

**CANADIAN  
EPDM CLASS ACTION  
NATIONAL SETTLEMENT AGREEMENT**

Made as of February 15, 2011

Between

**WATERVILLE TG, INC., R.N. PARTON LTD. and  
JEAN-CLAUDE FLUET**

(the “Plaintiffs”)

and

**DSM ELASTOMERS EUROPE B.V, and DSM COPOLYMER, INC.**

(the “Settling Defendants”)

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**CANADIAN EPDM CLASS ACTION  
NATIONAL SETTLEMENT AGREEMENT**

**RECITALS**

A. WHEREAS the Proceedings have been commenced by the Class Plaintiffs in British Columbia, Ontario and Quebec which allege that the Settling Defendants participated in an unlawful conspiracy to raise, fix, maintain, or stabilize the price of EPDM in Canada and/or to allocate markets and customers for the sale of EPDM in Canada, contrary to Part VI of the *Competition Act*;

B. WHEREAS the Settling Defendants deny the allegations in the Proceedings and deny any liability whatsoever;

C. WHEREAS Class Plaintiffs, on behalf of themselves and the Class Members, and the Settling Defendants agree that this Settlement Agreement shall not be deemed or construed to be an admission or evidence of the truth of any of plaintiffs' claims or the allegations in the Proceedings;

D. WHEREAS arm's-length settlement negotiations have taken place between Class Counsel and the Settling Defendants, and this Settlement Agreement, including its schedules, embodies all of the terms and conditions of the settlement between the Settling Defendants and Class Plaintiffs, both individually and on behalf of the Class Members, and has been reached as a result of the parties' negotiations, subject to the approval of the Courts as provided herein;

E. WHEREAS the Class Plaintiffs and Class Counsel have reviewed and fully understand the terms of this Settlement Agreement and, based on their analyses of the facts and law applicable to the Class Plaintiffs' claims, and having regard to the burdens and expense in prosecuting the Proceedings, including the risks and uncertainties associated with trials and appeals, have concluded that this Settlement Agreement is fair, reasonable, and in the best interests of the Class Plaintiffs and the classes they seek to represent;

F. WHEREAS despite their belief that they are not liable in respect of the allegations as alleged in the Proceedings and have good defences thereto, the Settling Defendants are entering into this Settlement Agreement in order to achieve a final and nationwide resolution of all claims asserted or which could have been asserted against them by the Class Plaintiffs, to avoid further

expense, inconvenience, and the distraction of burdensome and protracted litigation, and to obtain the releases, orders, and judgment contemplated by this Settlement Agreement;

G. WHEREAS the Parties therefore wish to, and hereby do, finally resolve on a national basis, without admission of liability, all of the Proceedings as against the Settling Defendants;

H. WHEREAS for the purposes of settlement only and contingent on approvals by the Courts as provided for in this Settlement Agreement, the Parties have consented to certification or authorization of the Proceedings as class proceedings and have consented to a Settlement Class and a Common Issue in each of the Proceedings; and

I. WHEREAS the Class Plaintiffs assert that they are adequate class representatives for the Settlement Classes and will seek to be appointed representative plaintiffs in their respective Proceedings; and

J. WHEREAS the deadline for opting-out of the Proceedings has already passed.

NOW THEREFORE, in consideration of the covenants, agreements, and releases set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed by the Parties that the Proceedings be settled, compromised, and dismissed on the merits with prejudice as to the Settling Defendants and all other Released Parties, without costs as to the Class Plaintiffs, the classes they seek to represent, or the Settling Defendants, subject to the approval of the Courts, on the following terms and conditions:

#### **SECTION 1 - DEFINITIONS**

For the purpose of this Settlement Agreement only, including the Recitals and schedules hereto:

(1) *Account* means an interest bearing trust account at a Canadian Schedule I bank in Ontario under the control of Ontario Counsel.

(2) *Administration Expenses* means all fees, disbursements, expenses, costs, taxes, and any other amounts incurred or payable by the Plaintiffs, Class Counsel, or otherwise for the approval, implementation, and operation of this Settlement Agreement, including Notice Costs but excluding Class Counsel Fees.

- (3) ***British Columbia Class*** means all persons in British Columbia who purchased EPDM or EPDM Products in British Columbia during the Class Period, except Excluded Persons.
- (4) ***British Columbia Counsel*** means Poyner Baxter LLP.
- (5) ***British Columbia Court*** means the Supreme Court of British Columbia.
- (6) ***Class Counsel*** means British Columbia Counsel, Ontario Counsel, and Quebec Counsel.
- (7) ***Class Counsel Fees*** means the fees, disbursements, costs, applicable taxes, or charges of Class Counsel, including any obligations for contributions that any Plaintiff, Settlement Class, or Class Counsel may have to the Fonds.
- (8) ***Class Period*** means January 1, 1997 to December 31, 2001.
- (9) ***Class Member*** or ***Class Members*** means, individually or collectively, member of the Settlement Class who did not timely and validly request exclusion from the Settlement Class in accordance with Orders of the Courts.
- (10) ***Class Plaintiffs*** means the individuals and entities named as plaintiffs in the Proceedings as set out in Schedule A.
- (11) ***Common Issue*** in each Proceeding means: Did the Settling Defendants agree to fix, raise, maintain, or stabilize the prices of, or allocate markets and customers for, EPDM in Canada during the Class Period?
- (12) ***Consumer*** means any individual who purchased EPDM Products during the Class Period for personal consumption or use.
- (13) ***Courts*** means the British Columbia Court, the Ontario Court, and the Quebec Court.
- (14) ***Defendants*** means the individuals and entities named as defendants in the Proceedings as set out in Schedule A.
- (15) ***Direct Purchaser*** means a person, other than a Distributor, who purchased EPDM in Canada during the Class Period directly from a Defendant or from a Distributor.

- (16) ***Distributor*** means a person who purchased EPDM in Canada during the Class Period directly from a Defendant and only resold all of the purchased EPDM without either further processing it or including it in any other product.
- (17) ***Effective Date*** means the date when Final Orders have been received from all Courts approving this Settlement Agreement.
- (18) ***EPDM*** means the synthetic rubber material known as ethylene propylene diene monomer.
- (19) ***EPDM Products*** means products that directly or indirectly contain or are derived from EPDM.
- (20) ***Execution Date*** means the date first appearing above.
- (21) ***Excluded Person*** means each Defendant, the directors and officers of each Defendant, the subsidiaries, parents, or affiliates of each Defendant, the entities in which each Defendant or any of that Defendant's subsidiaries or affiliates have a controlling interest, and the legal representatives, heirs, successors, and assigns of any Excluded Person.
- (22) ***Final Order*** means a final judgment entered by a Court in respect of the certification or authorization of a Proceeding as a class proceeding and the approval of this Settlement Agreement, once the time to appeal such judgment has expired without any appeal being taken, if an appeal lies, or once there has been a final disposition of all appeals.
- (23) ***Fonds*** means the Fonds d' aide aux recours collectifs in Quebec.
- (24) ***Intermediate Purchaser*** means a person, other than a Direct Purchaser, a Distributor, or a Consumer who purchased EPDM or EPDM Products during the Class Period.
- (25) ***Notice Costs*** means the fees and costs necessary to provide notice of this settlement to Class Members.
- (26) ***Ontario Class*** means all persons in Canada who purchased EPDM or EPDM Products in Canada during the Class Period, except the Excluded Persons and persons who are included in the British Columbia Class or in the Quebec Class.



- (27) ***Ontario Counsel*** means Siskinds LLP.
- (28) ***Ontario Court*** means the Ontario Superior Court of Justice.
- (29) ***Other Actions*** means actions or proceedings, other than the Proceedings, relating to Released Claims commenced by a Class Member either before or after the Effective Date.
- (30) ***Parties*** means the Class Plaintiffs and the Settling Defendants. The Parties shall sometimes hereinafter individually be referred to as a “Party.”
- (31) ***Proceedings*** means Ontario Court File; No. 45604CP (London), British Columbia Court File 5050982, Vancouver Registry and Quebec Court (District of Quebec) Action No. 200-06-000052-053.
- (32) ***Purchase Price*** means the net amount, including rebates or any other form of discounts, paid by a Direct Purchaser or Distributor for EPDM purchased in Canada during the Class Period.
- (33) ***Quebec Class*** means all persons in Quebec who purchased EPDM or EPDM Products in Quebec during the Class Period, except Excluded Persons.
- (34) ***Quebec Counsel*** means Siskind Desmeules s.e.n.c.r.l.
- (35) ***Quebec Court*** means the Quebec Superior Court.
- (36) ***Released Claims*** means any and all manner of claims, demands, actions, suits, causes of action, whether class, individual or otherwise in nature, whether personal or subrogated, damages whenever incurred, liabilities of any nature whatsoever, including interest, costs, expenses, class administration expenses, penalties, Class Counsel fees and other attorneys’ fees, known or unknown, suspected or unsuspected, in law, under statute or in equity, that Releasers, or any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have, relating in any way to any conduct anywhere, from the beginning of time to the date hereof, related to or arising from the purchase, sale, pricing, discounting, manufacturing, offering, marketing, or distributing of EPDM or EPDM Products in Canada, or relating, in any way, to any conduct alleged in the Proceedings including, without limitation, any such claims which have been asserted, would have been asserted, or could have

been asserted against the Settling Defendants or any one of them, whether in Canada or elsewhere, as a result of the purchase of EPDM or EPDM Products in Canada including but not limited to claims arising under antitrust, unfair competition, unfair practices, price discrimination, unitary pricing, trade practice, or civil conspiracy law, including, without limitation, Part VI of the *Competition Act*. However, the Released Claims do not include claims involving any alleged breach of contract, product defect or similar claim relating to EPDM or EPDM Products.

(37) *Releasees* means, jointly and severally, the Settling Defendants and all of their respective present and former direct and indirect, parents, subsidiaries, divisions, affiliates, partners, insurers, and all other persons, partnerships, or corporations with whom any of the former have been, or are now, affiliated, and their respective past, present, and future officers, directors, employees, agents, shareholders, attorneys, trustees, servants, partners, and representatives; and the predecessors, successors, purchasers, heirs, executors, administrators, and assigns of each of the foregoing.

(38) *Releasors* means, jointly and severally, the Class Plaintiffs and the Class Members and their respective present and former direct and indirect, parents, subsidiaries, divisions, affiliates, partners, insurers, and all other persons, partnerships, or corporations with whom any of the former have been, or are now, affiliated, and their respective past, present and future officers, directors, employees, agents, shareholders, attorneys, trustees, servants, partners, and representatives; and the predecessors, successors, purchasers, heirs, executors, administrators, and assigns of each of the foregoing.

(39) *Settlement Agreement* means this agreement, including the recitals and schedules.

(40) *Settlement Amount* means Cdn\$1,750,000.00.

(41) *Settlement Class* means, in respect of each Proceeding, the settlement class defined in Schedule A, and which shall collectively be referred to as the Settlement Classes.

(42) *Settlement Fund* means the dollar amount of the Settlement Amount plus any interest earned thereon after payment thereof by the Settling Defendants into the Account.

(43) *Settled Defendants* means Bayer Inc., Bayer A.G., Bayer Material Science A.G., Bayer Material Science LLC, Bayer Corporation, Crompton Corporation, Crompton Co., Crompton Canada Corporation, Uniroyal Chemical Company Inc., Dow Chemical Company, Dow Chemical Canada Inc., DuPont Dow Elastomers L.L.C., E.I. DuPont de Nemours and Company, E.I. DuPont Canada Company, Exxon Mobil Chemical Company, Polimeri Europa S.r.l., Polimeri Europa S.p.A., Polimeri Europa Americas Inc., Enichem S.p.A., Enichem Americas Inc., and Syndial S.p.A.

(44) *Settling Defendants* means DSM Elastomers Europe B.V. and DSM Copolymer, Inc.

## **SECTION 2 - CONDITION PRECEDENT: ONTARIO COURT APPROVAL**

This Settlement Agreement shall be null and void and of no force and effect unless the Ontario Court approves this Settlement Agreement in the Proceeding commenced in Ontario and the order so given becomes a Final Order.

## **SECTION 3 - SETTLEMENT APPROVAL**

### **3.1 Reasonable Best Efforts**

The Parties shall use their reasonable best efforts to effectuate this settlement, including all steps and efforts contemplated by this Settlement Agreement and any other steps and efforts that may become necessary by order of the Courts or otherwise, to carry out the terms of this Settlement Agreement and to secure the prompt, complete, and final dismissal with prejudice of the Proceedings as against the Settling Defendants.

### **3.2 Motions for Approval**

(1) Within ten (10) business days after the Execution Date, the Class Plaintiffs shall file motions before the Courts, in a form mutually agreed upon by counsel for the Settling Defendants and Class Counsel, for orders certifying or authorizing each of the Proceedings commenced in their respective jurisdictions as a class proceeding (for settlement purposes) and approving this Settlement Agreement. Until such motions are brought, this Settlement Agreement and all of its terms shall be kept confidential and shall not be disclosed by the Class Plaintiffs, Class Counsel, the Settling Defendants, or their counsel, without the prior written consent of Class Counsel and/or counsel to the Settling Defendants as applicable.

(2) The orders referred to in section 3.2(1) shall be in the form attached hereto as Schedule B. Sections 4, 5, 9, 10, 20, 21, 23, and 25 of the order attached at Schedule B need only be similar in substance to the sections set out in that Schedule. For greater certainty, the British Columbia and Quebec orders will be agreed upon by the Parties and shall mirror the form and substance of order attached hereto as Schedule B.

### **3.3 Sequence of Motions**

The Class Plaintiffs in British Columbia and Quebec shall not proceed with motions to approve this Settlement Agreement in the Proceedings commenced in their respective jurisdictions unless and until the Ontario Court approves this Settlement Agreement. The approval motions may be filed in British Columbia and Quebec, but British Columbia Counsel and Quebec Counsel agree to seek any adjournment of their approval hearings required to permit the Ontario Court to first render its decision on the motion for approval brought before it.

### **3.4 Effect of Non-Approval**

Notwithstanding any other term of this Settlement Agreement, the Settling Defendants may, in their sole and unfettered discretion, elect to terminate this Settlement Agreement in accordance with section 10 hereof if the British Columbia Court or the Quebec Court fails to approve this Settlement Agreement or any part thereof.

## **SECTION 4 - SETTLEMENT BENEFITS**

### **4.1 Payment of Settlement Amount**

(1) Subject to the provisions hereof, and in full, complete, and final settlement of the Proceedings as provided herein, the Settling Defendants agree to pay the Settlement Amount in accordance with this Settlement Agreement, in full satisfaction of all of the Released Claims against the Releasees. Specifically, the Settling Defendants shall have the following payment obligations:

- (a) Within ten (10) business days of the Execution Date and provided that Class Counsel have provided the Settling Defendants with a written estimate of the expected Notice Costs, the Settling Defendants shall pay an amount equal to the estimated Notice Costs, but in no event more than thirty-five thousand Canadian dollars (Cdn\$35,000.00), into the Account, which amount shall be available to Class Counsel immediately

thereafter for payment of such costs, fees, and expenses associated with the provision of notice to the Class Members pursuant to Section 9 hereof. The foregoing payment shall be made by wire transfer in immediately available funds to the Account designated by Class Counsel.

(b) Within ten (10) business days of the Effective Date, the balance of the Settlement Amount remaining to be paid by the Settling Defendants after the payment of an amount equal to the estimated Notice Costs as set forth in paragraph 4.1(1)(a) hereof shall be deposited by the Settling Defendants into the Account. The foregoing payment shall be made by wire transfer in immediately available funds to the Account designated by Class Counsel.

(2) The Settling Defendants shall have no obligation to pay any amount in addition to the Settlement Amount, for any reason, pursuant to or in furtherance of this Settlement Agreement.

(3) Ontario Counsel shall maintain the Account as provided for in this Settlement Agreement and shall not pay out any of the Settlement Fund, except in accordance with the provisions of this Settlement Agreement, without an order of the Ontario Court made on notice to or on consent of the Parties, provided that no part of the Settlement Fund, other than the Notice Costs, shall be paid out until Final Orders have issued from all of the Courts.

(4) The Settling Defendants shall not be liable for any costs or attorneys' fees of Class Counsel, and any and all such costs, fees, payments, or awards as may be approved by the Courts shall be paid out of the Settlement Fund. There shall be no payment of attorneys' fees, costs, or expenses of Class Counsel, or any other awards the Courts may make, out of the Settlement Fund until Final Orders have issued from all of the Courts.

#### **4.2 Taxes and Interest**

(1) All interest earned on the Settlement Amount shall become and remain part of the Settlement Fund.

(2) Subject to section 4.2(3), all taxes payable on any interest which accrues on the Settlement Fund or otherwise in relation to the Settlement Amount shall be the responsibility of the Settlement Classes. Ontario Counsel shall be solely responsible to fulfill all tax reporting and

payment requirements arising from the Settlement Fund, including any obligation to report taxable income and make tax payments. All taxes (including interest and penalties) due with respect to the income earned by the Settlement Fund shall be paid from the Account. In the event any tax liability is finally assessed against and paid by the Settling Defendants as a result of any income earned on the funds in the Account, the Settling Defendants shall be entitled to reimbursement of such payment from the funds in the Account, after approval of the Ontario Court and whether or not any Final Order has issued. The Settling Defendants will use reasonable efforts to resist any such assessment or payment.

(3) The Settling Defendants shall have no responsibility to make any filings relating to the Settlement Fund and will have no responsibility to pay tax on any income earned by the Settlement Fund or pay any taxes on the monies in the Account, unless this Settlement Agreement is not approved or is terminated, in which case the Settlement Fund shall be returned to the Settling Defendants who, in such case, shall be responsible for the payment of all taxes on such interest.

## **SECTION 5 - DISTRIBUTION OF THE SETTLEMENT AMOUNT AND ACCRUED INTEREST**

### **5.1 Distribution Plan**

The Settlement Fund shall be held by Ontario Counsel for the benefit of the Class Members, including Direct Purchasers, Distributors, Intermediate Purchasers, and Consumers and, after the Effective Date, shall be paid in accordance with a plan approved by the Courts. Class Counsel shall, by motion on notice to the Settling Defendants, submit a plan for approval by the Courts at the appropriate time. No part of the Settlement Fund, other than the Notice Costs, shall be paid out of the Settlement Fund until Final Orders have issued from all of the Courts. The Settling Defendants shall have no responsibility for, or liability in connection with, the distribution of the Settlement Fund.

### **5.2 No Responsibility for Administration or Fees**

In no event shall any of the Settling Defendants have any responsibility, financial obligations, or liability whatsoever with respect to the investment, distribution, or administration of the Settlement Fund including, but not limited to, in respect of Administration Expenses, Notice Costs, and Class Counsel Fees.

### **5.3 All Claims Satisfied by Settlement Fund**

Each Class Member shall look solely to the Settlement Fund for settlement and satisfaction, as provided herein, of all claims released pursuant to the terms of this Settlement Agreement. Except as provided by order of the Courts pursuant to this Settlement Agreement, no Class Member shall have any interest in the Settlement Fund or any portion thereof.

## **SECTION 6 - RELEASES AND DISMISSALS**

### **6.1 Release of Releasees**

Upon the Effective Date, the Releasers forever and absolutely release the Releasees from the Released Claims.

### **6.2 Release by Releasees**

Upon the Effective Date, each Releasee forever and absolutely releases each of the other Releasees from any and all claims for contribution or indemnity with respect to the Released Claims.

### **6.3 Covenant Not To Sue**

Notwithstanding section 6.1, for the purposes of the Proceedings commenced in the British Columbia Court and for any Class Members resident in any province or territory where the release of one tortfeasor is a release of all other tortfeasors, the Releasers do not release the Releasees but instead covenant and undertake not to make any claim in any way or to threaten, commence, or continue any proceeding in any jurisdiction against the Releasees in respect of or in relation to the Released Claims.

### **6.4 No Further Claims**

The Releasers shall not now or hereafter institute, prosecute, maintain, or assert, or continue to prosecute, maintain, or assert any action, suit, cause of action, claim, or demand, or collect from, seek to recover from, or proceed either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other person, against the Releasees (or any one of them) or any other person who may claim contribution or indemnity from any Releasee in respect of any Released Claim or any matter related thereto, except for the continuation of the Proceedings against the Non-Settling Defendants or unnamed co-conspirators. Class Plaintiffs and their counsel acknowledge that the Settling Defendants each

consider it to be a material term of this Settlement Agreement that all Class Members will be bound by the releases provided for herein.

**6.5 Dismissal of Settling Proceedings**

The Proceedings shall be dismissed with prejudice as against the Releasees, without costs.

**6.6 Dismissal of Other Actions**

All Other Actions commenced by any Class Member in British Columbia, Ontario, or Quebec relating to the Released Claims shall be dismissed against the Releasees, without costs and with prejudice.

**SECTION 7 - EFFECT OF SETTLEMENT**

**7.1 No Admission of Liability**

The Parties expressly reserve all of their rights if this Settlement Agreement does not become effective or is terminated by the Settling Defendants. Further, the Parties agree that, whether or not this Settlement Agreement is finally approved or is terminated, this Settlement Agreement and anything contained herein, and any and all negotiations, documents, discussions, and proceedings associated with this Settlement Agreement, and any action taken to carry out this Settlement Agreement, shall not be deemed, construed, or interpreted to be an admission of any violation of any statute or law, or of any wrongdoing or liability by any Settling Defendant, or of the truth of any of the claims or allegations contained in the Proceedings or any other pleading filed by the Class Plaintiffs, and evidence thereof shall not be discoverable or used, directly or indirectly, in any way, whether in the Proceedings or in any other action or proceeding.

**7.2 Agreement Not Evidence**

The Parties agree that, whether or not it is finally approved or is terminated, this Settlement Agreement and anything contained herein, and any and all negotiations, documents, discussions, and proceedings associated with this Settlement Agreement, and any action taken to carry out this Settlement Agreement, shall not be referred to, offered as evidence, or received in evidence in any pending or future civil, criminal, or administrative action or proceeding, except



in a proceeding to enforce this Settlement Agreement, to defend against the assertion of Released Claims, or as otherwise required by law.

### **7.3 No Further Litigation**

Except as provided in this section, no Class Counsel, nor anyone currently or hereafter employed by, associated with, or a partner with Class Counsel, may directly or indirectly participate or be involved in or in any way assist with respect to any claim made or action commenced by any person which relates to or arises from the Released Claims. Moreover, these persons shall keep strictly confidential and may not divulge to anyone for any purpose any non-public information obtained in the course of the Proceedings or the negotiation and preparation of this Settlement Agreement, except as ordered by a court of competent jurisdiction, *provided that* in each case the Party who has been ordered to disclose the information protected by this paragraph timely informs the other Parties and uses its best efforts to limit the disclosure and maintain confidentiality to the extent possible and permits the other Parties the opportunity to attempt by appropriate legal means to limit such disclosure and/or to seek a protective order or other appropriate remedy to prevent or limit such disclosure.

## **SECTION 8 - CERTIFICATION OR AUTHORIZATION FOR SETTLEMENT ONLY**

### **8.1 Settlement Class and Common Issue**

(1) The Parties agree that the Proceedings shall be certified or authorized as class proceedings solely for purposes of settlement of the Proceedings and the approval of this Settlement Agreement by the Courts.

(2) The Class Plaintiffs agree that in the motions for certification or authorization of the Proceedings as class proceedings and for the approval of this Settlement Agreement, the only common issue that they will seek to define is the Common Issue and the only classes that they will assert are the Settlement Classes.

### **8.2 Certification or Authorization Without Prejudice**

In the event this Settlement Agreement is not approved or is terminated in accordance with its terms, the Parties agree that any prior certification or authorization of a Proceeding as a class proceeding, including the definition of the Settlement Class and the statement of the

Common Issue, shall be without prejudice to any position that any of the Parties may later take on any issue in the Proceedings or any other litigation.

## **SECTION 9 - NOTICE TO SETTLEMENT CLASSES**

### **9.1 Notices Required**

The proposed Settlement Classes shall be given notice of (i) hearings at which the Courts will be asked to approve the Settlement Agreement; and (ii) the certification or authorization of the Proceedings as class proceedings and the approval of this Settlement Agreement.

### **9.2 Form and Distribution of Notices**

The form of the notices referred to in section 9.1 and the manner of their publication and distribution shall be as agreed to by the Parties and approved by the Courts.

## **SECTION 10 - TERMINATION OF SETTLEMENT AGREEMENT**

### **10.1 Exercise of Termination Right**

No Releasee shall make or advance any claim of any kind against any Settling Defendant in connection with or arising out of:

- (a) any decision it makes or fails to make to exercise or not to exercise a right to terminate this Settlement Agreement; or
- (b) any determination it makes or fails to make as to whether any order is or is not in compliance or is deemed in compliance with section 3.2(2).

### **10.2 Manner of Termination**

If either the British Columbia Court or the Quebec Court fails to approve this Settlement Agreement, and if the Settling Defendants elect to exercise their right to terminate this Settlement Agreement, then the Settling Defendants shall give written notice of termination to the Class Counsel no later than twenty-one (21) days after the disposal of all appeals (if any) or the expiration of the time for taking such appeals from such Court's judgment failing to approve this Settlement Agreement.

**10.3 Consequences of a Decision not to Terminate following a Refusal to Approve the Settlement Agreement**

If the Settling Defendants do not exercise their election to terminate this Settlement Agreement following any failure by the British Columbia Court or the Quebec Court to approve the Settlement Agreement, then each definition, section, and schedule of this Settlement Agreement shall be deemed to be herewith amended so as to delete all references and provisions relating to such jurisdiction(s) which declines to approve this Settlement Agreement. No Class Counsel Fees shall be payable from the Settlement Amount in any jurisdiction which declines to approve this Settlement Agreement.

**10.4 Effect of Termination Generally**

Except as provided in sections 10.5–10.7 hereof, if this Settlement Agreement is terminated, it shall have no further force and effect, shall not be binding on the Parties, and shall not be used as evidence in any litigation or other proceeding or otherwise. Specifically, all negotiations and proceedings connected with this Settlement Agreement shall be without prejudice to the rights of any Party hereto, shall not be deemed or construed to be an admission by any Party of any fact or matter, and shall not be used in any way in the Proceedings or in any related actions or proceedings.

**10.5 If Settlement Agreement is Terminated**

(1) If this Settlement Agreement is terminated:

(a) no motion to certify or authorize any of the Proceedings as a class action on the basis of this Settlement Agreement or to approve this Settlement Agreement shall proceed; and

(b) any order certifying or authorizing a Proceeding as a class action on the basis of the Settlement Agreement and approving this Settlement Agreement shall be set aside and declared null and void and of no force or effect, and everyone shall be estopped from asserting otherwise.

(2) If the Settlement Agreement is terminated, the Settling Defendants shall bring motions before each of the Courts seeking orders:

- (a) declaring the Settlement Agreement to be null and void and of no force or effect (except for the provisions set out in section 10.7);
- (b) setting aside any order certifying or authorizing a Proceeding as a class action on the basis of the Settlement Agreement; and
- (c) directing that the Settlement Fund be returned to the Settling Defendants within ten (10) business days of the date of entry of the Court's order entered pursuant to this paragraph.

#### **10.6 Allocation of Monies in the Account Following Termination**

If the Settlement Agreement is terminated, Ontario Counsel shall return to the Settling Defendants the entirety of the Settlement Fund, less only any taxes paid or owed on the earnings of the Settlement Fund.

#### **10.7 Survival of Provisions After Termination**

If this Settlement Agreement is terminated for any reason, the provisions of sections 4.2, 7.1, 7.2, 10.1, 10.4, 10.6, 11.2(5), and 13.6 and the definitions and schedules applicable thereto shall survive the termination and continue in full force and effect.

### **SECTION 11 - ADMINISTRATION AND IMPLEMENTATION**

#### **11.1 Mechanics of Administration**

Except to the extent provided for in this Settlement Agreement, the mechanics of the implementation and administration of this Settlement Agreement shall be determined by the Courts on motions brought by Class Counsel on notice to the Settling Defendants.

#### **11.2 Information and Assistance**

- (1) The Settling Defendants will make reasonable efforts to compile a list of the names and addresses of Direct Purchasers and Distributors in Canada who purchased EPDM in Canada from the Settling Defendants during the Class Period.
- (2) The Settling Defendants will make reasonable efforts to provide information from which the Purchase Price paid by each of their Direct Purchaser and Distributor customers in Canada during the Class Period can be derived.

(3) The Settling Defendants make no representation as to the completeness or accuracy of any information provided by the Settling Defendants pursuant to Sections 11.2 (1) and (2) and shall bear no liability whatsoever with respect to the completeness or accuracy of any such information provided.

(4) The information required by section 11.2(1) and (2) shall be delivered to Ontario Class Counsel within ten (10) business days of the Execution Date and shall be used solely to provide notice to Class Members in accordance with section 9 of this Settlement Agreement and to facilitate the claims administration process eventually established in accordance with section 5 of this Settlement Agreement.

(5) If this Settlement Agreement is terminated, all information provided by the Settling Defendants pursuant to Section 11.2(1) and (2) shall be returned to them forthwith and no record of the information so provided shall be retained by Class Counsel in any form whatsoever.

#### **SECTION 12 - CLASS COUNSEL FEES AND ADMINISTRATION EXPENSES**

(1) Class Counsel may seek the Courts' approval to pay Class Counsel Fees and Administration Expenses from the monies in the Settlement Fund.

(2) Class Counsel Fees and Administration Expenses may be paid out of the Settlement Fund only after the Effective Date.

#### **SECTION 13- MISCELLANEOUS**

##### **13.1 Motions for Directions**

(1) Any Class Counsel or Settling Defendant may apply to the Courts for directions in respect of the implementation and administration of this Settlement Agreement.

(2) All motions contemplated by this Settlement Agreement shall be on notice to the Parties.

##### **13.2 Releasees Have No Liability for Administration**

The Releasees have no responsibility for and no liability whatsoever with respect to the administration of the Settlement Agreement.

**13.3 Intended Beneficiaries**

No provision of this Settlement Agreement shall provide any rights to, or be enforceable by, any person or entity that is not a Class Plaintiff, Class Member, a Releasee, or Class Counsel. No Class Plaintiff, Class Member, or Class Counsel may assign or otherwise convey any right to enforce any provision of this Settlement Agreement.

**13.4 No Conflict Intended**

Any inconsistency between this Settlement Agreement and the schedules attached hereto shall be resolved in favour of this Settlement Agreement.

**13.5 Amendment; Waiver**

This Settlement Agreement shall not be modified in any respect except by a writing executed by all of the Parties, and the waiver of any rights conferred hereunder shall be effective only if made by written instrument of the waiving Party and, following issuance of an order approving this Settlement Agreement, any such modification or amendment must be approved by the Courts with jurisdiction over the matter to which the amendment relates. The waiver by any Party of any breach of this Settlement Agreement shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Settlement Agreement.

**13.6 Publicity**

The Parties and their counsel agree to act in good faith to ensure that any public comments about or descriptions of the settlement are balanced, fair, and accurate. No Class Plaintiff, Class Member, or Class Counsel will issue any press releases regarding this settlement, except those that may be agreed to by the Parties. Notwithstanding any other provision of this paragraph, the Settling Defendants shall be able to make, without notification to, or prior review or approval by, Class Counsel, any and all disclosures regarding the settlement that the Settling Defendants, in their sole discretion, believe is appropriate or may be required under any applicable law or regulation.

**13.7 Headings, etc.**

In this Settlement Agreement:

- (a) the division of the Settlement Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Settlement Agreement; and
- (b) the terms “this Settlement Agreement”, “hereof”, “hereunder”, and similar expressions refer to this Settlement Agreement and not to any particular section or other portion of this Settlement Agreement.

**13.8 Ongoing Jurisdiction**

- (1) Each of the Courts shall retain exclusive jurisdiction over each Proceeding commenced in its jurisdiction, the parties thereto, and the Class Counsel Fees in those Proceedings.
- (2) No Court shall make any order or give any direction in respect of any matter of shared jurisdiction unless that order or direction is conditional upon a complimentary order or direction being made or given by the other Court(s) with which it shares jurisdiction over that matter.

**13.9 Governing Law**

This Settlement Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario.

**13.10 Entire Agreement**

This Settlement Agreement constitutes the entire agreement among the Parties, and supersedes all prior and contemporaneous understandings, undertakings, negotiations, representations, promises, agreements, agreements in principle, and memoranda of understanding in connection herewith. None of the Parties will be bound by any prior obligations, conditions, or representations with respect to the subject matter of this Settlement Agreement, unless expressly incorporated herein.

**13.11 Binding Effect**

This Settlement Agreement shall be binding upon, and inure to the benefit of, the Class Plaintiffs, the Settling Defendants, the Releasees, and all of their successors and assigns. Without limiting the generality of the foregoing, each and every covenant and agreement made

herein by the Class Plaintiffs shall be binding upon all Releasors and each and every covenant and agreement made herein by the Settling Defendants shall be binding upon all of the Releasees.

**13.12 Survival**

The representations and warranties contained in this Settlement Agreement shall survive its execution and implementation.

**13.13 Counterparts**

This Settlement Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement, and a facsimile signature shall be deemed an original signature for purposes of executing this Settlement Agreement.

**13.14 Negotiated Agreement**

This Settlement Agreement has been the subject of negotiations and discussions among the undersigned, each of which has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Settlement Agreement shall have no force and effect. The Parties further agree this Settlement Agreement contains an entire, complete, and integrated statement of each and every term and provision agreed to by the Parties hereto, and is not subject to any condition not provided for herein.

**13.15 Language**

The Parties acknowledge that they have required and consented that this Settlement Agreement and all related documents be prepared in English; les parties reconnaissent avoir exigé que la présente convention et tous les documents connexes soient rédigés en anglais.

**13.16 Transaction**

The present Settlement Agreement constitutes a transaction in accordance with Articles 2631 and following of the *Civil Code of Quebec*, and the Parties are hereby renouncing to any errors of fact, of law, and/or of calculation.



**13.17 Recitals**

The recitals to this Settlement Agreement are true and form part of the Settlement Agreement.

**13.18 Schedules**

The schedules annexed hereto form part of this Settlement Agreement.

**13.19 Acknowledgements**

Each of the Parties hereby affirms and acknowledges that:

- (a) he, she, or a representative of the Party with the authority to bind the Party with respect to the matters set forth herein and has read and understood the Settlement Agreement;
- (b) the terms of this Settlement Agreement and the effects thereof have been fully explained to him, her, or the Party's representative by his, her, or its counsel;
- (c) he, she, or the Party's representative fully understands each term of the Settlement Agreement and its effect; and
- (d) no Party has relied upon any statement, representation, or inducement (whether material, false, negligently made, or otherwise) of any other Party with respect to the first Party's decision to execute this Settlement Agreement.

**13.20 Authorized Signatures**

Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement.

**13.21 Notice**

All notices under this Settlement Agreement shall be in writing. Each such notices shall be given either by (a) hand delivery; (b) registered or certified mail, return receipt requested, postage pre-paid; or (c) Federal Express, UPS, or similar overnight courier and in the case of either (a), (b), or (c) shall be addressed to the representatives for the Party to whom notice is being provided, as identified below, or to such other address as Class Counsel or the Settling Defendants may designate, from time to time, by giving notice to all parties hereto in the manner

described in this paragraph. Copies of all notices under this Settlement Agreement may, at the notifying Party's option, be transmitted by email to the appropriate parties. Providing a copy by email shall only be in addition to, and not a substitute for, the formal notice mechanisms provided for in (a), (b), or (c) of this paragraph.

For Class Plaintiffs and for Class Counsel:

Charles M. Wright  
Siskinds LLP  
Barristers and Solicitors  
680 Waterloo Street  
London, ON N6A 3V8  
Telephone: 519-672-2121  
Facsimile: 519-672-6065  
Email: [charles.wright@siskinds.com](mailto:charles.wright@siskinds.com)

Simon Hébert  
Siskinds, Desmeules  
Les promenades du Vieux-Quebec  
43 rue Buade, bureau 320  
Quebec City, QC G1R 4A2  
Telephone: 418-694-2009  
Facsimile: 418-694-0281  
Email: [simon.hebert@siskindsdesmeules.com](mailto:simon.hebert@siskindsdesmeules.com)

Kenneth Baxter  
Poyner Baxter LLP  
Lansdale Quay Plaza  
#408-145 Chadwick Court  
North Vancouver, BC V7M 3K1  
Telephone: 604-988-6321  
Facsimile: 604-988-3632  
Email: [ken@povnerbaxter.com](mailto:ken@povnerbaxter.com)

For Settling Defendants:

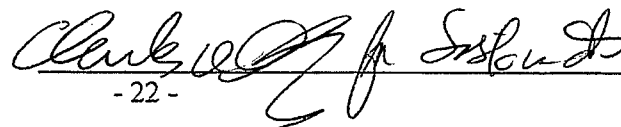
Robert Kwinter  
Blake, Cassels & Graydon LLP  
199 Bay Street  
Suite 2800, Commerce Court West  
Toronto ON M5L 1A9  
Telephone: 416-863-2400  
Facsimile: 416-863-2653  
Email: [robert.kwinter@blakes.com](mailto:robert.kwinter@blakes.com)

Britt M. Miller  
Mayer Brown LLP  
71 South Wacker Drive  
Chicago, IL 60606  
USA  
Telephone: 312-782-06000  
Facsimile: 312-701-7111  
Email: [bmiller@mayerbrown.com](mailto:bmiller@mayerbrown.com)

The Parties have executed this Settlement Agreement as of the date on the cover page.

WATERVILLE TG, INC.

By:



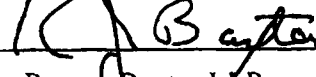
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Name: Siskinds LLP  
Title: Ontario Counsel.

By:

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R.N. PARTON LTD.



By:

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Name: Poyner Baxter LLP  
Title: British Columbia Counsel

JEAN-CLAUDE FLUET

By:

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Name: Siskinds Desmeules  
Title: Quebec Counsel

DSM ELASTOMERS EUROPE B.V. and DSM COPOLYMER,  
INC.

By:

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Name: Blake, Cassels & Graydon LLP  
Title: Canadian Counsel

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Name: Siskinds LLP  
Title: Ontario Counsel,

By:

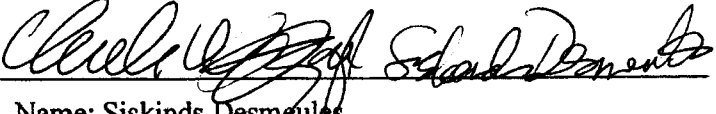
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R.N. PARTON LTD.

By: Name: Poyner Baxter LLP  
Title: British Columbia Counsel

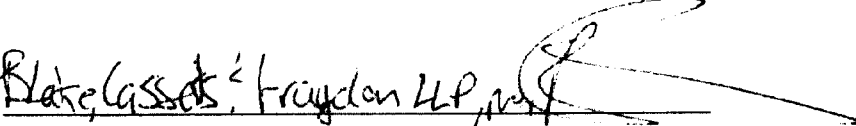
JEAN-CLAUDE FLUET

By:

  
Name: Siskinds Desmeules  
Title: Quebec Counsel

DSM ELASTOMERS EUROPE B.V. and DSM COPOLYMER,  
INC.

By:

  
Name: Blake, Cassels & Graydon LLP  
Title: Canadian Counsel

**SCHEDULE A - PROCEEDINGS**

<b>Proceeding</b>	<b>Defendants</b>	<b>Settlement Class</b>
<p>Ontario Superior Court of Justice Court File No. 45604CP (“Ontario Action”)</p>	<p>DSM Elastomers Europe B.V. and DSM Copolymer, Inc.</p>	<p>All persons in Canada who purchased EPDM Products in Canada during the Class Period, except the Excluded Persons and persons who are included in the British Columbia Action and in the Quebec Action.</p>
<p>Supreme Court of British Columbia, Vancouver Registry, Court File No. S050982 (the “B.C. Action”)</p>	<p>Bayer Inc., Bayer A.G., Bayer Material Science A.G., Bayer Material Science LLC, Bayer Corporation, Crompton Corporation, Crompton Co./Cie, Crompton Canada Corporation, Uniroyal Chemical Company Inc., Dow Chemical Company, Dow Chemical Canada Inc., DuPont Dow Elastomers LLC, E.I. DuPont de Nemours and Company, E.I. DuPont Canada Company, DSM Elastomers Europe B.V., DSM CoPolymer, Inc., Exxon Mobil Chemical Company, Polimeri Europa S.R.L., Polimeri Europa Americas Inc., Enichem S.p.A., Enichem Americas Inc., Syndial S.p.A</p>	<p>All persons in British Columbia who purchased EPDM Products in British Columbia during the Class Period, except the Excluded Persons.</p>
<p>Superior Court of Quebec (District of Quebec), File No. 200-06-000052-053 (the “Quebec Action”)</p>	<p>Koninklijke DSM N.V., DSM Elastomers Europe B.V., DSM Elastomers Holding Company, Inc., and DSM Elastomers America</p>	<p>All persons in Quebec who purchased EPDM Products in Quebec during the Class Period except the Excluded Persons.</p>



All persons in Canada who purchased EPDM or EPDM Products in Canada during the Class Period, except the Excluded Persons and persons who are included in the British Columbia Class or in the Quebec Class.

4. **THIS COURT ORDERS** that Waterville TG, Inc. be appointed as the representative plaintiff for the Settlement Class.
5. **THIS COURT ORDERS** that this action be certified as a class proceeding for settlement purposes only, on the basis of the following common issue:

Did the Settling Defendants agree to fix, raise, maintain or stabilize the prices of, or allocate markets and customers for, EPDM in Canada during the Class Period?
6. **THIS COURT ORDERS** that the Settlement Agreement is fair, reasonable, and in the best interests of the Settlement Class.
7. **THIS COURT ORDERS** that the Settlement Agreement is hereby approved pursuant to s. 29 of the *Class Proceedings Act, 1992* and shall be implemented in accordance with its terms.
8. **THIS COURT ORDERS** that the Settlement Agreement is incorporated by reference into and forms part of this Order and is binding upon the representative plaintiff, upon all Class Members, and upon the Settling Defendants.
9. **THIS COURT ORDERS** that each Class Member shall consent and shall be deemed to have consented to the dismissal of any Other Actions he, she or it has commenced against the Releasees, without costs and with prejudice.
10. **THIS COURT ORDERS** that each Other Action commenced in Ontario by any Class Member shall be and is hereby dismissed against the Releasees, without costs and with prejudice.
11. **THIS COURT ORDERS** that this Order, including the Settlement Agreement, is binding upon each Class Member including those persons who are minors or mentally incapable and the requirements of Rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure* are dispensed with in respect of this action.

12. **THIS COURT ORDERS** that each Releasor has released and shall be conclusively deemed to have fully, finally, and forever released the Releasees from the Released Claims.
13. **THIS COURT ORDERS** that each Releasor shall not now or hereafter institute, prosecute, maintain, or assert, or continue to prosecute, maintain, or assert any action, suit, cause of action, claim, or demand, or collect from, seek to recover from, or proceed either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other person, against the Releasees (or any one of them) or any other person or persons who will or could, in connection with any such action or proceeding, bring or commence or continue any claim, crossclaim, claim over, or any claim for contribution, indemnity, or any other relief against any of the Releasees in respect of any Released Claim or any matter related thereto.
14. **THIS COURT ORDERS** that the Releasees have released and shall be conclusively deemed to have fully, finally, and forever released each other from any and all claims for contribution and indemnity that said Releasees, or any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have, relating in any way to the Released Claims.
15. **THIS COURT ORDERS** that the use of the terms "Releasors" and "Released Claims" in this Order does not constitute a release of claims by those Class Members who are resident in any province or territory where the release of one tortfeasor is a release of all tortfeasors.
16. **THIS COURT ORDERS** that each Class Member who is resident in any province or territory where the release of one tortfeasor is a release of all tortfeasors covenants and undertakes not to make any claim in any way nor to threaten, commence, or continue any proceeding in any jurisdiction against the Releasees in respect of or in relation to the Released Claims.
17. **THIS COURT ORDERS** that all claims for contribution, indemnity or other claims against a Releasee, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, taxes, and costs, relating to the Released Claims, which



were or could have been brought against a Releasee by any other person or party, or by a Releasee against any other person or party, are barred, prohibited, and enjoined in accordance with the terms of this Order (unless such claim is made in respect of a claim by a person who has validly opted out of the Settlement Class).

18. **THIS COURT ORDERS** that this action be and is hereby dismissed against the Settling Defendants without costs and with prejudice.
19. **THIS COURT ORDERS** that the Releasees have no responsibility for and no liability whatsoever with respect to the administration of the Settlement Agreement.
20. **THIS COURT ORDERS** that ● be appointed as claims Administrator.
21. **THIS COURT ORDERS** that ~~77.5%~~ of the monies from the Settlement Fund be apportioned to the Distributors and Manufacturers settlement fund (as described in the Distribution Protocol) and the remaining ~~22.5%~~ of the monies from the Settlement Fund be apportioned to the Intermediaries and Consumers settlement fund (as described in the Distribution Protocol).
22. **THIS COURT ORDERS** that the Settlement Fund shall be distributed by the Claims Administrator in accordance with the Distribution Protocol attached hereto as Schedule "2".
23. **THIS COURT ORDERS** that Class Members shall submit a claim form to the Claims Administrator on or before the date which is ninety (90) days from the date of the first publication of the Notice of Certification and Settlement Approval and any Class Members who fails to do so shall not share in any distribution made in accordance with the Distribution Protocol with respect to settlement already approved unless the Court orders otherwise.
24. **THIS COURT ORDERS** that the Form of the proposed notice of certification and settlement approval to class members attached hereto as Schedule "3" is hereby approved.

25. **THIS COURT ORDERS** that the proposed method of disseminating the notice of certification and settlement approval to class members attached hereto as Schedule "4" is hereby approved.

Date:

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The Honourable Justice Rady