

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TIMOTHY TREON and his wife, JANE TREON,
and P. JENNINGS SCEARCE, and STEPHEN
CHRISTIAN individually and on behalf of others
similarly situated in the State of South Carolina,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No. 2002-CP-07-13776

Order Denying Motions under
Rule 59 (e)

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SERIAL A HENRI ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter came before the court pursuant to SCRCR Rule 59(e) on motions of William Dixon Robertson III, & William M. Bowen (hereinafter "Robertson Motion") and Timothy W. Bouch, W. Jefferson Leath Jr., & Michael S. Seekings (hereinafter "Bouch Motion"), both filed on or about October 9, 2012 to alter or amend this court's prior order denying motions to dismiss and/or quash. In accordance with SCRCR Rule 59(f), this court exercises its discretion to determine the motions on the briefs filed by the parties without oral arguments. After reviewing in detail, the Motions to Alter or Amend its prior order and the Memorandum in Opposition to the Motion and Plaintiffs Notice of Motion and Motion for Sanctions, I deny the motions.

Although service of the Motions to Alter or Amend filed by Counsel for Leath, Bouch and Seekings, was not accomplished in accordance with the rules of civil procedure, I considered those arguments in my deliberations as if the Motions had been properly served. Notwithstanding this procedural concern over service, I find that those arguments are not persuasive and do not affect my denial of the Rule 59 motions on all issues presented.

In addition, Counsel for Movants, Leath, Bouch and Seekings, claims to have made an appearance for only a limited purpose. To the extent that doctrine still exists, those attorneys moved beyond the "limited" jurisdictional arguments and advanced factual arguments and attempted to present factual information which related to some of the core factual issues to be determined at the Rule To Show Cause (RTSC). In addition, in their briefs filed the night before their appearance before this Court, they adopted "all" of the factual and legal arguments of the other Movants. Although this issue is not one that gives this Court pause in exercising its jurisdiction over Messrs. Leath Bouch and Seekings, this Court finds that their appearance was not limited. Further, the Court notes that the factual material placed in the record by Movants is entirely contradicted by the existing record of this case, and therefore underscores the need for the Rule to Show Cause Hearing to go forward.

In denying Plaintiffs' motion for sanctions, the Court stresses that it retains all the inherent powers and if what Plaintiffs have termed "a fraud" has taken place against this Court and the class action processes in South Carolina, this Court will be exercising both its inherent powers and Rule 23 supervisory authority over class action litigation to address that conduct.

Contrary to the arguments raised in the Bouch and Robertson Motions,¹ this Court has the inherent authority, and the express duty required by Rule 23, SCRCF to require the appearance of Movants and the power to compel their answers to its questions regarding Movants' conduct as class counsel.² This Court's power and authority to address the issues in the RTSC is not

¹ Specifically, arguments 1, 2, 3, and 7 of the Bouch Motion and arguments 3, 6, and 7 of the Robertson Motion are based on the misrepresentation that this Court lacks jurisdiction to conduct the RTSC.
² The Court notes that prior class representatives have not objected to cooperating with the Court's investigation.



limited by its Rule 23 obligations. Neither this Court, nor any court, is divested of its inherent or contempt power when affirmative duties are codified in a rule of procedure or statutory law.³

Furthermore, should the facts found at the RTSC require it, the Court may be required to exercise its power to punish which is inherent in all courts at all times. The "inherent" power's existence is essential to the preservation of order in judicial proceedings and consequently to the due administration of justice. *Cheap-O's Truck Stop v. Cloyd*, 350 S.C. 596, 567 S.E.2d 514 (Cl. App. 2002).

Rule 23 powers may be employed when the court believes it is necessary to curtail the opportunities for abuse of the judicial system in class actions. See, *Eldridge v. Greenwood*, 308 S.C. 125, 417 S.E.2d 532 (1992). This RTSC hearing's objective is to address alleged abuses to the administration of justice. If required to do so, the Court will avail itself of any available and proper remedies. *Brandt v. Gooding* 368 S.C. 618, 630 SE2d 259 (2006).

In their Motions, Movants focus a great deal of their attention on the \$825,000.00 attorney's fee amount. Because the dollar amount of the fee is significant, Movants reason they are entitled to a jury trial. Significantly, Movants cite no case law that suggests a dispute over an attorney fee in a Rule 23 class action should be decided by a jury rather than by the presiding trial judge in the matter. As no party contends that a South Carolina judge ever approved the \$825,000 fee, the Movants' arguments are without merit. Unless this matter transforms itself into a criminal proceeding and thus addresses a wrong committed against the state, a jury trial seeking private damages is not the proper avenue to address whether Rule 23 has been violated

³ Trial courts possess the inherent power to preserve order in judicial proceedings and enforce the administration of justice. *Miller v. Miller*, 375 S.C. 443, 453, 652 S.E.2d 754, 759 (2007). That power allows a court to control the adjudicative power to hear and decide cases in order "to safeguard the rights of litigants," enforce orders and judgments, modify or set aside orders and judgments that are the product of fraud, and investigate & punish "fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudicating cases that are presented for adjudication." This is an "implied and necessary power" that is required to ensure the "due administration of justice" and it may not "be taken away nor abridged by the legislature." *State v. Hite*, 272 S.C. 303, 305, 251 S.E.2d 746, 747 (1979).



and a civil jury should not determine the appropriate sanction for the wrong. Thus this court cannot find a constitutional right to a jury trial that is being denied the movants by conducting the RTSC. Also no challenge has been made to the provisions of Chief Justice's Order assigning this case the undersigned judge.

Generally, the constitutional right to a jury trial is reserved to matters historically arising from common law and cases where a person's liberty is at stake. The Court further finds that in South Carolina, proceedings to investigate and punish instances of fraud upon a court are equitable in nature and do not entitle the alleged perpetrators of a fraud on the court to a jury trial. See e.g. *Mr. T v. Ms. T*, 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct. App. 2008) (noting that Rule 60(b), SCRCP merely follows the equitable analysis associated with a fraud upon the court and quoting from 11 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* §2868 (2d ed. 1995)). Because the Court's inquiry in the RTSC proceeding is equitable in nature, Movants' claims⁴ of a right to a jury trial are without merit.

In its earlier Order, this court referenced its order of January 9, 2009, denying Dryvit's Motion for Summary Judgment as a means for further placing everyone on notice of what had been presented to the court that causes the court great concern. Additionally, based on the submissions made by the Movants and the years that this and other litigation has been on going,⁵ this Court has confidence that the Movants have proper notice and are aware of the issues and concerns of the Court which need to be addressed in the RTSC.

The assertion of a statute of limitation defense provides no basis to prevent the RTSC from proceeding. The statute of limitations is an affirmative defense not a jurisdictional issue. If the statute of limitations argument is advanced later it would require a showing of prejudice

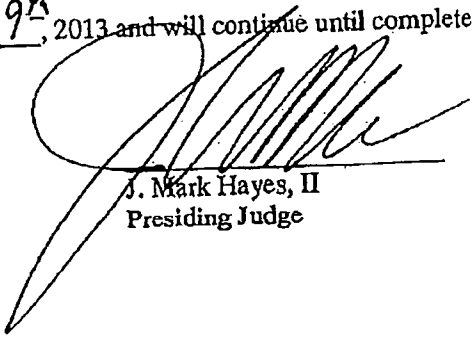
⁴ Arguments 8 and 17-19 in Bouch Motion and 2, 9 & 10-12 in Robertson Motion.
⁵ See also: 2008-CP-07-0774; 2008-CP-07-3145



(assuming an unreasonable delay). No prejudice argument has been presented upon which this court can even speculate as to the factual basis to support a prejudice argument. The exercise of the Court's inherent power cannot be restricted or affected by legislative action; therefore, Movant's arguments regarding venue, statute of limitations and Rule 12(b)(8) SCRCP⁶ are without merit. *Williams v. Bordon's Inc.*, 274 S.C. 275, 279-80, 262 S.E.2d 881, 883-84 (1980).

The Court finds that no due process rights of the Movants are being violated by conducting RTSC. The Movants have not made a request to conduct discovery. Further, the Movants have been provided volumes of documentation by present class counsel which relate to the issues in the RTSC and the Movants have presented documents which relate to the facts of the RTSC. The Court has great confidence that all of the parties have been placed on adequate notice of the Courts reasons for conducting the RTSC. The Court is not opposed to the parties doing discovery. The Court is aware that depositions were previously scheduled which were canceled when an appeal of an earlier email was filed. Even though the Court recalls that prior to the filing of RTSC discovery was presented to all or some of the present movants and no response information was received in response, and even though no request to conduct discovery as part of the RTSC has been made, the Court will assist in scheduling reasonable discovery upon the request by the parties.

The RTSC will go forward on September ^{9th}, 2013 and will continue until completed.

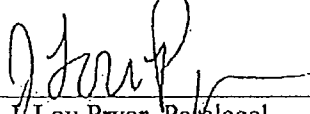


J. Mark Hayes, II
Presiding Judge

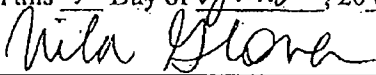
Spartanburg, South Carolina
May 31, 2013

⁶ Arguments 6, 11 & 12 in Bouch Motion and 1 in Robertson Motion.

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Sworn to and Subscribed before
me on this 5 Day of June, 2013



Notary Public for South Carolina

My Commission Expires: **NILA GLOVER**

Notary Public, State of South Carolina
My Commission Expires 10/4/2022