

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

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,)

**Notice of Motion and Motion for a
Fairness Hearing and for an Order
Extending Terms of Settlement to Every
Class Member**

v.)

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

Defendants.)

**TO: FRANCIS E. GRIMBALL, ESQ., GEORGE E. MULLEN, ESQ., , ATTORNEYS
FOR PLAINTIFFS AND RALPH E. TUPPER, ESQUIRE, ATTORNEY FOR DRYVIT
SYSTEMS, INC.,**

This is a certified class action case in which the Defendant Dryvit has settled with the named Class Representatives without Court approval. Plaintiffs, who have recently been permitted to intervene as additional Class Representatives (hereinafter the "Substituted Class Representatives"), hereby move for an Order extending the terms of the settlement Defendant Dryvit reached with the prior class representatives of this Action (hereinafter the "Prior South Carolina Class Representatives") to every class member.

This motion is made pursuant to the general principles of estoppel, S.C.R.C.P. Rule 23, and Premium Investment Corp. v. Green, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984). Further, Plaintiffs move for a fairness hearing and for an Order providing notice of such a class-wide settlement to absent class members according to the provisions of Rule 23, SCRCPP and applicable

case law. Because Dryvit effectively deprived absent class members of adequate representation in this matter and prejudiced their rights when it settled with each Prior South Carolina class representative, Dryvit should be ordered to honor that settlement with all class members.

On August 12, 2002, Prior South Carolina Class Representatives' counsel filed a class action suit on behalf of the Prior South Carolina Class Representatives, John and Sally Cardamone, Benjamin and Diane Clark, Nathan and Jill Gordon, Ramona Gianni and others similarly situated in the state of South Carolina against Dryvit System's Inc. and other defendants. The action alleged, *inter alia*, that "Defendant Dryvit entered into an action in Tennessee, Posey, et al. v. Dryvit Systems, Inc., Civil Action Number 17,725IV . . . in an effort to impose a settlement on Plaintiffs and the members of [this] class . . ." Complaint at pp. 4 & 16. The class definition included all persons that own or have owned one or two family residences in South Carolina clad with Dryvit EIFS stucco who were also members of the Tennessee action of Posey et al. v. Dryvit Systems, Inc. and met other restrictions. Complaint at pp. 6-7. In its prayer for relief, Plaintiffs sought to have the action certified as a class and have both plaintiffs and class members opted out of the Posey action.

In response to the August 12th Complaint, Dryvit filed a Motion to Dismiss this action on August 20, 2002 pursuant to Rule 12(B)(8), SCRCF because the named plaintiffs had other state court actions pending against Dryvit. Inexplicably, Dryvit's motion did not mention the pendency of the Posey action in Tennessee even though Posey is specifically mentioned in the complaint and Dryvit's lead counsel in Posey, Peter W. Morgan, joined in the motion. Motion at p.4.

By Order filed September 3, 2002, Judge Thomas Kemmerlin certified an opt-out class action comprised of the plaintiffs and the class as defined in the August 12th Complaint. September 3rd Order at p.2 (The South Carolina Class). Dryvit asked Judge Kemmerlin to reconsider the certification order. However, Dryvit did not raise the existence of the Tennessee action to this Court.

Dryvit took no other steps to oppose the instant action until September of 2005 when it filed a motion to decertify the class.

Although Dryvit did nothing to contest this Action from September, 2002 until September of 2005, it vigorously prosecuted a global nationwide settlement¹ in Posey. The Posey action was heard before the Honorable Judge Duane Sloan. Judge Sloan approved the Global Settlement on January 14, 2003. The Settlement was immediately appealed by several class members who had objected to it and a group of home builders who had attempted to intervene in the action so that they could also object to the Settlement (hereinafter the intervenors are referred to as the "Home Builders"). While the appeal was pending, Dryvit settled with all of the class members who were appealing the Posey Settlement. Only the Home Builders continued with the appeal and based on their efforts, the Global Settlement was twice reviewed by the Tennessee Court of Appeals (the Home Builders filed a third appeal, but abandoned it before it was decided by the Court).²

In both Posey I and Posey II, the Tennessee Court of Appeals expressed grave concerns over the "fairness and validity" of the Global Settlement and ordered Judge Sloan to review opposing

¹ Interestingly, Posey's class definition excluded the state of North Carolina due to the existence of a statewide class action against Dryvit.

² The Tennessee Court of Appeals expressed serious reservations with the notice provided absent class members and the terms of the Global Settlement. In its first opinion, issued March 22, 2004, the Court noted that the Global Settlement

is a nationwide settlement which is estimated to affect at least 95,000 homeowners. There were serious questions raised (even by the trial judge himself) regarding adequacy of notice and of the terms of the settlement. (The high number of opt-outs and the low number of responses in general demonstrate there may have been valid concerns as to both.) . . . **This action has such far-reaching implications that consideration of all opposing points of view is imperative.**

Posey v. Dryvit Systems, Inc., 2004 Tenn. App. LEXIS 174, 11-12 (Ct. App. 2004) (emphasis added) (hereinafter referred to as "Posey I"). The Court remanded the case to the trial court and stayed the operation of the Settlement. The Court further noted that "it is obvious that the Trial Court is required to address the matter of class definition as contained in its final order, which as certified is a meaningless class." Id. at 19.

On remand, Judge Sloan summarily denied several motions filed by the Home Builders and limited the stay imposed by Posey I to those homes actually built by the Home Builders. The Home Builders filed an emergency petition with the Court of Appeals to challenge Judge Sloane's limitation of the stay. After conducting a second review of the Global Settlement, the Court of Appeals issued an opinion which stated in pertinent part that

[t]he basis for the stay was to ensure that all evidence pertinent to the fairness and validity of this settlement be heard, whether put forth by the intervenors or anyone else. The Trial Court refused to hear intervenors' evidence regarding the propriety of the settlement in the original fairness hearing, but there is no question that, in a class action such as this, the Trial Court must exercise "the highest degree of vigilance in scrutinizing proposed settlements", and acts as a type of fiduciary for the class members. *See Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002). Courts recognize the importance of the trial court's role in approving class action settlements, and have required the trial court to take extra care when determining if the settlement is fair, considering all the factors as the "risk and likely return to the class of continued litigation", the range of possible outcomes and probability of each, whether class counsel's fees are proportional to the incremental benefits conferred on the class members, etc. *Id.* A review of the transcript of the fairness hearing in this case reveals that the Trial Court's scrutiny of the settlement was cursory at best. The Trial Court is directed to conduct an additional fairness hearing as soon as practicable so that the intervenors' rights can be determined. Posey v. Dryvit Sys., 2005 Tenn. App. LEXIS 1, 7-8 (Ct. App. 2005) (emphasis added) (hereinafter "Posey II").

points of view and pertinent evidence “whether put forth by the [Home Builders] or anyone else.” In effect, the Court of Appeals was ordering Judge Sloan to conduct a new and more thorough fairness hearing. Dryvit was well aware that South Carolina class counsel had effectively argued against the Global Settlement at the first fairness hearing on behalf of an objector, Mr. DeLoache. Transcript of Hearing, October 1, 2002 at p. 56 and p.70 line 19 to p.71 line 15. In fact, Dryvit admits that the Prior South Carolina Class Representatives’ counsel’s efforts had “cost Dryvit some money in Tennessee.” Transcript of Hearing, December 5, 2005 at p.36, line 25 to p.37, line 3.

Despite two invitations from the Court of Appeals to contest the Global Settlement, the Prior South Carolina Class Representatives remained silent and inactive. The cause of the inaction was simple – without Court approval and in violation of S.C.R.C.P. Rule 23, Dryvit settled with the Prior South Carolina Class Representatives thus depriving absent class members of adequate representation and causing the South Carolina action remain dormant. Deprived of a voice and representation absent South Carolina Class Members did not engage in an active dispute over the parallel class actions, and thus any advantage the South Carolina class may have garnered from the Posey I & II decisions was lost.

Dryvit protected its Global Settlement by offering separate, and very lucrative, settlements to the objectors in Tennessee and the Prior South Carolina Class Representatives. Under the Global Settlement, the most a class member could receive was \$7.00 for each square foot of Dryvit’s EIFS cladding on the class members’ home. Upon information and belief, Dryvit paid the Prior South Carolina Class Representatives much more than \$7.00 per square foot to settle their individual claims and stop representing the South Carolina class. These separate agreements effectively eliminated all active opposition to the Global Settlement and left absent class members unrepresented and without a voice to challenge the terms of the Global Settlement or to prosecute the

South Carolina Class Action.³ The United States Supreme Court considered and tacitly rejected a similar scheme in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

Amchem involved asbestos-related personal injury claims. 521 U.S. at 597. In an attempt to manage a growing asbestos litigation crisis, federal courts consolidated all pending federal asbestos cases into a single action. Counsel for both plaintiff and defendants were also consolidated into steering committees. Representatives of those committees devised a scheme whereby many plaintiffs with existing claims settled those claims “through separate agreements” whereas remaining and potential plaintiffs would be bound to a global settlement. 521 U.S. at 601. After the separate settlement agreements were executed, the defense steering committee and elements of the plaintiffs steering committee filed a class action, answer, proposed global settlement, and joint motion for certification, all on the same day. 521 U.S. at 601-02. The proposed global settlement was attacked by numerous objectors who raised various objections to it including the complaint “that compensation levels [under the settlement] were intolerably low in comparison to awards available in tort litigation or payment received by the [existing] plaintiffs.” 521 U.S. at 606. The Supreme Court rejected the Global Settlement on several grounds including an analysis that found common questions of law and fact did not “predominate” over other questions and that class members were not adequately represented. 521 U.S. at 622-23 and 627-28.

As part of their analysis, the Court noted that a class action can not be settled without approval of the trial court pursuant to Rule 23(e) of the Federal Rules.⁴ Under the circumstances presented in Amchem, the Court found that

The inquiry appropriate under Rule 23(e) . . . protects unnamed class members “from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise.”

³ Dryvit has never raised the issue of inadequacy of the class representatives’ ability to represent the class because they took part in ensuring the inadequacy of the representation by offering lucrative settlements to the class. The purpose was to buy off the class representatives to stop the class representatives to stop the class from going forward until Posey could become final.

⁴ Rule 23(c), SCRCP contains the same prohibition.

521 U.S. at 623 (quoting 7B Wright, Miller, & Kane §1797 at 518-519). The Court criticized the “settling parties” for reaching “a global compromise with no structural assurances of fair and adequate representation for the diverse groups and individuals affected.” Although the bulk of that criticism was directed toward the amalgamation of plaintiffs who had either developed or died from asbestos-related illnesses into a class with plaintiffs who merely had the potential for developing such illnesses in the future, the Court did touch upon the representational problem created when class representatives settle their individual claims. Various legal commentators have expanded upon that problem in subsequent analyses of the Amchem opinion. See, e.g., Susan P. Koniak, Feasting While the Widow Weeps: Georgina v. Amchem Products, Inc. 80 Cornell L. Rev. 1045, 1066-67 (Professor Koniak testified as an expert in the Amchem case and criticized the defendants for paying more to existing plaintiffs than other plaintiffs received from the global settlement).

The instant action represents a more egregious situation than that presented by Amchem. Although many existing plaintiffs settled outside of the global settlement, at least the Amchem class representatives maintained their claims against the defendants as they represented the class. In this action, the Prior South Carolina Class Representatives settled their personal claims and there is nothing in the record to suggest that they had any further involvement in this action. The result was obvious, the action ceased to be prosecuted in South Carolina while the Tennessee settlement ground forward to a final judgment.

Dryvit now attempts to avoid any analysis of its conduct in this South Carolina case by arguing the penultimate issue before this Court is whether the final judgment in Posey is entitled to full faith and credit in South Carolina. In its Brief in Opposition to Plaintiffs’ Motion for Partial Summary Judgment, Dryvit conceded that the Posey court in Tennessee had no authority over the

conduct of the instant action in South Carolina until one court or the other reached a final judgment. Brief dated 12/22/2005 at p. 10. According to Dryvit's interpretation of the law, "[i]t is only when one of the competing class actions reaches the final judgment stage that *res judicata* and full faith and credit come into play." *Id.* At a time when Dryvit thought it had no legal method to overcome the instant action, it undertook a strategy to paralyze the South Carolina class action by settling with the Prior South Carolina Class Representatives, while it pushed the Global Settlement through Tennessee's appellate courts to a final judgment.

Sadly, no member of the Posey or Cardamone classes responded to Posey I or II opinions, only the Home Builders continued to contest the Settlement and Judge Sloan took a very narrow view of their role in the litigation. The Prior South Carolina Class Representatives would have and should have provided Judge Sloan the "point of view" and "evidence" that the Court of Appeals had ordered him to consider. Instead, Dryvit and the Prior South Carolina Class Representatives reached lucrative settlements.

Absent class members must be adequately represented in order to be bound to a class action judgment. The Restatement of Law (2nd) of Judgments makes it clear that

A person is not bound by a judgment for or against a party who purports to represent him if . . . [t]he representative failed to prosecute or defend the action with due diligence and reasonable prudence, and *the opposing party was on notice of facts making that failure apparent.*

Restatement (Second) of Judgments §42 (1982) (emphasis added). As the Restatement explains, the authority of a class representative is derived "principally from the identity between his interests and those of the rest of the members of the described class." *Id.* at §42(e). The courts of our State have determined that the class representative is so closely identified with the interests of the class that the representative owes a fiduciary duty to the class. See, e.g., Premium Investment Corp. v. Green, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct. App. 1984) ("[A] plaintiff who sues on behalf of a class . . .

assumes a fiduciary obligation to absent members of the class, including the obligation to inform them of proposed compromises of the group action”). The fiduciary relationship is crucial to the Restatement’s position that a *defendant* can not bind absent class members to a judgment where the defendant knows “the representative seeks to further his own interest at the expense of the represented party.” Restatement of Judgments at §42(f).

Not only was Dryvit aware that the Prior South Carolina Class Representatives were pursuing their own interests, and not those of the class, Dryvit created the situation by offering lucrative individual settlements without offering anything else to the South Carolina Class. As the Restatement explains, “a fiduciary does not bind those for whom he acts as against third parties who are aware of the fiduciary’s failure to fulfill his responsibility.” *Id.* It also recognizes that this general rule is enhanced in the class action context where “the thoroughness and vigor of the representation is properly the subject of particular scrutiny because the bonds of responsibility between the representative and those for whom he acts are transitory and ordinarily not otherwise readily enforceable.” *Id.* The instant action is a perfect illustration of this point. The Prior South Carolina Class Representatives’ interest and involvement in the instant action did not survive their separate settlements, and Dryvit was well aware of it and now seeks to benefit from it.

The unique nature of class actions have prompted some commentators to call on courts to require that *defendants* ensure a class is adequately represented. See, e.g., Debra L. Bassett, *The Defendant’s Obligation to Ensure Adequate Representation in Class Actions*, 74 UMKC L. Rev. 511 (2006). In many instances, a defendant turns to a class action as a means of purchasing peace with numerous plaintiffs. Indeed, prior to the advent of the modern rules of civil procedure, a representative action to determine the rights of similarly situated parties in a single action lay with an equitable “bill of peace.” See *Aetna Casualty & Surety Co. v. Yonce*, 181 S.C. 369, 187 S.E. 536 (1936); see also, Hazard, Gedid, & Sowle, *An Historical Analysis of the Binding Effect of Class*

Suits, 146 U. Pa. L. Rev. 1849 (1998). Adequacy of representation was always a concern in representative actions and often determined whether a judgment arrived at in a representative action was binding on absent class members. Hazard at 1852-53. Adequacy of representation lay at the heart of the seminal case of Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). Shutts involved a nationwide class action brought in a Kansas state court to determine the rights of lease holders who were making small claims for royalty payments from Phillips. The Supreme Court explained that both the class representatives and the *class defendant* had to ensure that absent class members were adequately represented.

As a class-action defendant, petitioner is in a unique predicament Petitioner could be subject to numerous later individual suits by these class members because a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party. Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound.

472 U.S. at 805. In pursuit of the binding the entire class to the outcome of the class action, the Supreme Court instructed that a class can not be certified “unless the judge, with the aid of the named plaintiffs **and defendant**, conducts an inquiry into the common nature of the named plaintiffs and the absent plaintiffs claims” 472 U.S. at 809. The need for such an inquiry has remained. The Amchem court stated “that a necessary inquiry is ‘whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.’” 521 U.S. at 626, n.20. As noted above, under circumstances somewhat similar to the instant action, the Amchem court found the representation of the class to be lacking.

The jurisprudence of this State accords well with Shutts and its progeny. Before a class action is certified, it has no effect on the rights of unnamed or absent class members because they can not be bound by the the actions or inactions of the purported class representatives. Premium Investment Corp., 283 S.C. at 470, 324 S.E.2d at 76. Certification of the class dramatically alters the rights of

absent class members as “they [will] be bound by the outcome” of a certified class action and the actions of its representatives. Id. Because absent class members are bound to the outcome of a certified class action, Rule 23 of the South Carolina Rules of Civil Procedure prohibits the dismissal or compromise of a class action **without** court approval and notice to absent class members. Rule 23(c), SCRCF; see also Premium Investment Corp., 283 S.C. at 470, 324 S.E.2d at 76 (“The class representative [] surrenders the right to settle the action in return for individual gain, alone.”).

As this action now stands, other than recently added Substituted Class Representatives, there are no representatives to effect a compromise or dismissal of the action, they have all impermissibly settled with Dryvit. Class counsel is attempting to replace the representatives, but at this stage of the action there is little they can do. The inattention wrought by the separate settlements have prejudiced the rights of the absent class members. The only way to redress this wrong is to require Dryvit and the Class Representatives to divulge the settlement by which they settled each representatives’ claims and extend that settlement formula to the entire class or declare the Posey settlement null and void as to the South Carolina Class.

In Premium Investment Corp., our Supreme Court found that class members held the settlement of the action in a constructive trust for the entire class. 324 S.E.2d at 78. The subject matter of that action involved the restoration of a lake in a subdivision. Defendants settled the claims of class by conveying certain property within the subdivision to the class representative and class counsel. The Supreme Court found that each class member had an interest in the transferred property. The instant action differs markedly from the Premium Investment case in that the subject matter of the litigation is diffuse, involving each class members home and not one central issue such as the condition of a common body of water. In the Tennessee settlement, its individual settlements with the Class Representatives, and numerous other action within our State, Dryvit relied on a settlement formula that paid a plaintiff so many dollars per square foot for each square foot of

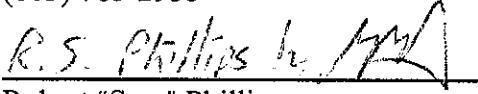
Dryvit's EIFS products that were used to clad the home. Plaintiffs contend that the formula used to settle with the class representatives should be extended to the entire class if found fair at the required "fairness hearing."

Finally, Dryvit should be estopped from arguing that the extension of the same settlement formula to all absent South Carolina Class members is not appropriate. Dryvit knew they were settling with the Prior South Carolina Class Representatives and in a manner inconsistent with Rule 23. Fairness dictates that the settlement be extended to all class members.

For the foregoing reasons, Plaintiffs request that this Court extend the terms of the previously approved Settlement Agreement with Class Representatives to all class members and order notice of such a class-wide settlement be made to absent class members according to the provisions of Rule 23, SCRCF and applicable case law.

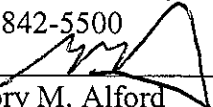
Columbia, South Carolina
October 23, 2006

FINKLE LAW FIRM, LLC
1201 Main Street, Suite 1800
Post Office Box 1799
Columbia, South Carolina 29202
(803) 765-2935


Robert "Sam" Phillips
Richard R. Gleissner

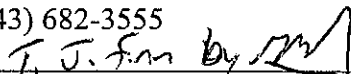
Hilton Head Island, South Carolina
October 23, 2006

ALFORD & WILKINS, PC
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500


Gregory M. Alford

Hilton Head Island, South Carolina
October 23, 2006

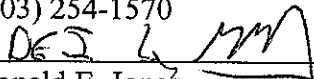
THE FINN LAW FIRM
Post Office Box 23243
Hilton Head Island, SC 29926
(843) 682-3555


Thomas J. Finn
Thomas E. Williams

COTTY & JONAS

Columbia, South Carolina
October 23, 2006

1328 Blanding Street
Columbia, SC 29202
(803) 254-1570



Donald E. Jonas

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

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

Certificate of Mailing

Plaintiffs,)

v.)

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

Defendants.)

I, Amanda DuBose, Paralegal with the law firm of Alford & Wilkins, P.C., certify that I have this date, served on the following a copy of Notice of Motion and Motion for a Fairness Hearing and for an Order Extending Terms of Settlement to Every Class Member, with respect to the above-captioned civil action, by depositing the same at the United States Post Office, Hilton Head Island, South Carolina, with first class postage prepaid to:

W. Jefferson Leath, Jr., Esq.
Timothy W. Bouch, Esq.
Leath Bouch and Crawford
Post Office Box 59
Charleston, SC 29401-1544

Francis E. Grimball, Esq.
P.O. Box 21849
Charleston, SC 29402

William Dixon Robertson, Esq.
Post Office Box 11401
Columbia, SC 29211-1401

William M. Bowen, Esq.
William M. Bowen, PA
P.O. Box 6128
Hilton Head Island, SC 29938

Michael S. Seekings, Esq.
George E. Mullen, Esq.
Mullen, Wylie & Seekings, LLC
P.O. Box 5969
Hilton Head Island, SC 29938
Attorneys for Plaintiffs

Ralph E. Tupper, Esq.
Tupper, Grimsley & Dean, PA
Post Office Box 2055
Beaufort, SC 29901-2055
Attorney for Dryvit Systems, Inc.

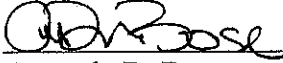
Jonathan J. Anderson, Esq.
Anderson & Segui, LLC
P.O. Box 87
Charleston, SC 29402
Attorney for Estate Builders, Inc.

Robert "Sam" Phillips, Esq.
Richard R. Gleissner, Esq.
Finkle & Altman, LLC
Post Office Box 1799
Columbia, South Carolina 29202

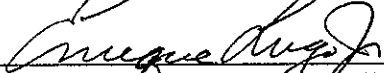
Thomas J. Finn, Esq.
Thomas E. Williams, Esq.
The Finn Law Firm
Post Office Box 23243
Hilton Head Island, SC 29926

Donald E. Jonas, Esq.
Cotty & Jonas
Post Office Box 97
Columbia, SC 29202
Attorneys for Intervenors

ALFORD & WILKINS, P.C.

By: 
Amanda DuBose
Paralegal

Sworn to and subscribed before me on
this 23rd day of October 2006


Notary Public for South Carolina
My Commission Expires: 8/8/2011