryvit denies the allegations contained in paragraph 17 of Plaintiffs' Complaint.

11. Dryvit denies those allegations contained within paragraph 18 of the Plaintiffs' Complaint which relate and/or refer in any manner to Dryvit. Dryvit lacks specific knowledge or information upon which to form a belief as to the remaining allegations contained within said paragraph, and therefore denies same.

12. Dryvit denies the allegations of paragraph 19 of the Plaintiffs' Complaint, including all sub-parts thereto.

13. Dryvit denies the allegations contained within paragraphs 20, 21, 22, 23, 24, 25 and 26 of the Plaintiffs' Complaint, including all sub-parts thereto, specifically denying that a class action is necessary and/or appropriate in this matter.

14. Dryvit admits only so much of the allegations contained within paragraphs 27 and 28 as could be construed to allege that Dryvit designs, manufactures and distributes EIFS to various locations throughout the United States of America; that EIFS systems are multi-layered exterior cladding systems comprised generally of insulation board, base coat, reinforcing mesh and finish coat that is attached to a substrate mechanically and/or adhesively; and that EIFS has been used as an exterior cladding on both residential and commercial structures; but denies the remaining allegations contained within said paragraphs inconsistent with or in addition to these admissions.

15. Dryvit denies the allegations contained within paragraphs 29 and 30 of the Plaintiffs' Complaint.

16. Dryvit lacks specific knowledge or information upon which to form a belief as to the allegations contained within paragraphs 31, 32, 33, 34, 35, and 36 of the Plaintiffs' Complaint, and therefore denies same, including all sub-parts thereto.

17. Dryvit denies the allegations contained within paragraphs 37 and 38 of Plaintiffs' Complaint.

18. Dryvit denies the allegations as stated within paragraph 39 of the Plaintiff's Complaint, including all sub-parts thereto.

19. Dryvit admits only so much of the allegations contained within paragraph 40 of the Plaintiffs' Complaint as could be construed to allege that Dryvit has advertised its products in various media; that EIFS is moisture-resistant, low maintenance and cost-effective; and that EIFS is ideally suited for both new construction and retrofit; but denies the remaining allegations contained in said paragraphs inconsistent with or in addition to these admissions.

20. Dryvit denies the allegations as stated within paragraphs 41, 42, 43, and 44 of the Plaintiffs' Complaint, including all sub-parts thereto.

21. Dryvit denies the allegations contained in paragraphs 45, 46, 47, 48, 49, 50, 51, 52, 53, and 54 of Plaintiffs' Complaint, including all sub-parts thereto. Dryvit specifically denies those allegations contained within these paragraphs of the Complaint which refer to "the Class,"

allege the existence of a class, or could otherwise be construed to allege the existence or propriety of a plaintiff's class in this case.

22. As to the allegation contained within paragraph 55 of the Complaint, Dryvit re-asserts, re-alleges and incorporates herein by reference each and every allegation and defense contained within this Answer as if the same were fully repeated verbatim.

23. Dryvit denies the allegations contained within paragraph 56 of the Plaintiffs' Complaint, including all sub-parts thereto, specifically denying that the Plaintiffs are entitled to such declaratory relief. Dryvit specifically denies those allegations contained within paragraph 56 of the Complaint which refer to " the Class" or "Class Members," allege the existence of a class, or could otherwise be construed to allege the existence or propriety of a plaintiff's class in this case.

24. As to the allegations contained within paragraph 57 of the Plaintiffs' Complaint, Dryvit re-asserts, re-alleges and incorporates herein by reference each and every allegation and defense contained within this Answer as if the same were fully repeated verbatim.

25. Dryvit admits only so much of the allegations contained within paragraph 58 of the Plaintiffs' Complaint as could be construed to allege that Dryvit owed such duties as are imposed by law, but denies the remaining allegations contained in said paragraph inconsistent with or in addition to this admission.

26. Dryvit denies the allegations contained within paragraphs 59, 60 and 61 of Plaintiffs' Complaint, including all sub-parts thereto.

27. As to the allegations contained within paragraph 62 of the Plaintiffs' Complaint, Dryvit re-asserts, re-alleges and incorporates herein by reference each and every allegation and defense contained within this Answer as if the same were fully repeated verbatim.

28. Dryvit lacks specific knowledge or information upon which to form a belief as to the allegations contained within paragraph 63 of the Plaintiffs' Complaint, and therefore denies same.

29. Dryvit denies the allegations contained in paragraphs 64, 65, 66, and 67 of Plaintiffs' Complaint.

30. As to the allegations contained within paragraph 68 of the Plaintiffs' Complaint, Dryvit re-asserts, re-alleges and incorporates herein by reference each and every allegation and defense contained within this Answer as if the same were fully repeated verbatim.

31. Dryvit lacks specific knowledge or information upon which to form a belief as to the allegations contained within paragraph 69 of the Plaintiffs' Complaint, and therefore denies same.

32. Dryvit admits only so much of the allegations contained within paragraph 70 of the Plaintiffs' Complaint as could be construed to allege that Dryvit knew that EIFS would be used as an exterior siding on wood-framed structures, but denies the remaining allegations contained in said paragraph inconsistent with or in addition to this admission.

33. Dryvit admits only so much of the allegations contained within paragraph 71 of the Plaintiffs' Complaint as could be construed to allege that Dryvit's EIFS products are appropriate for use as an exterior siding material; that EIFS prevents moisture intrusion; and that EIFS performs appropriately as an exterior cladding; but denies the remaining allegations contained in said paragraph inconsistent with or in addition to these admissions.

34. Dryvit denies the allegations contained within paragraphs 72 and 73 of the Plaintiffs' Complaint.

35. As to the allegation contained within paragraph 74 of the Plaintiffs' Complaint, Dryvit re-asserts, re-alleges and incorporates herein by reference each and every allegation and defense contained within this Answer as if the same were fully repeated verbatim.

36. Dryvit admits only so much of the allegations contained within paragraph 75 of the Plaintiffs' Complaint as could be construed to allege that Dryvit has advertised its products in various media, and that Dryvit manufactures and distributes quality products that are effective and reliable, but denies the remaining allegations contained in said paragraph inconsistent with or in addition to this admission..

37. Dryvit denies the allegations contained with in paragraphs 76, 77, 78, 79, 80, 81, 82, 83, and 84 of the Plaintiffs' Complaint.

38. As to the allegations contained within paragraph 85 of the Plaintiffs' Complaint, Dryvit re-asserts, re-alleges and incorporates herein by reference each and every allegation and defense contained within this Answer as if the same were fully repeated verbatim.

39. The allegations contained in paragraphs 86 and 87 purport to state legal conclusions to which no response is required. To the extent a response is required, Dryvit denies same.

40. Dryvit denies the allegations contained in paragraphs 88, 89, 90, 91, 92, and 93 of the Plaintiffs' Complaint.

41. As to the allegations contained within paragraph 94 of the Plaintiffs' Complaint, Dryvit re-asserts, re-alleges and incorporates herein by reference each and every allegation and defense contained within this Answer as if the same were fully repeated verbatim.

42. The allegations contained within paragraphs 95, 96, and 97 of the Plaintiffs' Complaint do not purport to state a claim against Dryvit. To the extent that any of those allegations might be construed to state a claim against Dryvit, however, they are specifically denied, including all sub-parts thereto.

43. As to the allegations contained within paragraph 98 of the Plaintiffs' Complaint, Dryvit re-asserts, re-alleges and incorporates herein by reference each and every allegation and defense contained within this Answer as if the same were fully repeated verbatim.

44. The allegations contained within paragraphs 99, 100, 101, and 102 of the Plaintiffs' Complaint do not purport to state a claim against Dryvit. To the extent that any of those allegations might be construed to state a claim against Dryvit, however, they are specifically denied, including all sub-parts thereto.

45. As to the allegations contained within paragraph 103 of the Plaintiffs' Complaint, Dryvit re-asserts, re-alleges and incorporates herein by reference each and every allegation and defense contained within this Answer as if the same were fully repeated verbatim.

46. Dryvit denies those allegations contained within paragraph 104 of the Plaintiffs' Complaint which allege or could be construed to allege that EIFS products manufactured by Dryvit are defective, allow moisture to penetrate through them, or cause damage to framing and/or structural components of structures on which they are installed. Dryvit lacks knowledge or information sufficient to form a belief as to the remaining allegations in said paragraph, and therefore denies same.

47. The allegations contained within paragraphs 105, 106, and 107 of the Plaintiffs' Complaint do not purport to state a claim against Dryvit. To the extent that any of those

allegations might be construed to state a claim against Dryvit, however, they are specifically denied.

48. As to the allegations contained within paragraph 108 of the Plaintiffs' Complaint, Dryvit re-asserts, re-alleges and incorporates herein by reference each and every allegation and defense contained within this Answer as if the same were fully repeated verbatim.

49. The allegations contained within paragraphs 109, 110, 111, and 112 of the Plaintiffs' Complaint do not purport to state a claim against Dryvit. To the extent that any of those allegations might be construed to state a claim against Dryvit, however, they are specifically denied, including all sub-parts thereto.

50. Dryvit denies those allegations contained within paragraphs 113, 114, 115, and in the section of the Plaintiffs' Complaint entitled "VIII. PRAYER FOR RELIEF," including all sub-parts thereto. Dryvit specifically denies those allegations contained within these paragraphs of the Complaint which refer to "the Class" or "Class Members," allege the existence of a class, or could otherwise be construed to allege the existence or propriety of a plaintiff's class in this case.

FOR A THIRD DEFENSE

51. The Plaintiffs above-named and all members of the class they represent were parties to a certain national class action lawsuit in the State of Tennessee in which Dryvit was a defendant. The certification of a national settlement class in that lawsuit, of which the Plaintiffs were members, as well as the conclusion and entry of final judgment in that action, is *res judicata* to this action, and the judgment in that action is entitled to Full Faith and Credit, and for that reason, the Complaint and all causes of action against Dryvit should be dismissed.

FOR A FOURTH DEFENSE

52. The Plaintiffs' Complaint fails to state a claim against Dryvit upon which relief can be granted, and for this reason, the same should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A FIFTH DEFENSE

53. Any injuries and damages sustained by the Plaintiffs as alleged within their Complaint were due to and caused solely by the acts and/or omissions of parties over whom Dryvit exercised no control or right of control, and for this reason, the Plaintiffs are not entitled to recover from Dryvit in any sum whatsoever.

FOR A SIXTH DEFENSE

54. Plaintiffs are estopped from pursuing relief in this action against Dryvit to the extent the Plaintiffs proceeded with prosecution of any other class, consolidated, or individual action in any jurisdiction against Dryvit, including but not limited to those certain actions instituted prior to or subsequent to this action.

FOR A SEVENTH DEFENSE

55. Dryvit asserts that some or all of the claims against it are barred or limited by the contributing, concurring, intervening, superseding, or insulating fault and breach of persons or entities other than Dryvit, which fault or breach may include but not be limited to misapplication, misuse and/or abuse of Dryvit's products, including installation on unsuitable structures and incorporation into structures with defects in other components, resulting in whole or in part in the damages sought and/or alteration or modification of Dryvit's products after they left the control of Dryvit, without the express consent or instructions or specifications of Dryvit. Any fault or breach by Dryvit, the existence of which is denied, was passive and secondary in light of the primary and active fault or breach of others.

FOR AN EIGHTH DEFENSE

56. Any damages sustained by the Plaintiffs as alleged within their Complaint were due to and caused by the sole negligence, gross negligence, willfulness, wantonness and recklessness of the Plaintiffs or their agents and representatives, and for this reason, the Plaintiffs are not entitled to recover from Dryvit in any sum whatsoever.

FOR A NINTH DEFENSE

57. Any damages sustained by the Plaintiffs as alleged within their Complaint were due to and caused by the greater negligence, gross negligence, willfulness, wantonness and recklessness of the Plaintiffs or their agents and representatives, which acts/omissions combined, contributed, and concurred with any alleged negligence on the part of Dryvit, which is denied, and therefore, the Plaintiffs are barred from recovery against Dryvit herein.

FOR A TENTH DEFENSE

58. Any damages sustained by the Plaintiffs as alleged within their Complaint were due to and caused by the comparative negligence, gross negligence, willfulness, wantonness and recklessness of the Plaintiffs or their agents and representatives, which acts/omissions combined, contributed, and concurred with any alleged negligence on the part of Dryvit, which is denied, and therefore, the Plaintiffs' recovery herein should be reduced proportionately.

FOR AN ELEVENTH DEFENSE

59. Plaintiffs are not entitled to recover in tort for purely economic loss.

FOR A TWELFTH DEFENSE

60. Dryvit denies any defects in the design of its products or any legal deficiency in its instructions or other communications concerning the use of its products, and further asserts that its products were subsequently sold to learned intermediaries or purchasers with learned intermediaries as advisers and installers, and that each received a product that was in compliance with the state of product art at the time, and for these reasons, Plaintiffs are barred from recovery against Dryvit herein.

FOR A THIRTEENTH DEFENSE

61. Plaintiffs lack sufficient legal privity with Dryvit to permit imposition of liability against Dryvit in this action.

FOR A FOURTEENTH DEFENSE

62. Dryvit made no representations or warranties that did or could have induced the purchase or use of its products by Plaintiffs, except those which may have been made in writing, and such writings constitute the only and best evidence of their content and legal effect, and include disclaimers of implied warranties of merchantability and fitness for a particular purpose, and include limitations of responsibility of Dryvit. Dryvit is not responsible for any warranties or representations of purchasers or resellers of its products.

FOR A FIFTEENTH DEFENSE

63. Plaintiffs failed to mitigate their damages as required by law.

FOR A SIXTEENTH DEFENSE

64. Plaintiffs' claims are barred by the doctrine of waiver.

FOR A SEVENTEENTH DEFENSE

65. Plaintiffs' claims are barred by the doctrine of estoppel.

FOR AN EIGHTEENTH DEFENSE

66. Plaintiffs' claims are barred by the doctrine of laches.

FOR A NINETEENTH DEFENSE

67. Dryvit asserts that some or all of the claims asserted against it are barred by the applicable statutes of limitation.

FOR A TWENTIETH DEFENSE

68. Plaintiffs' claims are barred by the doctrine of unclean hands.

FOR A TWENTY-FIRST DEFENSE

69. Dryvit asserts that any claims advanced by the Plaintiffs as warranty claims are barred for failure of the Plaintiffs or anyone else to give Dryvit timely and reasonable notice as required by law.

FOR A TWENTY-SECOND DEFENSE

70. Plaintiffs' claims are barred by the doctrine of spoliation of evidence.

FOR A TWENTY-THIRD DEFENSE

71. Plaintiffs' claims are barred to the extent that the Plaintiff discovered any alleged defect and was aware of the attendant dangers and hazards, but nevertheless proceeded thereafter to make use of the product.

FOR A TWENTY-FOURTH DEFENSE

72. Plaintiffs' claims seeking punitive damages violate Dryvit's rights under Article 1, § 10 of the United States Constitution, as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the similar provisions of the Constitution of South Carolina, including, but not limited to, Article 1, §3 and Article 1, §15 of the Constitution of South Carolina for the following reasons:

- (a) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, §3 and Article 1, § 15 of the Constitution of South Carolina are violated because the jury or fact finder has total discretionary power to award punitive damages, and adequate objective legal standards do not exist to guide and limit the jury's or fact finder's discretion, thus allowing an award of punitive damages to be irrational, arbitrary, capricious and based upon vague, unpredictable, conflicting and purely subjective standards;
- (b) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, §3 and Article 1, §15 of the South Carolina Constitution are violated because the vague and inconsistent legal standards for the imposition of punitive damages deprive Dryvit of sufficient notice of the type of conduct and mental state upon which a punitive damage award could result from alleged misconduct;

- (c) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, §3 and Article 1, § 15 of the South Carolina Constitution are violated because the guidelines, standards, procedures and instructions for the imposition of punitive damages are ambiguous, indefinite, vague, uncertain, conflicting, purely subjective, and fundamentally unfair;
- (d) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article 1, § 15 of the South Carolina Constitution are violated because no objective limitations are established concerning the amount or severity of punitive damages awards;
- (e) The Eighth Amendment of the United States Constitution and the same or similar provisions of the South Carolina Constitution including but not limited to Article I, § 15 of the South Carolina Constitution are violated because punitive damages constitute penal damages and amount to an unconstitutional criminal and excessive fine or punishment in a civil proceeding;
- (f) The Fifth and Sixth Amendments of the United States Constitution and the same or similar provisions of the Constitution of South Carolina including but not limited to Article I, § 12, Article I, § 14, and Article 1, §23 of the South Carolina Constitution are violated because Defendants are not allowed to exercise in this case all the constitutional and statutory rights which must be accorded to a party which is subject to the imposition of a criminal penalty in the form of punitive damages;
- (g) The Equal Protection Clauses of the Fourth and Fifteenth Amendments of the United States Constitution and the same or similar provisions of the South Carolina Constitution including but not limited to Article 1, §3 of the South Carolina Constitution are violated because the imposition of punitive damages discriminates against defendants on the basis of wealth and greater amounts of punitive damages for the identical claims may be awarded against some defendants who have more economic wealth than other defendants;
- (h) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the same or similar provisions of the South Carolina Constitution, including but not limited to Article I, §3 of the South Carolina Constitution, are violated because the defendants in this case may be subjected to multiple exposure and multiple awards of punitive damages.
- (i) The First Amendment of the United States Constitution and the same or similar provisions of the South Carolina Constitution, including but not limited to Article I, §2 of the South Carolina Constitution are violated because the imposition of

punitive damages is based upon vague, conflicting, uncertain, and purely subjective standards, without adequate notice to defendant, and thereby create a chilling effect on speech and expression;

(j) The Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the same or similar provisions of the South Carolina Constitution including but not limited to Article I, §3 of the South Carolina Constitution are violated because the imposition of punitive damages impairs the Defendants' right of access to the courts to adjudicate civil disputes;

(k) Article I, § 10 of the United States Constitution and the same or similar provision of the South Carolina Constitution including but not limited to Article I, §4 of the South Carolina Constitution are violated because the imposition of punitive damages impairs the Defendants' rights to contract.

(l) Pursuant to Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 522 U.S. 424, 121 S. Ct. 1678 (2001), if punitive damages are recoverable, which is denied, the amount of punitive damages "[are] not really a fact tried by the jury" therefore Plaintiff's request for punitive damages "to be determined by the jury" violates the United States Constitution.

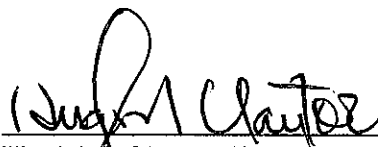
FOR A TWENTY-FIFTH DEFENSE

73. Dryvit specifically reserves and does not waive any additional defenses that may be revealed by additional information that may be acquired through discovery or otherwise.

DEMAND FOR JURY TRIAL

74. Dryvit respectfully requests a trial by jury as to all issues of fact arising in this litigation.

WHEREFORE, having fully answered the Plaintiffs' Complaint, the Defendant, Dryvit Systems, Inc., prays that the same be dismissed as to it, with costs and attorneys' fees, and that Dryvit be granted such other and further relief as the Court may deem just and proper.



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Attorney for Defendant Dryvit Systems, Inc.

May 11, 2006
Greenville, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 11th day of May, 2006, (s)he mailed a copy of the attached **DEFENDANT DRYVIT SYSTEMS, INC.'S ANSWER TO PLAINTIFFS' COMPLAINT** by depositing same in the United States Mail, Second-class, proper postage affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

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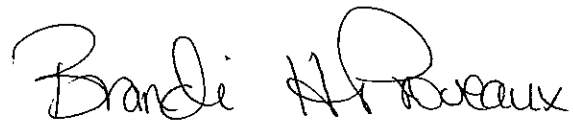
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06 MAY 15 PM 4:42
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May 11, 2006

The Honorable Elizabeth M. Smith
Clerk of Court, Beaufort County
P.O. Drawer 1128
Beaufort, SC 29901

Re: John and Sally Cardamone, et al vs. Dryvit Systems, Inc., et al.;
Case Number: 02 CP 07 1377

Dear Mrs. Smith:

Enclosed for filing please find an original and one copy of *Defendant Dryvit Systems, Inc.'s Answer to Plaintiffs' Complaint* in the above-referenced matter. Upon filing the original, please return to me one clocked copy in the enclosed self addressed stamped envelope provided.

Thank you for your assistance. Please call me if you have any questions or need additional information.

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE
A Professional Limited Liability Company


Hugh M. Claytor

HMC/bhp
Enclosure

Cc: All Counsel of Record
Hada Haulsee, Esquire