

MOTION SLIP

Caption: **JOHN CARDAMONE** and his wife, **SALLY CARDAMONE**, and **BENJAMIN T. CLARK**, and his wife, **DIANE M. CLARK**, **RAMONA GIANNI**, and **NATHAN W. GORDON** and his wife, **JILL GORDON** individually and on behalf of others similarly situated in the state of South Carolina. -versus- **DRYVIT SYSTEMS, INC.**, **ESTATE BUILDERS, INC.**, and **AMERICAN APPLICATORS OF SOUTH CAROLINA, INC.**

Case No.: **02-CP-07-1377**

Date Motion Filed: **08/30/02**

Moving Attorney: **Ralph E. Tupper**
Erin D. Dean

Telephone: **524-1116**

Moving Attorney Represents: **Defendant, Dryvit Systems, Inc.**

Opposing Attorney: Michael S. Seekings	843-853-5353
George W. Mullen	843-853-5353
Francis E. Grimball	843-722-3058
W. Jefferson Leath, Jr.	843-937-8811
Timothy W. Bouch	843-937-8811
William D. Robertson	803-988-0040
William M. Bowen	843-842-5000

Nature of Motion: to Dismiss

Estimated Time N

Reporter: **YES**

To: Grey

FR. Tom

CC: SAM
Phillips

BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

2002 AUG 30 PM 3 54

STATE OF SOUTH CAROLINA)
)
 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 and his)
 wife JILL C. GORDON)
 individually and on behalf of)
 others similarly situated in the)
 state of South Carolina,)
 Plaintiffs)
)
 -versus-)
)
 DRYVIT SYSTEMS, INC.,)
 ESTATE BUILDERS, INC.,)
 and AMERICAN APPLICATORS)
 OF SOUTH CAROLINA, INC.,)
 Defendants)
)

IN THE COURT OF COMMON PLEAS
 FOURTEENTH JUDICIAL CIRCUIT
 CIVIL ACTION NUMBER: 02-CP-07-1377

NOTICE OF MOTION AND MOTION TO
 DISMISS, RULE 12(b)(9)

2006 AUG 30 PM 3 54
 BEAUFORT COUNTY
 CLERK OF COURT
 BEAUFORT, S.C.

TO: GEORGE E. MULLEN, ESQUIRE; MICHAEL E. SEEKINGS, ESQUIRE,
 ROBERT L. WYLIE, IV, ESQUIRE, W. JEFFERSON LEATH, JR., ESQUIRE
 TIMOTHY W. BOUCH, ESQUIRE, FRANCIS E. GRIMBALL, ESQUIRE, WILLIAM
 M. BOWEN, ESQUIRE, AND WILLIAM DIXON ROBERTSON ATTORNEYS FOR
 PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE THAT the Defendant, Dryvit Systems, Inc.,
 will move on the tenth day after service hereof, or as soon thereafter as counsel may be heard,
 before the Presiding Circuit Court Judge for Beaufort County, South Carolina, for an Order of
 this Court dismissing with prejudice the Plaintiffs' Amended Complaint against the Defendant in
 this case.

This motion is made pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure, in that Plaintiffs Cardamone, Clark and Gianni each have pending in the Court of Common Pleas individual suits against Defendant Dryvit Systems, Inc. that allege the same causes of action as set forth in the case at bar (See attached Exhibit 1, individual Summons and Complaints for each Plaintiff filed in Beaufort County, and Exhibit 2, Amended Summons and Complaint for Class Action filed in Beaufort County Court of Common Pleas). In addition, Plaintiffs John and Sally Cardamone's case, number 99-CP-07-1237, is believed to be number one for trial on the Beaufort County Non-Jury roster beginning September 9, 2002. Given that these Plaintiffs all have individual actions pending against Defendant Dryvit Systems, Inc., this action must be dismissed.

As to the Gordon case, while there are no direct allegations raised by the Plaintiffs against Defendant Dryvit (Dryvit was brought in as a Third Party Defendant by Paragon), the Complaint could easily be amended to assert any such direct claim the Plaintiffs now perceive they may have against Dryvit in that case. Such an amendment would be in the interest of judicial economy and is perhaps required under Rule 19(a) of the South Carolina Rules of Civil Procedure rather than maintaining a second suit with the same set of facts as that which is already in existence.

Furthermore, the Plaintiffs have implied that in defending their motion, Defendant Dryvit has perpetuated a "fraud on the Court (Plaintiff's Sur-Reply to Defendant's Third Submission)." The Defendant Dryvit would assert that no such fraud exists on its behalf and would further point out that the Plaintiffs' Amended Complaint makes no allegations against Defendants Estate Builders, Inc. and American Applicators of South Carolina, Inc. with regard to the assertion of a class action. In fact, Estate Builders, Inc.'s response to the Plaintiff's Motion for Conditional

Certification confirms in paragraph 5:

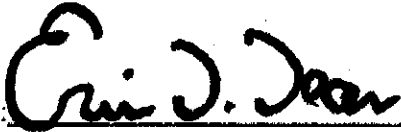
At present, no request has been made for certification of a class against Estate, and Estate has been given neither notice nor an opportunity to respond to such a request.

One can only assume that the sole purpose for the inclusion of the latter two Defendants in this proposed class action is to destroy diversity and prevent proper federal court jurisdiction over this matter. Upon information and belief, the allegations raised against these local Defendants (i.e. negligence and breach of warranty claims) have previously been plead against the same Defendants in the current pending State Court actions which should be dismissed under Rule 12(b)(8), SCRPC as well.

Based on the above and forgoing reasons, Defendant Dryvit Systems, Inc.'s Motion to Dismiss should be granted. This motion shall be further based upon the statutory and common laws of the State of South Carolina, the South Carolina Rules of Civil Procedure, the pleadings heretofore filed, and any and all affidavits, memorandums and supporting material which may be served on or before the date of service hereon.

The undersigned affirms pursuant to Rule 11 of the South Carolina Rules of Civil Procedure that consultation with opposing counsel is not required prior to the filing of this motion.

TUPPER, GRIMSLEY & DEAN, P.A.

By: 

Ralph E. Tupper

Erin D. Dean

Attorneys for Defendant, Dryvit Systems, Inc.

Post Office Box 2055

Beaufort, South Carolina 29901-2055

(843) 524-1116

DICKSTEIN, SHAPIRO, MORIN, & OSHINSKY

Peter W. Morgan

Attorney for Defendant, Dryvit Systems, Inc.

1201 L. Street NW

Washington, DC 20037-1526

Beaufort, South Carolina

Dated: August 30, 2002

STATE OF SOUTH CAROLINA)

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, and his)
wife, JILL C. GORDON,)
individually and on behalf of)
others similarly situated in the)
state of South Carolina,)
Plaintiffs)

-versus-

DRYVIT SYSTEMS, INC.,)
ESTATE BUILDERS, INC.,)
and AMERICAN APPLICATORS)
OF SOUTH CAROLINA, INC.,)
Defendants)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NUMBER: 02-CP-07-1377

2002 AUG 30 PM 3 54
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

CERTIFICATE OF SERVICE

I, C. Teresa Dean, paralegal for Ralph E. Tupper and Erin D. Dean, of Tupper, Grimsley & Dean, P.A. hereby certify that on August 28, 2002, I have served counsel for all parties in the above captioned matter with a copy of Defendant, Dryvit Systems, Inc.'s Notice of Motion and Motion to Dismiss by facsimile transmission and depositing in the U.S. Mail a copy of same in a properly addressed envelope with adequate postage thereon to the following:

Michael S. Seekings, Esquire
George E. Mullen, Esquire
Mullin, Wylie & Seekings, L.L.C.
134 Meeting Street, Suite 500
Charleston, South Carolina 29401-1544

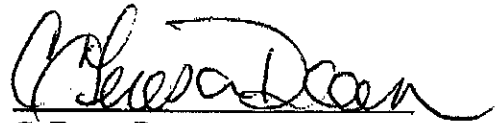
Francis E. Grimbball, Esquire
Post Office Box 21849
Charleston, South Carolina 29413

W. Jefferson Leath, Jr., Esquire
Timothy W. Bouch, Esquire
Leath, Bouch & Crawford, L.L.P.
Post Office Box 59
Charleston, South Carolina 29402

William Dixon Roberston, Esquire
Post Office Box 11401
Columbia, South Carolina 29211-1401

William M. Bowen, Esquire
William M. Bowen, P.A.
Post Office Box 6128
Hilton Head Island, SC 29938

Jonathan J. Anderson, Esquire
Anderson & Segui, L.L.C.
Post Office Box 87
Charleston, South Carolina 29402


C. Teresa Dean

SWORN to before me this
30th day of August, 2002


NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: May 28, 2009