

**IN THE CIRCUIT COURT FOR  
JEFFERSON COUNTY, TENNESSEE,  
AT DANDRIDGE**

**BOBBY R. POSEY, and wife, SABRINA )  
POSEY, and DALE TEAGUE, on behalf )  
of themselves and all others similarly )  
situated, )  
)  
Plaintiffs, )  
)  
v. )  
)  
DRYVIT SYSTEMS, INC., )  
)  
)  
Defendant. )  
)  
\_\_\_\_\_ )**

**MEMORANDUM OF *AMICI*  
IN OPPOSITION TO THE  
PROPOSED CLASS  
SETTLEMENT AGREEMENT  
BETWEEN PLAINTIFFS AND  
DRYVIT SYSTEMS, INC.**

**Case No. 17,715-IV**

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SUBMITTED BY AMICI CURIAE: EIFSFACTS.ORG AND HOMEOWNERS  
AGAINST DEFECTIVE DWELLINGS, INC. (HADD).

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## Interest of Amici

**EIFSFACTS.ORG** is a Virginia-based non-profit organization whose mission is to provide homeowners with information about, and assistance with, the problems associated with the use of Exterior Insulation and Finish Systems (EIFS) on residential structures. EIFSFACTS.ORG was founded by Charles McMillion, one of the three homeowners featured on Dateline NBC's EIFS investigation "Is Your Home Crumbling Around You?" which aired in March, 1999. In the three years since its founding, the organization has provided information and assistance to thousands of EIFS homeowners in the United States, Canada and abroad. The organization is dedicated to assisting EIFS homeowners through information and education about EIFS and the inherent problems associated with the use of EIFS in wood-frame residential construction and currently maintains a repository of EIFS-related information on the World Wide Web for public access.

**HOMEOWNERS AGAINST DEFICIENT DWELLINGS (HADD)** is a registered non-profit organization for homeowners and homebuyers. Founded in 1993, HADD's mission is to promote better building standards and practice, to educate the general public on how to avoid substandard, deficient housing and how to rectify current instances of substandard, deficient housing. HADD assists homeowners and homebuyers in seeking recovery of adequate damages from builders and sellers of deficient housing and works with state legislators to promote consumer protection bills concerning the residential building industry. HADD currently has chapters in Florida, Georgia,

Louisiana, Indiana, Wisconsin, Ohio, Michigan, Missouri, Kansas, Iowa, Colorado, Texas, Arizona, California, Nevada, New Jersey, Massachusetts, New Hampshire, Connecticut and Pennsylvania.

These organizations join this case as *Amici* because they recognize that the proposed national class action settlement is based upon flawed premise and provides no meaningful relief to class members.

## I. Introduction and Summary of Argument

The purchase of a home is the largest and most important single investment that a family will normally ever make. With that purchase comes the promise that you have not only physical shelter and protection from the elements but that you have an investment that will appreciate over time. For homeowners who purchased homes clad with Exterior Insulation and Finish Systems (EIFS), those promises have been shattered. EIFS homeowners are faced with the harsh reality that they must remove and replace the EIFS on their home if they are to prevent future moisture damage and stop the depreciation of their largest investment. The problems facing EIFS homeowners are neither isolated nor unique; they are widespread and pervasive and the direct result of an “inherently defective” system. Because Dryvit’s Outsulation EIFS has been determined to be defective by design, the only effective remedy is complete replacement of the system.

Accordingly, in opposition to the proposed class settlement, *amici* respectfully submit this memorandum: (i) to address the fact that because Dryvit Outsulation is “inherently flawed”; it cannot be repaired but must be replaced; and (ii) to demonstrate that the proposed settlement (which is based upon the premise of repair) provides no meaningful relief or remedy to individual class members and should not be approved by the Court.

## II. Argument

### A. EIFS Cannot Be Repaired

The fundamental premise of the proposed settlement is that Dryvit's EIFS are viable and can be repaired<sup>1</sup>. However, in support of the proposed settlement neither Dryvit nor class counsel have provided the Court with any evidence to support this premise<sup>2</sup>. It is undisputed that there are no accepted or approved industry standards for EIFS repair and, to date, Dryvit has refused to approve any of the specifications that have been published by the Moisture Warranty Corporation<sup>3</sup> for use in the repair of Dryvit's EIFS under the proposed settlement. The reason for this lack of proof and for the refusal to explain exactly how EIFS can and will be repaired is quite simple: the premise of "reparability" is not only patently false, it defies common sense. How can you "repair" a system that is by its very design defective absent changing the design? The answer is that you cannot.

The inherent defect or flaw in all barrier EIFS, including Dryvit's, is that they fail to provide a mechanism for the collection and evacuation of moisture that will inevitably intrude. Prior to the proposed class settlement and the lure of sharing in \$11,600,000

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<sup>1</sup> Settlement Agreement, Dryvit EIFS Class Action Settlement Q&A, Posey v. Dryvit Systems, Inc., #17,715-IV, (Cir. Court, Jefferson County, TN.)

<sup>2</sup> It is not surprising that class counsel has failed to provide any proof. Class counsel has previously and very publicly taken the position that EIFS is defective by design and cannot be repaired. Plaintiff's Perspective on the Product Liability Claim, Gary K. Shipman, Shipman and Associates, LLP, Wilmington, NC - *Exhibit 5*

<sup>3</sup> The Moisture Warranty Corporation was created in August of 2001, and has no proven expertise or experience in the area of EIFS repair.

worth of attorneys' fees, Class Counsel Gary Shipman was willing to admit that EIFS is flawed by design, that failure is inevitable and that repair is not an option<sup>4</sup>:

The conclusion, from hundreds of hours of research, the inspection of hundreds of homes, and common sense, is that 'barrier' EIFS is simply not compatible for use in residential construction. ... We believe that the evidence is overwhelming - 'barrier' EIFS, that relies upon a principle that requires maintaining a perfect, surface sealed barrier to water/moisture, is not suitable for residential construction. ... Water penetration is inevitable, with any home. Once that inevitable event occurs, EIFS entraps the water that enters the wall cavity, and contains no internal means of collecting and evacuating water that penetrates into the wall cavity.

There is no way to convert a conventional barrier EIFS into a drainable or "water-managed" system<sup>5</sup>. The only viable solution for homeowners is the complete removal and replacement of the EIFS with an alternative cladding system. Again, Class Counsel Gary Shipman admitted:

Unfortunately, the prognosis for repair is not good. ... Other common repairs take more of a retrofit approach, which includes installation of flashing and caulking around windows, doors and other penetrations. The problems cannot be 'cured' without providing a means for the intruding moisture to escape. There is not a retrofit or patching method available that can produce a watertight system and such band-aid type repairs may mask a serious problem. In order to install any existing moisture manages system, the EIFS must be fully removed.<sup>6</sup>

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<sup>4</sup> Plaintiff's Perspective on the Product Liability Claim, Gary K. Shipman, Shipman and Associates, LLP, Wilmington, NC - *Exhibit 5*

<sup>5</sup> FAQ About EIFS, CMD Associates, Inc. - North America's Most Experienced EIFS Consultants, 2002 - *Exhibit 6*

<sup>6</sup> Plaintiff's Perspective on the Product Liability Claim, Gary K. Shipman, Shipman and Associates, LLP, Wilmington, NC - *Exhibit 5*

Class counsel's conclusions are based upon, and supported by, overwhelming evidence that the concept of barrier-type EIFS is fundamentally flawed. Class counsel's conclusions are also based upon his own experiences as an EIFS homeowner. Faced with the inevitable failure of his own EIFS home and armed with the knowledge that EIFS cannot be repaired, class counsel undertook the only reasonable course of action for an EIFS homeowner: he completely removed the EIFS and replaced it with an alternative cladding system.<sup>7</sup> How can class counsel now represent to the Court and to the members of the class, to whom he owes a fiduciary duty, that the proposed "repair" settlement is fair and adequate? The fact that class counsel negotiated for a remedy that he knew to be inadequate and is now recommending that unsuspecting class members accept the very remedy that he himself was unwilling to accept is the best evidence that the settlement is inadequate.

Recently, following weeks of trial, Virginia Circuit Court Judge Joseph A. Leafe reached similar conclusions about the defective nature of EIFS:

This Court finds that the Outsulation<sup>8</sup> system would be defective even if installed completely according to Dryvit's specifications, details and instructions due to its failure to accommodate inevitable and foreseeable water intrusion. ... While the Court finds that the installation complied with the general standards in the trade, even if the Outsulation were perfectly applied according to Dryvit's specifications, instructions, and details, the patented Outsulation "system" consisting of the method of application and the component parts, is intrinsically defective and thus, is

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<sup>7</sup> Proof of Permit for Alteration: REPLACE SYNTHETIC STUCCO WITH HARDCOAT - LOT 61 of the Providence subdivision in New Hanover County, Deed - LOT 61 of the Providence subdivision in New Hanover County New Hanover County Inspections Department, Wilmington, NC, March, 2000 - *Exhibit 9*

<sup>8</sup> Outsulation is a trademarked name for Dryvit's most popular barrier EIFS. Outsulation: Exterior Wall Insulation and Finish System, DS201, Dryvit Systems, Inc., 1992 - *Exhibit 1*

not merchantable. The representations made by Defendants in relation to the Outsulation product cannot, under any circumstances, be fulfilled. Outsulation is far from maintenance-free and is not suitable for use on wood framed residential construction.<sup>9</sup>

Board of Directors of the Bay Point Condominium Association, Inc., et. al v. RML Corporation, et al., At Law No. CL99-475 (Norfolk, Virginia Circuit Court, 2002).

Among the most compelling supporting documents admitted in *Baypoint v. Dryvit* is a patent assigned to defendant Dryvit Systems, Inc. for its newer, water-managed EIFS sold under the trade name "Infinity:

Interestingly, Dryvit's Infinity system, which was launched prior to the beginning of the Spyglass construction, addressed most, if not all, of the problems that were caused by Outsulation. Infinity provides for the evacuation of water from behind the EIFS material, improved upon the application process, required third party inspections of the installation and application, and consisted of better and more appropriate materials. Dryvit's Infinity patents acknowledge that water intrusion was foreseeable and addressed the need to provide a mechanism that can evacuate the intruding water from the EIFS clad structure.

Id.

The sworn information provided by Dryvit in its patent application and contained in the patent<sup>10</sup> is very clear about the prognosis for the long-term viability and maintenance of barrier or "face-seal" type cladding systems:

In consequence of this relatively large pressure differential between the outside and inside of the building created by strong winds acting on the

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<sup>9</sup> Relevant excerpts from opinion attached as *Appendix - Bay Point v. Dryvit*

<sup>10</sup> Insulative wall cladding having insulation boards fitting together to form channels, US Patent #5,363,621, US Patent and Trademark Office, 1994, Assignee Dryvit Systems, Inc. West Warwick, RI - *Exhibit 2*

wall, significant water ingress through hair-line cracks and other unintentional openings and the like readily occurs. In the absence of a cavity in the wall, such moisture will reach and damage the inside surface of the wall of the building. Accordingly, cavities are most preferred in walls, to prevent water ingress, provided the cavity is vented to atmosphere to allow for pressure equalization and accumulative water run-off out of the cavity. Thus, cladding systems relying solely on outer face sealing materials suffer the risk of water ingress over time, enhanced by air pressure differentials, rain, and successive freezing and thawing of water contained within the cladding. ... Thus, while the composite layered cladding of the prior art provides a generally satisfactorily cladding which readily enables a decorative cladding system of a wall to be satisfactorily and quickly constructed, such a resultant wall often suffers from the effects of water damage under the air pressure differentials as aforesaid described, in the absence of an outside air-vented cavity.

It is simply beyond the pale to expect homeowners to maintain systems in which "hair-line cracks and other unintentional openings and the like readily occur[s]". Many homeowners purchased these systems after being given advertising materials stating that the systems were "virtually maintenance-free". This was occurring as late as 1992.<sup>11</sup> In fact, just the opposite is true. By 1996 Dryvit had reversed that stance and was publishing maintenance materials stating "maintenance is not only essential, but required".<sup>12</sup>

The evidence that the concept of barrier EIFS is defective was strong enough to cause one US-based EIFS manufacturer to cease production and marketing of their barrier systems. After reports of widespread moisture problems in 1995-1996 in Wilmington, NC, EIFS manufacturer US Gypsum undertook an intense investigation in conjunction with the world-renown Institute for Research in Construction (a research branch of the National Research Council of Canada). Upon completion of the research

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<sup>11</sup> Outsulation: Exterior Wall Insulation and Finish System, DS201, Dryvit Systems, Inc., 1992 - *Exhibit 1*

<sup>12</sup> Dryvit Systems Wall Care and Maintenance Program, Dryvit Systems, Inc. 1996 - *Exhibit 3*

US Gypsum issued a press release announcing that it would halt production and sale of barrier systems, concluding:

"Barrier EIFS construction is not practical or reliable for either residential or commercial construction. ... The basic problem is that barrier EIFS does not account for the fact that moisture can -- and will -- penetrate the exterior wall surface."<sup>13</sup>

**B. Repair Is An Inadequate Remedy Because A “Repaired” EIFS Home Is Still Non-Compliant With the Building Code in Virginia**

All commercial and residential structures in the Commonwealth of Virginia using Dryvit's Outsulation EIFS are non-compliant with Virginia Building Code:

The Virginia Building Code contains performance requirements, one of which is that a cladding is required to exclude water from a building's interior. Dryvit's Outsulation fails to conform to this basic performance requirement and thus, is not in compliance with Virginia's Building Code.

Board of Directors of the Bay Point Condominium Association, Inc., et al v. RML Corporation, et al., At Law No. CL99-475 (Norfolk, Virginia Circuit Court, 2002)

The proposed repairs under the settlement agreement will not alter the fundamental defects that make Outsulation non-compliant:

Outsulation's "Design" element is defective and conceptually flawed because the design assumes all water is shed at the exterior face of the structure, even though water intrusion is foreseeable. The Outsulation design details fail to provide for the collection and redirection of foreseeable water that intrudes behind the cladding; instead, Outsulation

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<sup>13</sup> Water-Management: The Future of EIFS, Jim Reicherts - US Gypsum, March 1996 - *Exhibit 4*

traps water behind the cladding. Where the Virginia Building Code performance requirements state that a cladding is required to exclude water from a building's interior, Dryvit's Outsulation system, by design, violates the Code and is inconsistent with standard residential construction means and methods. This Court finds that Outsulation fails to meet the standard of what an exterior cladding should do and what Dryvit represented it would do.

Id.

Class members in the Commonwealth of Virginia who have the required repairs made under the proposed settlement agreement will still own homes that are non-compliant with the building code. This introduces potential liabilities should the homeowner attempt to sell the property. Further, one has to ask, what will the market be for a home that is non-compliant with building code?

**D. The Proposed Settlement Requires Class Members To Spend Their Own Money On Repairs That Will Inevitably Fail Again.**

After spending their hard-earned dollars, consumers are now being told they will have to spend more to "repair" the "virtually maintenance free" systems that even Dryvit admits are defective. In many cases, homeowners will be paying contractors who originally installed the defective systems. Ultimately, a significant portion of the homeowner's money will go back to Dryvit, the sole provider of EIFS-component repair materials.<sup>14</sup> This warped, incestuous flow of funds is designed to minimize costs to Dryvit through the creation of a self-funding settlement.<sup>15</sup>

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<sup>14</sup> Settlement Agreement, Posey v. Dryvit Systems, Inc., #17,715-IV, (Cir. Court, Jefferson County, TN.)

<sup>15</sup> RPM, Inc. 4<sup>th</sup> Quarter Board of Directors Conference Call, 2002 - Exhibit 6

Under the proposed settlement, homeowners will be reimbursed for a fraction (40%) of the *estimated cost* of repairs rather than the *actual cost* that they will incur. Under the proposed settlement, class members will receive a wholly inadequate warranty provided by a virtually unknown company that provides absolutely no coverage for structural or consequential damages caused by water intrusion resulting from the continued and inevitable failure of the system; it simply provides for covering the costs of having a contractor make additional repairs to prevent the reoccurrence of the failure.<sup>16</sup> At the end of the three-year warranty period, homeowners will be left with, at best, a patched-up but still inherently defective cladding system that will be virtually unmarketable and possibly uninhabitable.

Adding insult to injury, the proposed settlement requires homeowners to enter into a contractual agreement with an “approved contractor” (however, no action is provided as to how these contractors will be approved and under what standards, if any) and fund the repairs up-front in the hope of receiving a partial reimbursement later.<sup>17</sup> It is reasonable to assume that many homeowners will not have the financial resources to pay for these repairs. This situation is made even more likely given the state of the economy and current devaluation of securities. Many homeowners may be forced to take out a loan in order to fund the up-front repair costs. Ironically, the presence of the defective cladding system on their homes will likely disqualify many homeowners for a loan based

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<sup>16</sup> MoistureFree Warranty - Dryvit Settlement Edition, Moisture Warranty Corporation, 2002

<sup>17</sup> Settlement Agreement, Posey v. Dryvit Systems, Inc., #17,715-IV, (Cir. Court, Jefferson County, TN.)

on home equity. Lenders, increasingly aware of widespread EIFS problems, are now requiring EIFS inspections prior to making home equity loans. Homeowners attempting to qualify for such a loan to fund repairs could find themselves in a "catch 22"; the lenders will not approve loans to fund repair or replacement of EIFS until EIFS have been repaired or replaced. In many cases, the market value for EIFS homes have dropped so dramatically that there is simply no equity available in the home. For example; one of the homes in the Dateline segment was recently reduced in assessed value from \$711,000 to \$452,000 because of the EIFS problems.<sup>18</sup>

Finally, the homeowners who were most proactive and took the initiative to investigate and pierce the orchestrated veil of denial promulgated by the PR arm of the EIFS industry<sup>19</sup> and took reasonable steps in an attempt to protect their homes will receive nothing for their efforts, expenses and heartache.<sup>20</sup>

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<sup>18</sup> Notice of Reassessment to Suzanne Hamilton, Fairfax County Department of Tax Administration, March, 2002 - *Exhibit 7*

<sup>19</sup> PR Plan Outline For Managing EIFS Crisis in Northwest, Northwest Wall and Ceiling Bureau Memo, 1998; Letter from Bernard Allmayer to Dave Surette, 1999, Insuring the Integrity of Your Home, Dryvit Systems, Inc., 2001, Consumer Tips, EIFS Industry Members Association (EIMA), 2002, A Case of Misplaced Blame, Stephen Klamke - Executive Director of the EIFS Industry Members Association (EIMA), Best's Review, Sept. 1999 - *Combined as Exhibit 8*

<sup>20</sup> Dryvit EIFS Class Action Settlement Q&A, Posey v. Dryvit Systems, Inc., #17,715-IV, (Cir. Court, Jefferson County, TN.)

### **III. Conclusion**

The proposed settlement provides no meaningful relief or remedy to individual class members. Instead, the proposed settlement is designed to minimize future costs to Dryvit at the expense of innocent homeowners who have already paid far too much. Asking homeowners to pay Dryvit again for the very problem they are responsible for creating runs contrary to the very concept of fairness. The proposed settlement is as fundamentally and conceptually flawed as EIFS and should not be approved.

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing on all the following counsel by placing same in the United States mail, properly addressed and first class postage prepaid:

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