

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CASE NO: 2000-CP-10-4870

CHARLES SALMONSEN, individually )  
and on behalf of all others similarly )  
situated, )  
Plaintiff, )

vs.

CGD, INC. f/k/a CHARLESTON )  
GYPSUM DEALERS & SUPPLY CO., )  
INC., FRANK CRIDER, RAYMOND G. )  
WOLFORD, HENRY (HANK) FUTCH, )  
AND HAROLD (HAL) FUTCH, )  
Defendants. )

**FINAL ORDER APPROVING  
CLASS ACTION SETTLEMENT AND  
AWARDING ATTORNEYS FEES**

CGD, INC. f/k/a CHARLESTON )  
GYPSUM DEALERS & SUPPLY CO., )  
INC., FRANK CRIDER, RAYMOND G. )  
WOLFORD, HENRY (HANK) FUTCH, )  
AND HAROLD (HAL) FUTCH, )  
Third-Party Plaintiff, )

vs.

PAREX, INC. )  
Third-Party Defendant )

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JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

**FILED**

Plaintiffs' motion, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure, for an order for Final Approval of the Settlement of this Charleston County class action and Application for Attorneys' Fees and Expenses came before the Court on June 30, 2009. Appearances were made on behalf of all the parties. Defendants joined in Plaintiffs' motions for an order granting Final Approval of the Settlement for settlement purposes only. No appearance was made on behalf of any objector nor were any objections filed with this Court.

## FINDINGS

The Court has carefully reviewed the papers filed in connection with the proceedings and considered all supporting evidence in the record and as presented by counsel and the oral arguments proffered during the proceedings.

### Background of the Action

On October 19, 2000, Salmonsens filed his original Complaint against Parex, Inc. (the stucco manufacturer), Jeff Thomas d/b/a Thomas Construction (the general contractor for the residence), Mike Tenny d/b/a Synco Enterprise (the subcontractor responsible for applying EIFS), and Charleston Gypsum n/k/a CSR America (the distributor). In his Complaint, Salmonsens claimed his residential home sustained water intrusion damage resulting from allegedly defective construction materials, particularly the Exterior Insulation and Finish System ("EIFS"). Based on these damages, Salmonsens asserted causes of action for breach of implied warranty, breach of express warranty, negligence, and strict liability. Prior to the scheduled trial date of October 14, 2002, Salmonsens settled and entered into a release with the defendants. In the settlement documents, Salmonsens specifically reserved his claims against CGD, Inc., f/k/a Charleston Gypsum Dealers & Supply Co., Inc.(fn1)

On October 23, 2002, Salmonsens filed an Amended Complaint on behalf of himself and other similarly situated homeowners, which named CGD, Inc., f/k/a Charleston Gypsum Dealers & Supply Co., Inc. ("CGD"), and each of its former shareholders as defendants. In the Amended Complaint, Salmonsens alleged products liability claims against CGD for breach of implied warranty, negligence, and strict

liability. As to the former shareholders, Salmonsens alleged they were personally liable for misconduct associated with the distribution of the corporation's assets.

On February 18, 2003, Salmonsens moved for class certification. In response, CGD filed a memorandum in opposition and a motion to amend its Answer to include third-party defendants who had contributed to the alleged damages of the class of homeowners. After a hearing, this Circuit Court issued an order on September 25, 2003, granting Salmonsens's motion to certify the class and denied CGD's motion. The Order provided that all of the prerequisites for class certification were satisfied pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure. In addition to these criteria, this Court also based its decision to certify the class on the ground that there was a limited fund to satisfy the class claims given the corporation was dissolved and had only a limited amount of insurance coverage available. The following class was certified:

All persons and entities that own or have owned structures clad with Parex EIFS sold by the Defendant between January 1, 1991 and May 15, 1995.  
This class excludes:

1. Employees of the Defendant; and
2. Those persons who have released the Defendant or are currently in litigation with the Defendant.

Subsequently, CGD and the shareholders jointly filed two motions requesting reconsideration of class certification and the denial of the addition of third-party defendants. By orders dated December 15, 2003, the Court amended the prior order by ruling that the class would be conditionally certified and permitting CGD additional time to conduct class discovery. The Court also granted CGD leave to amend its Answer to list Parex as a third-party defendant. Pursuant to this ruling, the defendants filed an Amended Answer and a Third-Party Complaint in which they asserted causes of action

for indemnity, negligence, negligent misrepresentation, and breach of implied warranties.

After conducting discovery, CGD filed a motion on April 30, 2004, to decertify the conditionally-certified class. In its motion and accompanying memorandum, CGD contended that the requirements of Rule 23, SCRCF, were not met and certification was inappropriate because trying the case would involve numerous separate "mini-trials." CGD reasoned that the homeowners were distinct in their claims and, particularly, their damages.

On October 12, 2004, a hearing on the motion to decertify the class was held. The motion was denied by issuance of a formal order in which indicated that a formal order would be forthcoming. Prior to the issuance of the formal order, CGD and Parex filed motions to bifurcate the claims of individual class members and, in the alternative, requested a litigation plan for the class action. On January 14, 2005, Circuit Court Judge Roger Young, the Chief Administrative Judge, held a pre-trial conference on these motions. Judge Young removed the case from the trial roster, requested the parties submit proposed trial plans, and assigned the case to himself for all further proceedings.

On February 24, 2005, a formal order denying the defendants' motion for decertification was issued. In the order, the Court reiterated that all of the criteria of Rule 23(a), SCRCF, were met to warrant certification of the class. On February 25, 2005, Judge Young held a second pre-trial hearing to consider the parties' proposed trial plans and to address the issue of class notification. By order dated May 31, 2005, Judge Young established an "opt-in" notification procedure. In reaching this conclusion, Judge

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Young found the "opt-in" procedure was "the preferred method of litigating the instant case by serving the interests of the parties and furthering judicial economy." Judge Young further explained that "an opt-in provision is the most pragmatic procedure to facilitate the management of this case. The makeup of this Class should only contain, at most, a narrow group of members, namely the homeowners as identified by sales invoices provided by Defendants." Judge Young declined to establish a trial management plan until after the class had been closed and the class members had been identified. Significantly, Judge Young specifically reserved the "authority to alter, amend, or modify its orders as changes during the course of this case may warrant."

All parties timely appealed Judge Young's order and the prior class certification Orders. Salmonsens appealed Judge Young's May 31, 2005 Order establishing the "opt-in" notification procedure. CGD cross-appealed, challenging the February 17, 2005 Order and May 31, 2005 Order denying decertification of the class. Parex also cross-appealed challenging the three Orders converting the case into a class action and the Order permitting the case to continue as a class action.

The South Carolina Supreme Court dismissed the appeals of the class certification orders as interlocutory adopted the "opt-out" class action and notification procedure as the exclusive method of class action litigation in this state. Salmonsens v. CGD, Inc., 377 S.C. 442, 661 S.E.2<sup>nd</sup> 81 (2008) The Court reversed Judge Young's order and remand for further proceedings consistent with its opinion. Id. Following the issuance of the Supreme Court Order dated April 28, 2008 the parties reached a settlement. On March 4, 2009, this Court entered its Order Preliminarily Approving Class Action Settlement ("Preliminary Approval Order").

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### **Class Certification**

This is a court of general jurisdiction, having subject matter jurisdiction over Plaintiff's individual and class claims. The Court has personal jurisdiction over the named plaintiff by consent and over the defendants by reason of their doing business in South Carolina.

As seen in the Content of Action above class certification has been addressed repeatedly in this matter with the last ruling being issued by the South Carolina Supreme Court on April 8, 2008. The members of each class have been identified from defendants' records. Plaintiff has maintained there are potentially 400 members of the class. Defendant has asserted the class size is closer to 200 members. Nonetheless, it is undisputed that the size is in excess of 100 members as Parex's records reflect over a hundred prior settlements between Parex and class members. It would be impracticable to join so many as named parties.

The claims of the Plaintiff are typical of the claims of members of the class. Plaintiff claims that he was harmed by the installation of Parex EIFS on his home. The Plaintiff seeks damages for the alleged wrongs. Members of the class also own or have owned houses where Parex EIFS was installed. Class members will benefit from the relief the Plaintiff seeks on their behalf.

The Plaintiff has adequately represented the class. Plaintiff's interest do not diverge from those of class members. Plaintiff's counsel have substantial experience in the prosecution of complex class actions similar to this case. The terms of the proposed settlement demonstrate that the Plaintiff and his counsel have adequately represented the interest of members of the class.

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Common questions of law and fact predominate for purpose of settlement in this proceeding. The Second Amended Complaint alleges that Defendant engaged in a common practice and method of doing business. For settlement purposes, the Court considers whether the proposed Settlement provides fair, adequate and reasonable compensation for class members' claims arising from this allegedly common practice and method of doing business. The common issue predominates for purposes of settlement.

For purpose of granting final approval of the Settlement, the class is manageable.

Certification of a class for purposes of granting final approval of the Settlement is the superior means of resolving the disputes between the parties. Substantial benefits will accrue to both the litigants and the courts from maintaining the case as a class action for that purpose. Certification will permit a single court to resolve claims now pending in other courts and dispose, in one proceeding, of numerous claims arising out of the same or similar factual circumstances. Resolution of all claims in this single proceeding offers substantial benefits in contrast to continued litigation of multiple class actions in various state and federal courts.

#### **Class Notice**

The Court previously approved the Notice which was sent to class members. (Preliminary Approval Order.) The Court finds that the Notice fairly and adequately informed class members of the nature of the action, the terms of the proposed settlement, the effect of the action and settlement on other actions raising similar claims, and class members' rights to exclude themselves from this action or object to

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the proposed settlement.

The requirements for opting out of the subclasses are stated with reasonable clarity in the and were not overly complicated.

The Notice adequately describes the benefits to be received by class members. It also provides an example of how the amount to be paid to an individual subclass member will be calculated. Given the nature of the Settlement-i.e., fixed settlement funds to be distributed pro rata to claimants-it would have been impossible to estimate accurately the actual amount an individual subclass member will receive from the settlement or even to estimate a meaningful range of potential individual recovery.

The Notice adequately discloses the nature and scope of the release provision of the Settlement. It also adequately revealed that Plaintiff would seek an award of attorney fees and costs as well as the amount they would request.

The distribution of the Notice was mailed by first class mail to class members at their last known addresses, and to their counsel, if known on or about March 20-21, 2009. In addition, a summary Notice was published on March 23, 2009 and on March 30, 2009 in Charleston Post & Courier. The deadline for opting out or objecting was May 15, 2009. There was an adequate interval between notice and deadline to permit class members to choose what to do and act on their decision.

#### **Fairness Of Settlement**

The Settlement has previously been filed with the Court and is again attached hereto and is in the gross amount of One Million Five Hundred Thousand Dollars (\$1,500,000.00). The Settlement is entitled to a presumption of fairness.

The Stipulation of Settlement was reached as the result of extensive arm's length





negotiations between the parties with the help of experienced neutral mediators.

Sufficient investigation and discovery was accomplished to permit counsel and the court to act intelligently with respect to evaluating the proposed settlement.

The settlement is recommended by counsel for all parties. Plaintiff's attorneys comprise several highly skilled and experienced lawyers handling plaintiffs' consumer class actions. Plaintiff's counsel are well able to evaluate the benefits and burdens of the proposed settlement in comparison with the potential recovery, complexity, risk and delay likely were the case to be litigated to a final conclusion.

No objections were received from any class members. Only two persons opted out of the Settlement.

Plaintiff's counsel and Defendants' counsel found the limited funds available through, insurance coverage to be fair and adequate recompense for the claims of the class members. The Court agrees with this assessment. While class members might have received more if the case were litigated to a final conclusion, they might also have received less or nothing at all. The settlement takes into account the substantial litigation risk that the class members faced. A settlement may be approved as fair and reasonable even if it provides substantially less than 100% of the damages Plaintiffs seek.

The release provision of the Settlement is fair and reasonable. It releases only claims for which the settlement provided compensation to class members.

The proposed methods of distributing the redress funds are fair to class members and are not unduly burdensome. The Court retains jurisdiction over implementation of the settlement so it can assure that the redress funds are distributed

appropriately.

Attorneys' fees of one third of the recovery in the amount of \$500,000.00, plus costs of \$66,503.13 with an allowance of \$20,000.00 for administrative costs are fair and reasonable. In making this determination, the Court has addressed the elements set forth in Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989) and specifically finds that the following factors justify the fees and cost application: (1) the magnitude of the litigation, including the complexity, scope, duration and the facts the litigation was multistate, multi jurisdictional and multifaceted, (2) Plaintiff's attorneys are well respected lawyers who have provided excellent representation and pursued an extremely fair resolution, (3) the time submissions are reasonable given the level of work involved and in light of the nature and the duration of the litigation, (4) the attorneys' rates are reasonable and appropriate for attorneys of comparable skill and experience, (5) the award is justified under a lodestar multiplier analysis, and the multiplier is in accord with South Carolina law, and (6) the award is justified under a percentage of the recovery analysis and is well within a reasonable range.

Likewise the incentive award to the class representative in the amount of \$10,000.00 is fair and reasonable.

Taken as a whole, the Settlement is fair, adequate and in the best interests of the settlement subclass.

#### ORDERS

Based on the forgoing findings and good cause appearing, it is orders, adjudged and decreed as follows:

*July 10*

**A. Class Certification**

For settlement purposes only, a class containing the members defined below is hereby certified. The class is defined as follows:

All persons and entities that own or have owned structures clad with Parex EIFS sold by the Defendant between January 1, 1991 and May 15, 1995.

This class excludes:

1. Employees of the Defendant; and
2. Those persons who have released the Defendant or are currently in litigation with the Defendant.

The class excludes the two opt-outs: Roderick MacPherson and Duane and Joan Hitt.

**B. Class Notice**

The Court re-approves the class notice previously mailed to class members and the published summary notice. It determines that the notices fully and accurately informed members of all material elements of the action, proposed settlement, and their alternative with respect to same, and that the notices constituted valid, due, and sufficient notice to all members.

**C. Attorneys Fees and Costs**

The Court approves the award of attorneys fees, costs and administrative fees in the amount of \$586,503.13 pro-rata. This award of attorney's fees and costs will be

paid from the settlement

fund immediately after this Order becomes final and non-appealable.

**D. Continuing Jurisdiction**

Neither this Order Approving Class Action Settlement nor the Settlement are an admission or concession by Defendants of any fault, omission, liability, or wrongdoing. This Order Approving Class Action Settlement is not a finding of the validity or invalidity

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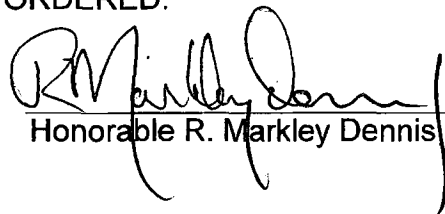
of any claims in this Action or a determination of any wrongdoing by the Defendants. The final approval of the Settlement does not constitute any opinion, position, or determination of this Court, one way or the other, as to the merits of the claims and defenses of the Plaintiffs, the subclass members or Defendants.

Without affecting the finality of this Order Approving Class Action Settlement and Final Judgment in any way, the Court retains jurisdiction over: (1) implementation and enforcement of the Settlement pursuant to further orders of the Court, until such time as each and every act agreed to be performed by the parties hereto shall have been performed pursuant to the Stipulation of Settlement; (2) any other actions necessary to conclude this settlement and implement the Settlement; (3) the enforcement, construction, and interpretation of the Settlement including, but not limited to, any dispute concerning subclass members' release of claims.

The Court finds that no just reason exists for delay in entering this Order Approving Class Action Settlement and Final Judgment. Accordingly, the Clerk is hereby directed forthwith to enter this Order Approving Class Action Settlement and Final Judgment.

IT IS SO ORDERED.

DATED: June 30, 2009

  
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Honorable R. Markley Dennis, Jr.

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Memorandum of Settlement:  
Salmonsens v. GCD, Inc. et al

Through a court-ordered mediation process, the parties have reached a settlement of the action known as *Charles Salmonsens, individually and on behalf of all others similarly situated, ("Plaintiff") vs. CGD, Inc. f/k/a Charleston Gypsum Dealers & Supply Co., Inc., Frank Crider, Raymond G. Wolford, Henry (Hank) Futch, and Harold (Hal) Futch, ("Defendants") vs. Parax, Inc., ("Third-Party Defendant")*, Civil Action No. 2000-10-4870, Charleston County Court of Common Pleas. The terms and conditions of the settlement are to be fully set forth in a formal written settlement agreement and releases to be prepared and agreed upon by counsel for the parties. The purpose of this memorandum is to memorialize the basic terms of the settlement pending completion of the final settlement documents. The basic terms are as follows:

1. The Plaintiff and Defendants, identified by name in the case caption set forth in the opening paragraph, agree to settle the claims between them, consisting of the individual claims of the named Plaintiff and the Class Claims for the total sum of \$1.5 million (One Million, Five Hundred Thousand Dollars). This amount to be paid as set forth in this agreement to Plaintiff's counsel in behalf of the class. This payment shall settle all claims of any kind, including class claims, consequential damages, attorney fees, litigation expenses, and class administrative and notice expenses.
2. This agreement is binding, final, and irrevocable as to the signatories but is subject to preliminary and final approval of the Court. Should the Court not grant preliminary or final approval, this agreement shall be null and void and all money shall be returned to Defendants, with interest, within ten days.
3. The Plaintiff and Defendants will seek preliminary approval by the Court immediately and Plaintiff will publish the notice of the class action and settlement in a form substantially similar to that agreed to by counsel on August 6, 2008, albeit updated to include the date of the preliminary approval, the amount of the settlement, attorneys fees, and expenses, the termination date for the opt out period (approximately 45 days from published notice); the date of the fairness/final hearing; and the availability of a long form notice with further details. Plaintiff will serve a long form notice containing the foregoing and additional information regarding the size of the class and the allocation and distribution of the recovery to each class member/property on Plaintiff's master list and to all others who request the same.
4. Complete settlement funds shall be delivered by the insurers of Defendants and placed in escrow with Justin Lucey within thirty days of an Order by the Court granting preliminary approval of the settlement. These settlement funds shall be maintained in an interest bearing money market account, and shall be maintained in trust pending final approval by the Court and the expiration of the time allowed for any objections and/or appeals from said Order granting final approval, or in the event of the filing of an appeal or objections, until such time as the appeal(s) and/or objections are finally resolved.



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Payment shall be made payable to "JOL,PA, Attorneys for Salmonsens Class," Federal I.D. No. 57-0959667.

5. Subject to the supervision of the Court, Plaintiff's counsel shall be responsible for the distribution of the settlement proceeds and Defendants and Third-Party Defendant shall not be responsible for or involved with said distribution.

6. As part of the overall settlement of the case, the Defendants and the Third-Party Defendant, identified by name in the case caption set forth above in the opening paragraph, agree to settle the third-party claims for the total sum of \$150,000 (One Hundred and Fifty Thousand Dollars) to be paid by the insurers of Parex. For simplicity, at the request of Defendants, the settlement check to be paid by the insurers of Third-Party Defendant will be made payable to "JOL, PA, Attorneys for Salmonsens Class," Federal I.D. No. 57-0959667 and delivered and placed in escrow with Justin Lucey within thirty days of an Order by the Court granting preliminary approval of the class settlement. These settlement funds shall be maintained in the same interest bearing money market account as the Class settlement funds, and likewise shall be maintained in trust pending final Court approval of the Class settlement and the expiration of the time allowed for any objections and/or appeals from said Order granting final approval, or in the event of the filing of an appeal or objections, until such time as the appeal(s) and/or objections are finally resolved. This payment of \$150,000 shall settle all claims of any kind or nature that were brought or could have been brought between Defendants and their insurers, on the one hand, and the Third-Party Defendant and its insurers, on the other, including, without limitation, claims for subrogation and/or indemnification arising from Defendants' settlement of individual and/or class claims, claims for actual and consequential damages, attorney fees, litigation expenses, class administrative and notice expenses and all other kinds of claims, damages, losses, or expenses.

7. The settlement of the third-party claims between Defendants and Third-Party Defendant is binding, final, and irrevocable as to the signatories but is conditioned on the preliminary and final approval by the Court of the Class settlement between Plaintiff and Defendants as described in the preceding paragraphs. Should the Court not grant preliminary or final approval, this agreement shall be null and void, and the full settlement amount shall be repaid, with interest, within ten days of the Court's order to counsel for the Third-Party Defendant to be remitted to the insurers of the Third-Party Defendant.

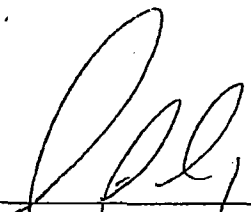
8. The only obligations undertaken by the Third-Party Defendant and/or its insurers under this settlement agreement shall be the payment of \$150,000, as described above in paragraph 6, in full and complete settlement and satisfaction of the Third-Party Action, and the execution of releases to be mutually agreed upon and stipulations or consents of dismissal, with prejudice, in connection with the settlement of the Third-Party Action. In consideration for payment of this settlement amount and the release and dismissal of Third-Party Defendant's counterclaims, the Defendants agree to provide Third-Party Defendant and its insurers with a full and complete release of all third-party claims of any kind or nature that were brought or that could have been brought as part of the Third-

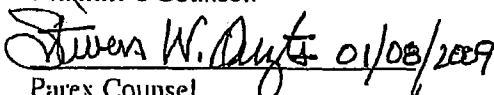
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Party Action, as further described in paragraph 6, and a stipulation or consent order of dismissal of the Third-Party Action, with prejudice.

9. The only obligations undertaken by the Defendants and/or their insurers under this settlement agreement shall be the payment of \$1.35 Million Dollars (One Million, Three Hundred Fifty Thousand), in full and complete settlement and satisfaction of the action against Defendants, and the execution of releases to be mutually agreed upon and stipulations or consents of dismissal, with prejudice, in connection with the settlement of the action against the Third-Party Defendant. In consideration for payment of this settlement amount and the release and dismissal of Plaintiffs claims, the Plaintiffs agree to provide Defendants and their insurers with a full and complete release of all claims of any kind or nature that were brought or that could have been brought as part of the action, excluding opt-outs. A stipulation or consent order of dismissal of the action, with prejudice. This payment of \$1.35 Million shall settle all claims of any kind or nature that were brought or could have been brought by Plaintiff's class, including settlement of individual and/or class claims, claims for actual and consequential damages, attorney fees, litigation expenses, class administrative and notice expenses and all other kinds of claims, damages, losses, or expenses.

10. The judgment enrolling this settlement shall include a complete release of Defendants by the Plaintiff and Plaintiff's class; a mutual release as between Defendants and Third-Party Defendant; and a dismissal of all claims, counterclaims, and third-party claims, with prejudice.

  
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Plaintiff's Counsel:

  
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Steven W. Dwyer 01/08/2009  
Parex Counsel

  
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CGD and Shareholder Counsel:

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