STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT Timothy J. Treon and his wife, Jane Treon, P. Jennings Scearce, and Stephen Christian, individually, and on behalf of others similarly situated in the State of South Carolina, Plaintiffs, vs. Dryvit Systems, Inc., Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action No.: 2002-CP-07-1377 **Order Denying Respondents' Motion to Dismiss SCRCP Rule 23 Rule to Show Cause and Accounting Proceeding**

This matter is before the Court on the motions of Respondents W. Jefferson Leath, Jr.; Timothy W. Bouch; Michael S. Seekings; William Dixon Robertson; William M. Bowen; John and Sally Cardamone; Benjamin T. and Diane M. Clark; and Ramona Gianni to dismiss and/or quash this Court's Order for a Rule to Show Cause & Accounting filed on June 5, 2012 (hereinafter "June 5th Order"). Additionally, certain Respondents have claimed their participation in this proceeding is by "special appearance." The June 5th Order requires the Respondents to appear on October 1, 2012 to be examined and account for all fees and benefits, if any, received and or promised in connection with this action (hereinafter the aforementioned proceeding will be referred to as the "RTSC").

As for specific objections to the RTSC proceeding, Respondents John and Sally Cardamone, Benjamin T. and Diane M. Clark, and Ramona Gianni (hereinafter individually and collectively referred to as "Cardamone Representatives") seek to dismiss or quash the RTSC on the grounds:

1) This Court lacks personal & subject matter jurisdiction over Respondents,

2) Process was improper or improperly served upon the Respondents,

3) Plaintiffs' counsel are not qualified to prosecute the instant action due to limitations placed on them by order of another court,

4) The form and substance of the relief demand by Plaintiffs is violative of the respondents' rights to equity and a jury trial,

5) The claims advanced by the Plaintiffs are barred by the applicable statute of limitations, and

6) The allegations against the Cardamone Representatives lack merit because there is no evidence they took an "antagonistic" action against the instant Class.[1]

Respondents W. Jefferson Leath, Jr.; Timothy W. Bouch; and Michael S. Seekings (hereinafter individually and collectively referred to as "Leath Bouch") seek the dismissal or quashing of the RTSC pursuant to Rules 12(b)(1) - (8), SCRCP. Their arguments raise issues 1) through 5) above along with:

7) The venue of the RTSC is improper,

8) Defendant Dryvit Systems Inc. is an indispensible party to the RTSC, and

9) The June 5th Order fails to state facts sufficient to constitute a cause of action upon which relief may be granted.[1]

Respondent William Dixon Robertson (hereinafter "Mr. Robertson") also seeks to dismiss the RTSC based on grounds 1) through 4) above. Additionally, Mr. Robertson argues:

10) The RTSC proceeding lacks sufficient procedural safeguards to ensure Respondent's due process rights are safeguarded, and

11) The June 5th Order demonstrates the presiding judge has already decided a question of fact before the Court.

Finally, Respondent William M. Bowen (hereinafter "Mr. Bowen") seeks the dismissal and withdrawal of the RTSC based on grounds 1) through 4) and 11) above.

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[1] The Cardamone Representatives and Leath Bouch claim they are making a "special appearance" in this matter. It is generally recognized that special appearances were abolished with the adoption of the South Carolina Rules of Civil Procedure in 1985. Smalls v. Weed, 291 S.C. 258, 261, 353 S.E.2d 154, 156 (Ct. App. 1987) ("We recognize that under the South Carolina Rules of Civil Procedure effective July 1, 1985, the special appearance has been eliminated."). Moreover, were it to still exist, its protections are waived by a party when seeking a dismissal on grounds that impliedly acknowledge the jurisdiction of the Court, adopting the substantive arguments of other parties, and otherwise participating in the action. Id. at 260, 353 S.E.2d at 156.

All pending motions were heard on two (2) days, July 18-19, 2012. After a full and careful review of the memoranda, exhibits, documents, Clerk's file, and arguments of counsel, the Court DENIES Respondents' motions for the reasons set forth below.

Background[2]

This class action lawsuit was commenced in August of 2002[3] by John & Sally Cardamone, Benjamin T. & Diane M. Clark, Nathan W. & Jill C. Gordon, and Ramona Gianni. They brought the action "on behalf [sic] themselves and all other similarly situated persons in the State of South Carolina" pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. Named parties in a Rule 23 class action are known as class representatives; accordingly, the aforementioned persons will be collectively referred to hereinafter as the "Cardamone Representatives." In their class action complaints, the Cardamone Representatives pledged to "fully and adequately protect the interests of Class members" and declared that they, and their counsel, had "the necessary financial resources to adequately and vigorously litigate this class action." The Cardamone Representatives acknowledged they were "aware of their fiduciary responsibilities to the Class[4]" and claimed to be "determined to diligently discharge those duties, and [to] have no interests which are adverse to or in conflict with other members of the Class." [5] At the time of this declaration, the Cardamone Representatives were actively pursuing individual

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[2] This Court has recounted the factual and procedural background of this matter in several prior orders including orders filed on January 7, 2009 and June 5, 2012. The factual basis of this order includes, and hereby specifically incorporates by reference, the facts found in those prior orders.

[3] Initial complaint was filed on August 12th while an amended complaint was filed on August 29th.

[4] This is a reference to the fiduciary duty owed by named class representatives and their counsel to the unnamed members of a Rule 23 class action. See e.g., Premium Inv. Corp. v. Green, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct. App. 1984) ("It is now generally conceded that a plaintiff who sues on behalf of a class and the attorney representing the class assume a fiduciary obligation to absent members of the class.").

[5] No person may serve as either a class representative or class counsel if possessed of an economic interest that is not shared by the unnamed class members. See Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990) ("The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named [class] representative has a claim which conflicts with the economic interests of the class."); see also Hospitality Mgmt. Associates, Inc. v. Shell Oil Co., 356 S.C. 644, 664, 591 S.E.2d 611, 622 (2004) (recognizing that neither the class representative nor class counsel may have an interest that conflicts with the interests of the class.).

lawsuits against the same defendant, Dryvit Systems, Inc., regarding the same synthetic stucco[6] building product that is the subject of this action.

In this class action lawsuit, the Cardamone Representatives sought money damages from Defendant Dryvit Systems, Inc. for moisture damage to class members' homes caused by alleged defects with Dryvit's synthetic stucco product. Additionally, this action challenged a purported nationwide settlement Dryvit reached in another class action known as Posey v. Dryvit Systems, Inc. (C/A No. 17,715-IV) in the Circuit Court for Jefferson County, Tennessee at Dandridge. Specifically, the Cardamone Representatives sought an "opt out" from the Posey settlement for themselves and the unnamed members of the South Carolina class they represented.

Attorneys Timothy W. Bouch; William M. Bowen; Francis E. Grimball, W. Jefferson Leath, Jr.; George E. Mullen; W. Dixon Robertson, III; Michael S. Seekings; and Robert L Wylie, IV represented the Cardamone Representatives in this action. Hereinafter, these lawyers will be referred to collectively as "Cardamone Counsel." While serving as class counsel, certain members of Cardamone Counsel represented the Cardamone Representatives in their individual lawsuits against Dryvit Systems, Inc. Each member of Cardamone Counsel, or his law firm, represented other unnamed plaintiffs from the South Carolina class in individual actions against Dryvit while also serving as class counsel in this matter.

While serving as Cardamone Counsel, attorneys Francis E. Grimball; Michael S. Seekings; Robert L. Wylie, IV; and George E. Mullen[7] appeared *pro hac vice* in the Posey action on behalf of William and Allison DeLoache[8]. Additionally, Cardamone Counsel attorneys Frank Grimball; William Dixon Robertson, III; Robert L. Wylie, IV; and W. Jefferson Leath, Jr.

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[6] Synthetic stucco is also known as "Exterior Insulation and Finish System" and is commonly referred to in many construction defect by the acronym "EIFS."

[7] In an earlier hearing in this matter, George Mullen testified an affidavit bearing his name and signature that was filed in support of the DeLoache appearance in Posey contained a forgery of his signature.

[8] In February of 2009, Allison DeLoache testified neither she nor her husband William were acquainted with any member of Cardamone Counsel, were ever represented by them in any matter, and were unaware that their identities had been used in the Posey proceeding.

appeared on behalf the South Carolina class at a hearing in Posey on December 18, 2002 that approved the national settlement.[9]

Although the South Carolina class action was filed in opposition to Posey's national settlement in August of 2002, Cardamone Counsel supported the Posey settlement at a hearing on December 18, 2002 before the Posey court in Tennessee. Thereafter, each Cardamone Representatives reached an individual cash settlement with Dryvit beginning with John and Sally Cardamone on February 5, 2003 and ending with Benjamin and Diane Clark in August of 2003. Documentation obtained through discovery has been presented to this Court which indicates Cardamone Counsel memorialized an agreement with Posey class counsel and Dryvit's counsel on April 22, 2004 wherein Counsel was to receive a total of $825,000.00 in attorneys fees for the "SC Class" upon the dismissal of the Cardamone action in South Carolina.

On September 23, 2005, Defendant Dryvit System Inc. moved to have the Cardamone class action dismissed and decertified. Additionally, the Current Class Representatives and Current Class Counsel moved to intervene into this action. Both motions were heard on December 5, 2005. At the December 5th hearing, attorneys William M. Bowen; W. Jefferson Leath, Jr.; Timothy W. Bouch; Michael A. Seekings; and William Dixon Robertson, III moved to be relieved as Cardamone Counsel which was accomplished by order filed on January 19, 2006. The Cardamone Representatives were replaced by current representatives Timothy & Jane Treon and P. Jennings Scearce by order of substitution on or about November 26, 2006. In that Order, the Court reserved the option of revisiting any compensation paid to Cardamone Counsel in connection with this matter. The current Class Representatives and their Counsel eventually reached a class-wide settlement with Defendant Dryvit System, Inc.

After their intervention in 2006, Current Class Representatives engaged in discovery with

[9] During this second Posey fairness hearing, Cardamone Counsel was referred to alternatively as "South Carolina Counsel," "South Carolina objectors," or "lawyers who have a certified South Carolina class opting out their state in its entirety."

Dryvit and discovered the attorney fee agreement that Cardamone Counsel reached with Dryvit in April of 2004. Current Class Counsel then filed a Motion for an Accounting or Rule to Show Cause regarding the Posey fee agreement on January 14, 2010. In order to facilitate the litigation or settlement of the pending product defect allegations against Dryvit, this Court deferred ruling on the January 14th Motion and instructed the Current Representatives and their Counsel to exclusively pursue the product defect case against Dryvit until resolution before returning to the Motion for Accounting. This Court issued its ruling on the January 14th Motion on June 5, 2012.

Discussion

Although the history of this litigation leading to its settlement in 2010 is extensive, the involvement of the Cardamone Representatives and their Counsel is brief. After obtaining the certification of the South Carolina Class in August of 2002, the Representatives and their Counsel filed a class-wide "opt-out" form to the Posey settlement with the Tennessee court in September of 2002. Thereafter, certain members of Cardamone Counsel conducted negotiations with counsel for Dryvit and the Posey class in Tennessee which culminated in Counsel's support of the Posey Settlement at a hearing in Tennessee on December 18, 2002.[10] After the December 18th hearing, no action was taken to prosecute the South Carolina class' claims against Dryvit or provide any type of notice to the South Carolina Class.[11] However, documents from discovery reflect that the Cardamone Representatives and their Counsel remained engaged with Dryvit and finalized financial settlements between Dryvit and the Class Representatives at various times in 2003. Those individual settlements were not disclosed to this Court until 2006, well after the

[10] In a letter dated November 15, 2002, Cardamone Counsel Jeff Leath wrote to Dryvit proclaiming that the "South Carolina attorneys believe that these enhancements [to the Posey Settlement] are in the interest of all parties [and] would appear to answer many, if not most of, the substantive objections which have been filed to the Posey settlement." Cardamone Counsel Frank Grimball echoed this statement at the December 18, 2002 hearing to approve the Posey settlement: "I think [the changes in the Settlement] cures a lot of the problems that are being raised by the objectors ... I think that we have done that through some intense negotiations with South Carolina counsel and Jeff Weak (phonetically)."

[11] In February of 2003, Cardamone Counsel opposed an attempt by Harry and Trudy Creasy to intervene into this action as class representatives.

Representatives' claims against Dryvit were mooted.[12]

When deciding a motion to dismiss, well pled facts are presumed to be true and the plaintiff's pleadings should be construed so that substantial justice is done between the parties. Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010). The exercise of personal jurisdiction over a person must comport with due process which requires a defendant to "purposefully avail itself of the privilege of conducting activities within the forum state." Coggeshall v. Reproductive Endocrine Assocs., 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). Motions brought pursuant to Rule 12(b)(6) should not be granted when the facts alleged would entitle the plaintiff to relief on any theory. Cricket Cove, 390 S.C. at 321, 701 S.E.2d at 44. With regard to motions brought pursuant to Rule 12(b)(8), an action should be dismissed if another action is pending between the same parties that involve claims that are "*precisely or substantially the same in both proceedings* in order for the drastic remedy of dismissal to be appropriate." Id. 390 S.C. at 323, 701 S.E.2d at 45 citing Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 105-06, 674 S.E.2d 524, 531-32 (Ct. App. 2009)(emphasis in original).

This Court's jurisdiction and authority over the Cardamone Representatives and their Counsel is so widely recognized in Rule 23 jurisprudence that a cursory review of precedent will suffice to dispose of the Respondents' jurisdictional objections. "It is now generally conceded that a plaintiff who sues on behalf of a class and the attorney representing the class assume a fiduciary obligation to absent members of the class." Premium Inv. Corp. v. Green, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct. App. 1984). The class representative and/or class counsel breach that obligation by using the class action they filed to obtain a benefit for themselves, even

[12] Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 566, 564 S.E.2d 94, 98 (2002) ("Where the named plaintiffs' claims become moot after class certification by death or other means, the class claims become moot unless intervenors can be substituted as named plaintiffs.").

if the benefit received "is not at the expense of the class." Id. As our Court of Appeals explained, the assumption of this fiduciary obligation means "[t]he class representative surrenders the right to settle the action in return for individual gain alone." Id. It goes without saying that class counsel, who is ethically prohibited from having a personal interest in the litigation, is similarly prohibited from settling a class action for counsel's individual gain.

The prohibition against a class counsel or class representative pursuing his or her own self-interest while representing unnamed members of a Rule 23 Class is well grounded in South Carolina and Federal law. Our Supreme Court recognized this fundamental principle as early as 1916 with the observation that it only required "[a] moment's reflection without the citation of authority" to understand that "one cannot represent a class when his interest and that of the class are antagonistic." Sartor v. Newberry Land & Security Co., 104 S.C. 184, 88 S.E. 467, 468 (1916). This principle is universally recognized in modern class action litigation and is equally applicable to class counsel and class representatives. For example, all major treatises on the Federal Rules of Civil Procedure note that any conflict of interest or antagonism between unnamed class members and their representatives is sufficient grounds to disqualify the class representatives.[13] Of all the different types of conflicts that can develop, the most fundamental is when a representative uses the prosecution of a class action to advance his or her own economic self-interest. "A class representative should never use a class action as leverage to procure a more favorable settlement of non-class claims." Moore's Federal Practice Explicit Condition: Representative Parties Must Fairly and Adequately Represent Class § 23.25 [2][b][vii].

To ensure that class representatives and class counsel do not abuse their fiduciary obligations, trial courts have "broad powers" under Rule 23 to "impose such terms as shall fairly

[13] E.g., Wright & Miller 7A Fed. Prac. & Proc. Civ. The Representatives Will Protect the Interests of the Class – Antagonistic or Conflicting Interests § 1768 (3d ed.) ("It is axiomatic that a putative representative cannot adequately protect the class if the representative's interests are antagonistic to or in conflict with the objectives of those being represented."); 1 Newberg on Class Actions Adequacy of Class Representative – Conflicts of Interest § 3:58 (5th ed.) ("All that is required—as the phrase "absence of conflict" suggests—is sufficient similarity of interest such that there is no affirmative antagonism between the representative and the class.").

and adequately protect the interest of the persons on whose behalf the [class] action is brought" so that the judicial system may not be used to abuse the rights of unnamed class members. Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992). Many courts have recognized that the trial judge must police the actions of class representatives and class counsel to ensure that they do not violate their fiduciary obligations. Our Supreme Court recognized that "the kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy" such as when the class representatives or their counsel have "a claim which conflicts with the economic interests of the class." Waller v. Seabrook Island Property Owners Ass'n., 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). Some courts have characterized the role of the trial judge in a Rule 23 action as that of a fiduciary because the court must be the guardian of the rights of absent class members at every stage of class litigation from pre-certification to settlement in order to guard against the inherent risk of conflict developing between class members and their representatives. See e.g., Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978) (setting forth the duty of the trial court to unnamed class members prior to class certification) and Premium Investment Corp. v. Green, 283 S.C. 464, 472, 324 S.E.2d 72, 77 (Ct. App. 1984) (noting that the proposed dismissal of a class action requires court approval and notice to unnamed class members). The trial court's obligation to unnamed class members was well recognized when South Carolina adopted its modern rules Rule of Civil Procedure in July of 1985. Rule 23 included a specific provision that prohibited a class action from being "dismissed or compromised without the approval of the [trial] court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Rule 23(c), SCRCP; see also Reynolds v. Beneficial National Bank, 288 F.3d 277, 280 (7th Cir. 2002) (noting the trend amongst courts "to term the district judge in the settlement phase of a class action suit a fiduciary of the class" and to impose on the trial court the

same "high duty of care that the law requires of a fiduciary.").

A trial court's obligation to the unnamed members of a Rule 23 class is especially critical when the court is asked to approve a class action settlement. In Stanton v. Boeing Co., the United States Court of Appeals for the Ninth Circuit set forth a lengthy explanation of the "real" and "inherent dangers" posed by the self-interest of class representatives and their counsel to unnamed class members in the negotiation of a class action settlement.

> [C]lass representatives have their own incentives to advance their interests at the expense of the class." Also, class counsel has their own "incentives ... to pursue their own self-interest and that of certain class members [which] can influence the result of the negotiations without any explicit expression or secret cabals. That is why [trial] court review of class action settlements includes not only consideration of whether there was *actual* fraud, overreaching or collusion but, as well, substantive consideration of whether the terms of the [settlement] decree are fair, reasonable and adequate to all concerned.

327 F.3d 938, 959-60 (9th Cir. 2003). Although the Ninth Circuit's generally defers to the trial court's judgment as to whether a proposed class action settlement is **fair** to unnamed class members, the Court routinely determines whether the terms of a class action settlement "directly lend themselves to **pursuit of self-interest** by class counsel and certain members of the class - namely, attorneys fees and the distribution of ... monetary relief among class members." Id. (emphasis added); see also Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 183 (3rd Cir. 2012) (recognizing "the linchpin of the adequacy [of representation] requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class.").

From the documentation obtained through discovery which has been presented to this Court, this Court has concluded there has been a sufficient factual showing for it to invoke its Rule 23 powers and to require the respondents to appear before it. The Court rejects the position that because this Court has found that a sufficient factual basis exists for issuing the RTSC, the

Court must now dismiss the RTSC because it has already decided a question of fact. As indicated by the RTSC, the documentation received by this Court is not *de minimis* and relates directly to the Court's Rule 23 duties. This Court's opinion is that it would be a dereliction of its Rule 23 duties to not issue the RTSC based on the factual information before it.

The fact that the Court's managerial decision to conclude the underlying lawsuit before conducting this inquiry into the alleged settlements Dryvit reached with the Cardamone Representatives and their Counsel was deferred until now, provides no support for the Respondent's jurisdictional arguments. In Rule 23 actions, a trial "court has broad equitable powers to deny attorneys' fees (or to require an attorney to **disgorge fees already received**) when an attorney represents clients with conflicting interests." Rodriguez v. Disner, 688 F.3d 645, 653 (9th Cir. 2012) (emphasis added) citing Silbiger v. Prudence Bonds Corp., 180 F.2d 917, 920 (2d Cir.1950) ("Certainly by the beginning of the Seventeenth Century it had become a common-place that an attorney must not represent opposed interests; and the usual consequence has been that he is debarred from receiving any fee from either [client], no matter how successful his labors."); see also Premium Investment Corp. v. Green, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984) (imposing a constructive trust on benefits obtained by class representatives and counsel in violation of their fiduciary duty to unnamed class members in an earlier class action settlement). In an early Rule 23 case, the United States Court of Appeals for the Third Circuit recognized the expansive powers of a trial judge to perform a post-settlement review of an attorneys' fee award where class counsel had failed to candidly inform the presiding judge of information relevant to a possible conflict of interest between counsel and the class. In re: Eastern Sugar Antitrust Litig., 697 F.2d 524, 533 (3rd Cir. 1982). In Eastern Sugar, certain members of class counsel and defense counsel discussed the possibility of merging their two firms during the pendency of class action litigation. No notice of the merger was given to

anyone during the pendency of the antitrust litigation. The Third Circuit approved the disgorgement of **all** fees earned during the class action litigation, even fees earned for work performed before the merger talks began, in order "to deter future misconduct of a similar type." 697 F.2d at 533. In each matter discussed above, the trial court's inquiry into possible conflicts of interest occurred well after the settlement of the class action litigation. Such delay can not act as a bar to an equitable inquiry, in South Carolina or elsewhere, because "the statute of limitations does not apply to actions in equity." Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005). Also, the settlement reached in this matter with Defendant Dryvit Systems, Inc. does not bar the Court's inquiry into the conduct of the Class Representatives or their counsel. The Order entered on June 10, 2010 that granted final approval to the settlement of the action against Dryvit, it made no specific findings regarding the performance of the Cardamone Representatives or Cardamone Counsel and specifically reserved those issues for a later determination.

Similarly, the collateral lawsuits now pending against the Respondents do not require the dismissal of the RTSC. In order to dismiss a related action, the moving party must demonstrate that the claims are "*precisely or substantially the same in both proceedings.*" Cricket Cove, 390 S.C. at 323, 701 S.E.2d at 45 (emphasis in original). The collateral lawsuits are civil actions wherein the unnamed plaintiffs in this action seek a jury trial against the Respondents for damages they sustained based on allegations of breach of fiduciary duty, legal malpractice, etc. The RTSC involves an inquiry by this Court into the conduct of parties and lawyers appearing before it. Although the RTSC proceeding has some relationship to the collateral actions, the RTSC inquiry is based on Court's Rule 23 obligations which are fundamentally and structurally different than the issues raised by the plaintiffs in the collateral proceedings. Accordingly, the

RTSC does not meet the "narrow" dismissal standard of Rule 12(b)(8). Capital City Ins., 382 S.C. at 106, 674 S.E.2d at 532.

This Court has personal jurisdiction over the Class Representative and their Counsel based on the service of the Rule to Show Cause Order and the inherent contempt power of a South Carolina circuit court.[14] A Rule to Show Cause stands in place of a summons to establish jurisdiction over a party and hale that party into court. "[O]ur Supreme Court has previously excused the use of the Rule to Show Cause in place of a summons to obtain jurisdiction when it contained the essential elements of a valid Summons." Ex parte South Carolina Dept. of Revenue, 350 S.C. 404, 407-08, 566 S.E.2d 196, 198 (Ct. App. 2002) quoting Citizens & S. Nat'l Bank of S.C. v. First Palmetto State Bank & Trust Co., 279 S.C. 252, 254, 305 S.E.2d 80 (1983) (internal punctuation omitted). In the instant matter, the Court's Rule to Show Cause Order complies with the applicable requirements of a summons as set forth in Rule 4(b), SCRCP.

There is no grounds for the disqualification of current class counsel with regards to the RTSC proceeding. The notion that current class counsel must withdraw from this action based on an Order issued by Judge Marvin Dukes in an associated legal malpractice action (*Treon v. Dryvit Systems, Inc.* (2008-CP-07-0774)) is misplaced in both fact and law. Judge Dukes' Order contains no basis for forcing the removal of the undersigned from this matter.[15] In fact, the opposite is true. Judge Duke specifically noted that "[i]t would be inequitable to allow the asserted conflict [in the malpractice action] to impair the access of the class and class representatives in case #1377 to the counsel who have represented them since December of

[14] As officers of the court, Cardamone Counsel's appearance at the RTSC is required by State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983). Leath Bouch's challenge to Brantley misstates its facts and holding. In their motion, Leath argues the "Court of Appeals" did not rule upon the jurisdictional issue because Sheriff Brantley "specifically admitted to having already waived jurisdiction." In fact, Brantley was decided by our Supreme Court which specifically noted that "[a]ppellant contends the trial court lacked jurisdiction" for several specific reasons. Rather than conceding jurisdiction, the Brantley court held the Sheriff waived his jurisdictional challenge by sending a deputy to court in his place. Nevertheless, the Court went on to hold that the Sheriff's failure to comply with the trial court's "notice to appear" "constituted a constructive contempt of court."

[15] One of the undersigned attorneys, Robert Phillips, did not participate in the action giving rise to Judge Dukes' order and is consequently not subject to its provisions. The following discussion only pertains to those lawyers who did participate in both actions.

2005." In fact, Judge Dukes lacked the power to make the ruling the Cardamone Representatives falsely claim he did. Salmonsen v. CGD, Inc., 377 S.C. 442, 545, 661 S.E.2d 81, 88 (2008) (noting that one circuit court judge does not have the authority to override another circuit court judge). Although the Court rejects the argument that current counsel is disqualified, it order the examination of the Cardamone Representatives be performed by attorney Robert B. (Sam) Phillips, a lawyer who currently represents the Class, but made no appearance in the proceeding that produced Judge Dukes' order.

The June 5th Order comports with the requirements of due process in that it requires an accounting from the Cardamone Representatives and their Counsel for all financial gain they were promised and/or realized while serving as a fiduciary for the South Carolina Class. Plaintiffs also seek to impose a constructive trust on that gain pursuant to Premium Investment Corp. v. Green, 283 S.C. 464, 472, 324 S.E.2d 72, 77 (Ct. App. 1984) and related authority. An action to perform an accounting or impose a constructive trust sound in equity, not law; accordingly, the Representatives and their Counsel are not entitled to a jury trial on these matters. Chief Justice Jean Hoefer Toal, et al., Appellate Practice in South Carolina 185 (2nd ed. 2002) (noting actions to perform accountings and impose constructive trusts both sound in equity). Additionally, this Court has received no request to conduct a jury trial as part of this RTSC.

Respondents argue there is insufficient evidence in the record to pursue RTSC. The material entered in support of Plaintiffs' Motion for Accounting or RTSC suggest otherwise. The purpose of the class created by Judge Kemmerlin was to opt South Carolina homeowners out of the Posey Settlement in Tennessee.[16] At a minimum, the pursuit of that goal required the

[16] By August 25, 2003, all of the South Carolina Class Representatives had settled non-class claims with Dryvit and Original Class Counsel had entered into other arrangements with Dryvit to settle certain individual cases and to receive a sizeable attorney fee. All of this was undertaken without any notice to, or input from, this Court even though Rule 23(c), SCRCP specifically requires any attempt to settle or compromise a class action to be approved by a court after appropriate notice and a fairness hearing.

Cardamone Representatives and their Counsel to keep the South Carolina class informed of the status of the two competing class actions and the positions took by Cardamone Counsel in the Posey proceedings. It is axiomatic that "absent class plaintiffs must receive notice plus an opportunity to be heard and participate in [class action] litigation, whether in person or through counsel" in order to satisfy the requirements of minimal due process in a class action lawsuit. Salmonsen v. CGD, Inc., 377 S.C. 442, 457, 661 S.E.2d 81, 89 (2008). Said notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Salmonsen, 377 S.C. at 457, 661 S.E.2d at 89 quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). Timely notice was particularly necessary to the unnamed members of this Class who were subject to the Posey action, had already received notice of its purported nationwide settlement and were being asked to submit to the exclusive jurisdiction of the Tennessee court. Timely notice from the Cardamone Representatives and their Counsel were crucial for informing South Carolinians of their competing litigation options. Indeed, the class certification order filed on September 3, 2002, required such notice to the South Carolina class, yet Cardamone Representatives and their Counsel took no action to fulfill this important due process requirement despite the clear need, and court instruction, to do so.

Inaction is not the only matter that warrants examination. Prior to the intervention of the current representations and their counsel, documentation has been present which suggests Dryvit coordinated its motion practice with the Cardamone Representatives and their Counsel to de-certify this action without any mention of the Cardamone Representative's individual settlements or the agreement their Counsel reached to receive an attorney fee after this action was dismissed. Respondents' motions impermissibly seeks to impair this Court's authority to investigate those actions and is clearly violative of Rule 23 SCRCP which provides "[t]he court may at any time

impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended." Rule 23(d)(2). This rule "specifically permits the trial court to maintain continual control over class action proceedings." Salmonsen v. CGD, Inc., 377 S.C. 422, 454, 661 S.E.2d 81, 88 (2008). A trial court has a specific responsibility to account for individual benefits derived by class representatives and/or their counsel in accordance with Rule 23, SCRCP. Premium Investment Corp. v. Green, 282 S.C. 464, 324 S.E. 2d 72 (Ct.App. 1984) (reviewing the discharge of fiduciary obligations by class representatives and their counsel.).

The Court has been asked to dismiss the RTSC upon the assertion that venue is in Charleston County. The underlying product liability action was commenced with the filing of a summons and complaint in Beaufort County (Fourteenth Judicial Circuit). Subsequent to the lawsuit being certified as a class action, the undersigned was vested with exclusive jurisdiction to hear all matters related to the case regardless of where he may be assigned to hold court. Pursuant to the assignment, the undersigned was vested with all powers and duties of a circuit judge of the Fourteenth Judicial. The RTSC hearing is brought pursuant to Rule 23 and relates to the underlying litigation. The assertion that the RTSC should be denied because Venue is in Charleston County is without merit. *See,* Cardamone v. Dryvit Sys. Inc., S.C. Sup. Ct. Order dated Aug. 31, 2006.

Lastly, the Court rejects that the RTSC must be dismissed upon the assertion that Defendant Dryvit Systems, Inc. is an indispensible party to the RTSC pursuant to Rule 12(b)(8), SCRCP. Rule 12(b)(8) is not a mechanism whereby a defendant may compel the dismissal of an action against it based on the plaintiff's earlier settlement with a joint-tortfeasor. Rather, the Rule operates to join an indispensable party whose presence is required in order to render complete relief to the Plaintiff. See Chester v. South Carolina Dept. of Pub. Safety, 388 S.C. 343, 698 S.E.2d 559 (2010). In this matter, Dryvit is not such a party as demonstrated by the

fulfillment of the settlement it reached with the South Carolina Class. Nevertheless, the Court's denial of the motion is based upon a Rule 12(b) standard. Since the Respondent suggests the possibility that no "agreement" with Dryvit ever existed, Dryvit has not been dismissed from the underlying litigation.

Accordingly, the Respondents' motions are DENIED.

J. Mark Hayes, II
Circuit Court Judge
Fourteenth Judicial Circuit

Date: September 27, 2012