THE STATE OF SOUTH CAROLINA
In the Court of Appeals

69069

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable J. Mark Hayes, II

Case No. 2002-CP-07-1377

Ex Parte: William Dixon Robertson III; William M. Bowen; W. Jefferson Leath, Jr.; Michael S. Seekings; and Timothy W. Bouch.....Appellants

Timothy J. Treon and his wife, Frances Treon; P. Jennings Scearce; and Steven Christian individually and on behalf of other similarly situated in the State of South Carolina .....Respondents

v.

Dryvit Systems, Inc.....Defendant

MOTION TO DISMISS APPEAL

Plaintiffs are the named class representatives in this class action lawsuit that was certified by the aforementioned court pursuant to Rule 23 of the South Carolina Rules of Civil Procedure against Defendant Dryvit Systems, Inc. Plaintiffs, by and through their undersigned class counsel, respectively move that the appeal filed by Ex Parte persons William Dixon Robertson III; William M. Bowen; W. Jefferson Leath, Jr.; Michael S. Seekings; and Timothy W. Bouch (hereinafter collectively "Appellants") be dismissed pursuant to Rules 240 of South Carolina's

Appellate Court Rules. Appellants seek to appeal from an interlocutory order wherein the presiding judge, the Honorable J. Mark Hayes, II, seeks to question Appellants under oath about attorneys fees and other preferments they negotiated with the Defendant during their representation of instant class, but did not disclose to either the presiding trial judge or the unnamed classmembers as required by Rule 23, SCRCP and related authority. Although Appellants asserted below that theirs was a "special appearance" to challenge Judge Hayes' jurisdiction to conduct such an inquiry, they nevertheless advanced a response to the Judge's inquiry without being subject to examination due to the stay associated with their appeal. Plaintiffs therefore seek the dismissal of this appeal with costs awarded to the Plaintiffs.

July 12, 2013

for Gregory Alford & Thomas Williams w/ express permission.

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL

I. STANDARD OF REVIEW

The order appealed from "require[s] each member of Original Class Counsel[1] and the Original Class Representatives[2] to appear before it and account for the funds and or benefits, if any, they received as a result of their representation of this Class." Order is attached as Exhibit A (hereinafter "Order").

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1 Appellants, along with three (3) other attorneys, are collectively referred to as "Original Class Counsel" in the appealed order and this motion. Each attorney has subsequently withdrawn from this action. The class is now represented by the undersigned attorneys.

2 John & Sally Cardamone, Benjamin & Diane Clark, Nathan & Jill Gordon, and Ramona Gianni are collectively referred to as "Original Class Representatives" in both the appealed order and this motion. Each reached an individual settlement with the Defendant and then withdrew from the case. The above named plaintiffs currently serve as current class representatives.

The Order is entirely interlocutory because it merely requires an "examination" of the Appellants and does not grant any relief, make any finding of fact, or otherwise resolve this action or any distinct branch thereof. *See generally*, S.C. Code Ann. §14-3-330(1) *and Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990). Intermediate or interlocutory orders are not immediately appealable unless they meet an applicable exception set forth in Section 14-3-330 or one of several specialized appellate statutes. The first pertinent exception can be found in Section 14-3-330(1) and pertains to interlocutory orders "involving the merits" of a cause of action or defense. Our appellate courts have interpreted the 330(1) exception to apply to orders that "finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Green v. City of Columbia*, 311 S.C. 78, 79-80, 427 S.E.2d 685, 687 (Ct. App. 1993). The Order decides nothing involving the merits of the matter, but merely requires Appellants to account for their conduct while serving as class counsel. The second applicable exception is found in Section 14-3-330(2) and pertains to an interlocutory order that "affects a substantial right" and "determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." Again, the inquiry ordered by the Order is merely the beginning of a process; it makes no findings, grants no relief and does not determine any issue with finality. No other specialized appellate statute pertains to this matter.

Because the Order is interlocutory and does not meet one of the exceptions set forth in either Section 14-3-330 or one of the specialized appellate statutes, the instant appeal should be dismissed pursuant to Rule 240, SCACR.

II. BRIEF REVIEW OF THE FACTS GIVING RISE TO ORDER APPEALED FROM

The Order was entered by the Honorable J. Mark Hayes, II on June 5, 2012, nearly ten (10) years after this case was originally filed. It requires the Appellants to appear before Judge Hayes and respond under oath to evidence discovered after the Appellants withdrew as counsel for the plaintiffs ("class

counsel") in this case. Exhibit A at p.8. The after-discovered evidence suggests Appellants "may have negotiated attorneys' fees for themselves based on a willingness to compromise the prosecution of this action [and] did not disclose to, nor have they sought approval by, the Court for the payment of any attorneys' fees." Exhibit A at pp.8-9. Judge Hayes found that Appellants' actions creates the appearance that they used their willingness to compromise this action in to obtain individual settlements for the Original Class Representatives and others without making the required disclosure to absent class members or obtaining the required approval from the presiding judge.

Rule 23(c) of the South Carolina Rules of Civil Procedure requires class counsel to provide class members with notice of settlement negotiations and seek court approval for any resulting settlement proposals. Exhibit A at p.10. Because Appellants did not comply with the requirements of Rule 23(c), Judge Hayes concluded he is "compelled to ascertain why fees of $825,000 were promised to Original Class Counsel[3] which the e-mails and other documents in the record say are conditioned upon the dismissal of this case." Exhibit A at 7.

In the Order, Judge Hayes noted that "the record of this case is substantial in its size" and that "the vast majority of the record relates to the use of a South Carolina Circuit Court judge's order granting class certification [in this matter] as a sword against a sister state's attempt to finalize a nationwide class action settlement [in the Tennessee action of Posey, et al. v. Dryvit Systems, Inc.]." Exhibit A at p.2. Judge Hayes explained that the September 2003 order certifying a class of absent South Carolina homeowners against Defendant Dryvit Systems, Inc. pursuant to Rule 23, SCRCP placed Original Class Counsel in "a representative capacity for absent class members and imposed upon them fiduciary duties and Rule 23 obligations." Exhibit A at p.3. The fiduciary duties owed by class counsel and class representatives to the unnamed members of a certified class is well established in Rule 23

3 Judge Hayes collectively referred to the Appellants and the other attorneys who originally represented the plaintiffs in this matter (Frank E. Grimball, George E. Mullen and Robert L. Wylie) as "Original Class Counsel" in his June 5th Order, and they will be so designated herein also.

jurisprudence. Exhibit A at pp.10-11, *see also Premium Investment 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, including the obligation to inform them of proposed compromises of the group action."). In light of the evidence that Appellants failed to act in a manner required of class counsel in a certified Rule 23 class action, Judge Hayes concluded:

> This Court's responsibility to unnamed class members and to the integrity of the judicial process requires that this Court exercise its authority and duty to inquire of the issues contained in this Rule to Show Cause and to account for all funds paid, or promised to be paid, in connection with this action. Rule 23 of the South Carolina Rule of Civil Procedure "specifically permits the trial court to maintain continual control over class action proceeding."

Exhibit A at p.10.

The evidence referenced in the Order begins with Original Class Counsel's failure to provide absent classmember with notice as required by the order certifying this case as a class action pursuant to Rule 23, SCRCP. Although Original Class Counsel did not provide the required notice, they did make an appearance in the Tennessee action of Posey v. Dryvit Systems Inc. to oppose the Posey settlement. A member of Original Class Counsel informed Posey's presiding judge that "the entire state of South Carolina at this point ... has opted out of the Posey Settlement." Exhibit A at fn.5. Shortly after that appearance in Posey, Appellant Mike Seekings returned to this action and announced that Original Class Counsel had settled this case with Dryvit and Posey class counsel:

> [Original Class Counsel] went to Tennessee and opted our class out [of Posey.] Participated in additional negotiations with both Dryvit and counsel for the [Posey] plaintffs at the direction of the [Posey] court. The [Posey national] settlement changed. We as our certified class then went to a hearing and told the [Posey] judge we thought now it is fair. ... Now this class de facto doesn't exist anymore. The [instant] case underline has been settled. The Dryvit settlement [in Tennessee] has been changed to the satisfaction of all involved.

Exhibit A at p.5 (internal punctuation omitted). Despite the Order's explicit requirement to provide notice of the action, and Rule 23's requirement to provide notice of a proposed settlement, Original Class Counsel did no comply with these two (2) requirements. Exhibit A at pp.3&8,

An attempt to settle a Rule 23 class action requires class counsel to: (1) provide absent class members with notice of the proposed settlement and (2) seek judicial review of the fairness of the settlement and the adequacy of the representation leading to that settlement. E.g. Rule 23, SCRCP ("A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromised shall be given to all members of the class in such manner as the court directs."). Despite this clear and universally recognized requirement[4], Appellants took no action to provide notice of the proposed settlement to class members or have it reviewed and approved by the trial judge. In fact, after Seekings announcement of a settlement in September of 2003, Original Class Counsel did nothing more to prosecute this case and eventually withdrew on February 19, 2006. Exhibit A at p.5. It was only after the Appellants' withdrawal that evidence was discovered which suggested Original Class Counsel used this period of inactivity to finalize an undisclosed agreement with Defendant Dryvit and class counsel in the Posey matter whereby Original Class Counsel would receive an attorneys fee award of $825,000 upon the dismissal of this action and Dryvit would pay lucrative individual settlements to the Original Class Representatives and other persons designated by Original Class Counsel. Exhibit A at pp.5&8.

> [I]t appears to this Court that following the Posey fairness hearing, Original Class Counsel and Dryvit's attorneys and Posey Class Counsel agreed to settle the individual lawsuits of certain [South Carolina] class members who were represented by Original Class Counsel and pay Original Class Counsel a significant attorneys' fee.

4 The notice and judicial review requirements of Rule 23(c), SCRCP were identical to the language used in Rule 23 of the Federal Rules of Civil Procedure as well as every other state (including Tennessee) that had adopted Rule 23 when Appellant Seekings announced the proposed settlement in 2003.

Exhibit A at p.5. Judge Hayes made this observation based on emails and other evidence obtained by the current class representatives and their counsel from Dryvit after Appellants withdrew from this action. For example, on April 22, 2004 Appellant Jeff Leath wrote to counsel for Dryvit and Posey class counsel to confirm they had reached an agreement to pay attorneys' fees to Original Class Counsel:

> Some of my SC lawyers are concerned about not having any memorialization of the agreement [Original Class Counsel] Frank Grimball and I reached with the 2 of you in Tennessee about class counsel compensation and I agree we should at least have an e-mail writing of it prior to [a scheduled hearing of Dryvit's motion to decertify the instant action].

Exhibit A at p.6. The agreement called for "[Posey] class counsel [to] earmark 600K of its [$11,600,000.00] national class fees for SC counsel and in addition Dryvit will contribute 225K which can be distributed by class counsel to the SC group." *Id.* In a subsequent email to Appellant Leath on September 29, 2005, Dryvit's counsel "reaffirmed the agreement to pay Original Class Counsel a total of $825,000 as an attorneys' fee upon the ultimate dismissal of [this] action." *Id.*

Judge Hayes notes that Original Class Counsel not only did not reveal this agreement to the presiding judge, Counsel did not disclose their receipt of the first $600,000.00 from Posey class counsel. Exhibit A at pp.7-8, fn.9. The court only learned of the payments to Original Class Counsel after Appellants withdrew and the Current Class Representatives (Timothy & Frances Treon and P. Jennings Scearce) intervened into in this case and conducted discovery with Dryvit. Exhibit A at pp.5-6.

The Order notes that members of Original Class Counsel have already advanced contradictory "theories" as to why the $600,000 fee was paid. One theory claimed the fee was earned for representing a South Carolina couple in the Posey matter while another claimed "it was for work done" for the entire Posey class. Exhibit A at p.8. Judge Hayes notes there is evidence in the record that contradicts both of these claims. Objectors William and Allison DeLoache deny they were ever represented by any member of Original Class Counsel and there is no mention of Appellants appearing as class counsel in Posey.

Exhibit A at fn.s10&11. In light of the evidence of the undisclosed payments to Original Class Counsel, the contradictory testimony regarding the purpose of those payments, and the undisclosed individual settlements to the Original Class Representatives and others, Judge Hayes concluded an examination of the Appellants "is needed, if for no other reason than to clarify for the record of this case that the South Carolina class action rules have been complied with, so that the integrity of the class action process is maintained." Exhibit A at p.8.

III. ARGUMENT

The inquiry Judge Hayes seeks to make of Appellants' conduct is no different than the inquiry every Rule 23 judges must make of a proposed class action settlement; albeit, the instant inquiry comes after the settlement was reached because Original Class Counsel and Dryvit did not timely disclose their agreements to the court as required by Rule 23, SCRCP. Appellate courts and legal scholars recognize that the presiding judge in a Rule 23 class action must supervise settlement proceedings to a degree not found in "conventional bipolar litigation" due to the potential for the named plaintiffs ("class representatives") and their counsel ("class counsel") to abuse the rights of absent class members ("absentees") who are often bound to the outcome of the action without being "real parties to the suit." *E.g. Fed.R.Civ.P. 23; In re: General Motors Corp. Pick-Up Truck Fuel Tank Products*, 55 F.3d 768, 784-86 (3rd Cir. 1995). The trial judge "plays the important role as protector of the absentees' interests, in a sort of fiduciary capacity, by approving appropriate representatives and class counsel." 55 F.3d at 784. Where the trial court lacks sufficient information to perform this function, there is a danger "that the court cannot properly discharge its duty to protect the interests of the absentees during the disposition of the action." 55 F.3d at 787. This danger is especially grave when a settlement is reached without court oversight, such as where a class settlement is reached before the actual class action lawsuit is filed and/or certified as a class, as was the case with Posey's national settlement. In the absence of

sufficient information about settlement negotiations or the class representatives' conduct, a Rule 23 judge can not effectively monitor for:

(1) "collusion" between the defendant and the class representatives and/or class counsel,

(2) "individual settlements,"

(3) "buy-offs (where some individuals use the class action device to benefit themselves at the expense of absentees)," and

(4) "other abuses."

Id. In this matter, Original Class Counsel did not disclose the agreements they reached with the Defendant and others to the trial judge. As a result, this action was beset with the exact types of misconduct that Rule 23 procedures were designed to avoid:

(1) Original Class Counsel **colluded** with Dryvit to dismiss both this action and their objection to the Posey settlement in Tennessee, without any notice to absent class members nor judicial oversight. *See* Exhibit A at pp.4-5.

(2) Dryvit negotiated lucrative **individual settlements** that only benefited the Original Class Representatives and others persons designated by Original Class Counsel. *See* Exhibit A at p. 6 & fn.8.

(3) Dryvit offered to **buy-off** Original Class Counsel with a large attorneys fee in exchange for their agreement to dismiss this action. *See* Exhibit A at p.7.

(4) Original Class Counsel otherwise **abused** their position by failing to notify absent class members of the existence of this action as required by the September 2002 certification order and by not disclosing Dryvit's agreement to pay individual settlements and attorneys fee as required by Rule 23(c), SCRCP. *See* Exhibit A at p.8.

Although Appellants claim the delay in Judge Hayes' inquiry excuses them from having to comply with it, a trial judge's power to resolve matters of class counsel misconduct are broad enough to permit this inquiry. 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 exercise its adjudicative power "to safeguard the rights of litigants,"[5]

5 *Williams v. Borden, Inc.*, 274 S.C. 275, 279, 262 S.E.2d 881, 883-84 (1980).

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."[6] This is an "implied and necessary power" that is required to ensure the "due administration of justice" and it is so important to the functioning of the judiciary that 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). In the Rule 23 context, other courts have recognized a trial court's inherent power to inquire into irregularities. Regarding attempts to defraud a trial judge, our Supreme Court has adopted the position of the U.S. Supreme Court in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944):

> This matter does not concern only private parties. They are issues of great moment to the public.... Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which **fraud cannot complacently be tolerated**.

Chewning v. Ford Motor Co., 354 S.C. 72, 79, 579 S.E.2d 605, 609 (2003) quoting 322 U.S. at 245-46 (emphasis added). Both the *Hazel-Atlas* and *Chewning* courts emphasized the need to give trial judges a great deal of flexibility in combating fraud. "Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Id.* The *Chewning* court specifically held that "[a]ttorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice." 354 S.C. at 83-84, 579 S.E.2d at 611.

The Ninth Circuit Court of Appeals reached a similar conclusion in *Dixon v. Commissioner of Internal Revenue*, 316 F.3d 1041 (9th Cir. 2003) wherein attorneys representing the Internal Revenue

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6 *Chewning v. Ford Motor Co.*, 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003) (defining a "fraud upon the court.").

Service ("IRS") were defending the claims of approximately 1,800 tax payers who participated in a certain tax shelter. The parties agreed to try several representative cases in order to determine the tax treatment that would be afforded the entire group. Unbeknownst to the other tax payers and the presiding judge, counsel for the IRS reached secret settlements with two (2) of the representative taxpayers before the trial of their cases. In an opinion entitled "**Truth Needs No Disguise,**"[7] the *Dixon* Court noted that the secret settlements allowed the IRS to portray the proceedings before the trial court as a "legitimate, representative proceeding" when in fact the undisclosed settlements "corrupt[ed] the adversarial nature of the proceeding, the integrity of witnesses, and the ability of the trial court to judge impartially." 316 F.3d at 1044-47. The IRS argued that the discovery of the secret settlements before the entry of a final judgment in the matter did not cause any injury to the class members. *Dixon* rejected that argument finding that "[f]raud on the court occurs when the misconduct harms the integrity of the judicial process, regardless of whether the opposing party is prejudiced." 316 F.3d at 1046. It went onto to find "the perpetrator of the fraud should not be allowed to dispute the effectiveness of the fraud after the fact." *Id.* (*citing Hazel-Atlas*, 322 U.S. 238, 247 (1944)).

In the instant matter, it is hard to imagine conduct more injurious to the integrity and public confidence in the court system than to permit Appellants to delay the trial court's inquiry into overwhelming evidence of misconduct with the filing of a spurious appeal. As explained above, the entire procedural scheme set forth in Rule 23 is designed to be conducted by a presiding judge to guard against and rectify just the sort of misconduct engaged in by Appellants. There can be no public confidence in Rule 23 class action litigation if the presiding judge's inquiry into lawyer misconduct can be derailed with the filing a meritless appeal from an interlocutory order.

The legal profession is, and by necessity must be, a self-regulating profession. "An independent legal profession is an important force in preserving government under law, for abuse of legal authority is

7 This is a quote from the *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 247 (1944) (emphasis in original).

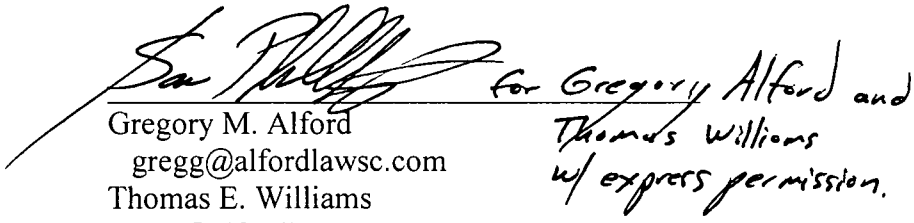
more readily challenged by a profession whose members are not dependent on government for the right to practice." *Preamble: A Lawyer's Responsibilities*, Rule 407, SCACR, Rules of Prof. Conduct (2005). Lawyers are entrusted with the unique responsibility of safeguarding and advocating for the rights of their clients. "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." *Id.* Although the lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen with an interest in earning a satisfactory living are usually harmonious, conflict can arise between the three. The public must have confidence that the attorneys they hire will harmonize these different responsibilities. *See e.g. Preamble*, Rule 407(8&9). The need for lawyer integrity is never more necessary than when a lawyer is representing absent class members in a Rule 23 action and is required to provide certain information to those absentees and the trial judge. The Order notes the substantial amount of evidence from which "one can reasonably conclude that the payments [of attorneys fees and individual settlements] were based on Original Class Counsel's status as being named 'class counsel' and the agreement to compromise and ultimately dismiss this case; again, the substance of which was never presented to Court in accordance with SCRCP Rule 23(c) and (d)." Exhibit A at p.8. The Order also notes the contradictory "theories" regarding Original Class Counsel's conduct and the evidence that appears to contradict them. Contrary to Appellants claims below and during their last attempt to lodge this appeal, the Order makes no findings of fact or rulings on the merits of these issues. Rather, Judge Hayes is simply complying with his obligations as a Rule 23 trial judge. Such an inquiry under the circumstances of this action is supported by the nationwide body of Rule 23 jurisprudence and South Carolina law. *See e.g. Ex Parte: TLC Laser Eye Centers (Piedmont/Atlanta), LLC, et al. v. Dr. Jonathan Woolfson, et al.*, Op. No. 27280 (S.C.Sup.Ct. filed July 3, 2013).

IV. CONCLUSION

This appeal of Judge Hayes' Order is not only procedurally unwarranted, it will cause a delay that will be injurious to the integrity of the legal profession. The absent class members and public intuitively recognize the possibility of conflict between a lawyer's responsibility to his clients, the legal system and his own interest in earning a satisfactory living. In this matter, the plaintiffs' attorneys and their individual clients obtained large cash benefits for themselves from the defendant and others based on an undisclosed agreement that made no such provision for absent class members. Those absent class members and the public deserve an explanation of how that occurred. Rule 23 of the South Carolina Rules of Civil Procedure requires the trial court to make such inquiry and such inquiries are routinely conducted by trial judges in all jurisdiction who have adopted Rule 23 of the Federal Rules of Civil Procedure. When the existence of the undisclosed individual settlements and attorneys fees were reported to Judge Hayes, he instructed undersigned counsel to focus the litigation on Defendant Dryvit's conduct and deferred an inquiry into the conduct of the Original Class Representatives and Original Class Counsel until after the underlying case against Dryvit was resolved. Rule 23 jurisprudence and South Carolina law permit such a course of action and support the trial judge's conclusion that the rules and the law "compel" him to complete this inquiry. It is the Plaintiffs' prayer that this appeal be dismissed so that the trial judge may fulfill his fiduciary duty to the absent class members and conduct the inquiry contemplated by the Order.

Prior to the filing of this appeal, Judge Hayes scheduled his inquiry for the week of September 9, 2013. In recognition of the difficulty in finding such a large block of time in a busy judicial schedule, the undersigned respectively make this Court aware of this availability if it is inclined to return the matter to the trial judge.

July 12, 2013



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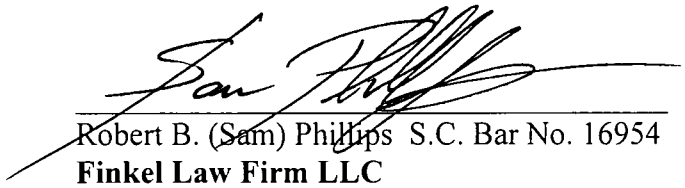

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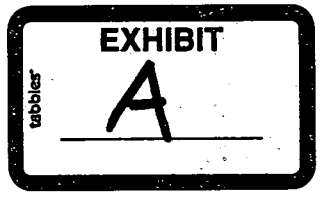
STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT TIMOTHY TREON and his wife, JANE TREON, P. JENNINGS SCEARCE and STEVEN CHRISTAIN individually and on behalf of others similarly situated in the State of South Carolina, Plaintiffs, V. DRYVIT SYSTEMS, INC., Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action No.: 2002-CP-07-1377 **RULE TO SHOW CAUSE and ORDER FOR ACCOUNTING**

This matter is before the Court on Plaintiffs' Motion for an Accounting of attorney fees allegedly received by certain Class Counsels and for benefits paid to prior Class Representatives which were never disclosed to or approved by this Court. A hearing on the motion was conducted on March 31, 2010 and the Court's initial decision to grant the Plaintiffs' motion was announced at that time. After being appointed as the judge assigned with the responsibility of cases 2008-CP-07-3145 and 0774,[1] the Court delayed further action in this matter so that a global resolution of all three cases could be explored. No global resolution has occurred and this Court's present belief is that at this time proceeding with this Rule to Show Cause is proper.

The Plaintiffs seek an accounting of any attorneys' fees paid to or otherwise received by Original Class Counsel because of their status as Class Counsel in the present matter. Plaintiffs also seek an accounting of any benefits paid to or otherwise received by

[1] These two cases involve claims of professional malpractice and breach of fiduciaries arising from the present litigation.



Original Class Representatives because of their status as Class Representatives. The Plaintiffs also seek to have any fees and/or benefits received by Original Class Counsel and Original Class Representatives placed in a constructive trust for the benefit of the class.

The record of this case is substantial in its size. The vast majority of the record in this case, however, does not relate to the substantive product liability claim asserted in this lawsuit against the Defendant. But rather, the vast majority of the record relates to the use of a South Carolina Circuit Court judge's order granting class certification as a sword against a sister state's attempt to finalize a nationwide class action settlement and the subsequent conduct of Original Class Counsel and Original Class Representatives.

Based on the record of this case, this Court believes a sufficient showing has been made for it to invoke its powers under SCRCP Rule 23 and its inherent judicial powers to issue this Rule to Show Cause and Order for Accounting.

Background[2]

This class action lawsuit was commenced with the filing of a summons and complaint on August 12, 2002. It was originally captioned John and Sally Cardamone, et al. v. Dryvit Systems, Inc., et al. 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 originally served as class counsel in this matter (hereinafter they will be collectively and individually referred to as "Original Class Counsel"). Original Class Counsel and Original Class Representatives moved for an order from the Honorable Thomas Kemmerlin, Jr. certifying a class in this action. As defined by

[2] The factual basis of this order includes and is hereby incorporated by reference, the facts found in this Court's prior order dated January 7, 2009.

the complaint, the Cardamone Class consisted of current and former owners of certain residential property in South Carolina clad with an Exterior Insulation and Finish System[3] manufactured by Defendant Dryvit Systems, Inc. who were also "members" of a purported nationwide class action settlement in a Tennessee action known as Posey, et al. v. Dryvit Systems, Inc., Tennessee Case No. 17,715.

After hearing the certification motion, Judge Kemmerlin certified the Cardamone class and specifically opted it out of the Posey action in Tennessee by Order dated September 3, 2002. (the "September 2003 Order"). This Court's opinion is that Judge Kimmerlin's Order placed Original Class Counsel and the Original Class Representatives in a representative capacity for absent class members and imposed upon them the fiduciary duties and Rule 23 obligations. Also, the September 2003 Order expressly required that a notice plan be submitted within 30 days. No notice plan was ever submitted by Original Class Counsel or Original Class Representatives.

Even though no notice plan was ever pursued by Original Class Counsel, on October 1, 2002, members of Original Class Counsel attended a hearing the Posey court conducted to consider the fairness of the purported nationwide settlement.[4] The Tennessee Court (The Posey Court) was made aware of the South Carolina's court decision to certify South Carolina class action when the Original Class Counsel spoke in opposition to the proposed settlement during the fairness hearing.[5] After participating in

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[3] Exterior Insulation Finish Systems are commonly known as "synthetic stucco" or by their acronym EIFS. EIFS is a relatively new building product that looks very similar to traditional concrete-based stucco, but incorporates an insulation lawyer that traditional stucco does not have.

[4] Posey's purported nationwide settlement sought jurisdiction over EIFS homeowners in every state except for North Carolina due to a state-wide class action settlement Dryvit had entered into earlier.

[5] Frank Grimball, Robert Wylie, and Dixon Robertson - attended that Hearing in Tennessee. Although ostensibly appearing on behalf of two individual objectors, William and Alison DeLoache, Frank Grimball argued against the Posey Settlement on a variety of grounds and he explained that "the entire state of South Carolina at this point, Your Honor, has opted out [of the Posey Settlement]." Posey Hr'g Tr. dated October 1,

certain negotiations with the lawyers in Tennessee, members of the Original Class Counsel attended a second fairness hearing on December 18, 2002, where their support for the final approval of the national settlement was reported to the Posey court. See Dryvit Systems, Inc.'s Evidence in Support of Motion to Dismiss at Tab 4. The Posey Court was also told that with the modifications to the settlement, the Cardamone class was withdrawing its objections to Posey settlement. Hr'g Trans. Dated 12/18/2002 at p. 28, lines 8-18.[6]

The Posey Court issued an order granting final approval to the Posey settlement on January 14, 2003. In that Order, the judge specifically noted the contribution of the South Carolina class counsel in reaching a settlement:

> [Posey] Class Counsel, together with counsel for certain objectors, including those representing a proposed litigation class in South Carolina, have been engaged in numerous substantial discussions and negotiations since the Fairness hearing with Counsel for the Settling Defendant.[7]

The Tennessee Order specifically approved an attorney fee and expense award of $11,600,000.00 to be distributed "among counsel for the Class." January 14th Order at p. 10. That "counsel" included the Order's earlier reference to "counsel ... representing a proposed litigation class in South Carolina." Id. at pp. 8,10. The Order also specifically prohibited class members from participating in other class actions, such as the Cardamone action. Id. at pp. 6, 9.

2002 at p.16, lines 15-17; p.17, lines 6-10. He also argued that "opt-outs are really objectors, but they just had sense enough to go ahead and remove themselves from this situation, avoid this class so that they could effect a full recovery." Id. at p.115, lines 7-11.

[6] Attorney Robert Phillips, who represented the South Carolina objectors Harry and Trudy Creasy was also present at the Second Fairness Hearing. He responded to the claim that the Cardamone class no longer sought to opt-out of the Settlement by informing Judge Slone that his clients were

> intervening in the South Carolina class action. We filed that motion approximately a month ago, and it is not our position that the changes cure the fundamental legal defects that keep this class from being certified, much less a settlement. So I just wanted to correct that representation.

[7] Posey Order dated January 14, 2003 at p.5, ¶15.

Following the issuance of the January 14th Order, Original Class Counsel presented the proposition of the attempted compromise of the Cardamone action to Judge Kemmerlin. During a hearing on February 5, 2003, Michael Seekings of the Mullen, Wylie and Seekings firm, informed the court that:

> [Original Class Counsel] came – we opted out after we came to your Honor and asked for certification of a class in South Carolina. We then went to Tennessee and opted our class out. Participated in additional negotiations with both Dryvit and counsel for the plaintiffs at the direction of the court. The settlement changed. We as our certified class then went to a hearing and told the judge we thought now it is fair. ... Now this class de facto doesn't exist anymore. The Cardamone case underlined has been settled. The Dryvit settlement [in Tennessee] has been changed to the satisfaction of all involved.

In the present litigation, Dryvit was ordered to produce numerous documents including e-mails, letters, settlement agreements and other documents. The Court has reviewed these materials and is satisfied that they are authentic and reflect the ongoing dialogue between Original Class Counsel, Posey Class Counsel and Dryvit Counsel. The Court has also reviewed transcripts of the hearings in Posey and a hearing in front of the Honorable Thomas Kemmerlin, Jr., on February 26, 2003. After such review, it appears to this Court that following the Posey fairness hearing, Original Class Counsel and Dryvit's attorneys and Posey Class Counsel agreed to settle the individual lawsuits of certain Cardamone class members who were represented by Original Class Counsel and pay Original Class Counsel a significant attorneys' fee. See Dryvit Documents Numbers Card 092-094, Dry 0970, CARD 00088, CARD 00072-73; Dry 0277, 0379, 0103, CARD 06727-29, 06739.

After the agreement to settle the Class Representatives' cases and to pay the attorneys' fees to Original Class Counsel, it appears that the present case was allowed to

lie dormant until December 2005. During the nearly three (3) intervening years, Dryvit and Original Class Counsel finalized individual settlements with each of Cardamone's named class representatives.[8]

In an email dated September 29, 2005, Dryvit's counsel reaffirmed the agreement to pay Original Class Counsel a total of $825,000 as an attorneys' fee upon the ultimate dismissal of the Cardamone action. Shortly thereafter, Dryvit moved to Dismiss and Decertify the Cardamone action in South Carolina. Dryvit Documents Number CARD 0128-0129. One of the Original Class Counsel also referenced an agreement between Cardamone and Posey counsel in an email dated April 22, 2004:

> "Subject: SC Class. Hi to both of you. We are preparing to attend and agree to the motion to decertify the [Cardamone] class which will take place Monday in Beaufort, S.C. Some of my SC lawyers are concerned about not having any memorialization of the agreement Frank Grimball and I reached with the 2 of you in Tennessee about class counsel compensation, and I agree we should at least have an e-mail writing of it prior to Monday at 1 pm. Here is my understanding of it: Class counsel will earmark 600K of its national class fees for SC counsel and in addition Dryvit will contribute 225K which can be distributed by class counsel to the SC group. I would appreciate confirmation of this understanding." Dry0970.

After learning that Dryvit was attempting to decertify and dismiss the Cardamone action, Timothy and Frances Treon, and P. Jennings Scearce successfully moved to intervene in the action and became the named class representatives (hereinafter collectively and individually referred to as "Intervening Class Representatives"). Additionally, their attorneys, Richard R. Gleissner, Robert B. (Sam) Phillips, Gregory M.

[8] In correspondence dated February 5, 2003, Dryvit's counsel confirmed the individual settlement it had reached with class representatives John and Sally Cardamone and acknowledged that the amount "Dryvit has agreed to pay [the Cardamones] includes a bonus reflecting Mr. Cardamone's status as a named plaintiff in the South Carolina class action. This settlement, of course, ends his participation in that class action, which it is anticipated will be entirely dismissed following resolution of the limited number of cases previously listed."

Alford, Thomas J. Finn, Thomas E. Williams, and Donald E. Jonas successfully moved to intervene as class counsel (hereinafter collectively referred to as "Intervening Class Counsel"). Although most members of Original Class Counsel chose to voluntarily withdraw from this action at that time, attorneys George Mullen and Frank Grimball remained in the action.

By order dated January 18, 2006, this Court allowed Intervening Class Counsel and Misters Mullen and Grimball to act as Class Counsel. (the "January 18, 2006 Order").

The existence of the agreement referenced above regarding the terms of the settlements and the attorneys' fees to be paid to Original Class Counsel were not disclosed to the Court by Original Class Counsel at the February 26, 2003 or December 2005 hearing. However, after Dryvit produced documents, the record reflects that Original Class Counsel have received the $600,000.00 payment promised by the April 22nd email.[9]

Plaintiffs' have asked the court for an accounting of the attorneys' fees promised and/or paid to Original Class Counsel while they were representing the Cardamone class along with the fees related to individual settlements they negotiated for certain class members. At this time, this Court is not requiring disclosure of fees related to individual cases of Class members who were not also named Class Representatives. Nevertheless, this Court is compelled to ascertain why fees of $825,000 were promised to Original Class Counsel which the e-mails and other documents in the record say are conditioned upon the dismissal of this case.

[9] The following checks were provided to the Court: Check issued by Doffermyre, Shields, Canfield, Knowles, & Devine, LLC ("Doffermyre, LLC") to Leath, Bouch & Crawford, LLP ("Leath Bouch") and Mullen Wylie & Seekings on 11/15/2005 for $310,345.00 with notation "Leath and Seekings share of attorney fees"; check issued by Doffermyre, LLC to Leath Bouch on 6/21/2006 for $93,103.00; check issued by Doffermyre, LLC to Leath Bouch for $196,552.00 on 9/18/2006 with notation "Attorneys Fees for Objectors."

Again, none of the payments or arrangements were disclosed to the Court. Further, the different reasons or justifications given by different members of Original Class Counsel made in statements and testimony before this Court compels the Court to inquire further. One theory proffered by Original Class Counsel is that the monies were paid solely for the representation of Posey Objectors William and Allison Deloach.[10] Another theory is that it was for work done for the Posey class.[11] However, from the documents in the record in this case, one can reasonably conclude that the payments were based on Original Class Counsel's status as being named "Class Counsel" and the agreement to compromise and ultimately dismiss this case; again, the substance of which was never presented to Court in accordance with SCRCP Rule 23(c) and (d).

Law/Analysis

This Court finds it has jurisdiction over the Original Class Counsel and the Original Class Representatives sufficient to require them to appear before me to answer the questions raised by the documents produced by Dryvit and the monies they received while they had fiduciary obligations to this Court and the Class. This Court's belief is that the present Order is needed, if for no other reason than to clarify for the record of this case that the South Carolina class action rules have been complied with, so that the integrity of the class action process is maintained.

In this matter, there is evidence that Original Class Counsel participated in the Posey action while representing this Class to which they owed a fiduciary duty. See Premium Investment Corp, 282 S.C. 464, 324 S.E.2d 72. It appears that Original Class

[10] Mrs. Deloach has testified in her deposition that she and her husband had no attorney- client relationship with any of Original Class Counsel.
[11] The final Order in Posey, does not designate any of Original Class Counsel as "Class Counsel" in Posey.

Counsel may have negotiated attorneys' fees for themselves based on a willingness to compromise the prosecution of this action. Original Class Counsel did not disclose to nor have they sought approval by the Court for the payment of any attorneys' fees or for approval of the settlement of the claims of the Original Class Representatives.

The Court therefore finds it necessary to require each member of Original Class Counsel and the Original Class Representatives to appear before it and account for the funds and or benefits, if any, they received as a result of their representation of this Class. Original Class Representatives and Original Class Counsel invoked the jurisdiction of this Court to make themselves the fiduciaries of this Court and the Class under Rule 23 SCRCP and therefore this Court feels it appropriate to exercise its jurisdiction over them.

Furthermore, as officers of the court, Original Class Counsel have an obligation to appear before a circuit court judge seeking their testimony on a pending matter for which their input is required. See State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983) (holding trial court could order sheriff from adjoining county, as an officer of the court, to appear without issuing a subpoena), cf. Rule 3.4(c), RPC, Rule 407, SCACR (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Rule 1.15(d), RPC, Rule 407, SCACR (a lawyer shall promptly render a full accounting regarding contested property). The exercise of this power is enhanced by the operation of Rule 23, SCRCP which grants each trial court broad powers to oversee the conduct of a class action lawsuit and protect the interests of unnamed class members.

Accordingly, this Court finds the issuance and service of an Order and/or Rule to Show Cause appropriate in order to allow the Class to properly account for the benefits, if any, promised and/or paid to Original Class Counsel and the Original Class

Representatives. Additionally, the appearance of Original Class Counsel in this matter allows this court to examine and, if necessary, to correct conduct that is calculated to obstruct, degrade, and undermine the administration of justice. Brandt v. Gooding, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006).

From the information provided to the Court, there appears to be no dispute that Original Class Counsel aided in the settlement of the individual cases of the Original Class Representatives. Those settlements create an appearance of being in violation of South Carolina law.[12] The U.S. Supreme Court has stated: due process requires adequate representation "at all times." *Shutts*, 472 U.S. at 812 (1985):

This Court's responsibility to unnamed class members and to the integrity of the judicial process requires that this Court exercise its authority and duty to inquire of the issues contained in this Rule to Show Cause and to account for all funds paid, or promised to be paid, in connection with this action. Rule 23 of the South Carolina Rules of Civil Procedure "specifically permits the trial court to maintain continual control over class action proceedings." Salmonsen v. CGD, Inc., 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). This allows the trial court, "at any time, [to] impose such terms as shall fairly and adequately protect the interest of the person on whose behalf the action is brought." Rule 23(d)(2), SCRCP. A trial court has a specific responsibility to account for the benefits derived by Class Representatives and Class Counsel in this action in accordance with Rule 23, SCRCP. See Premium Investment Corp. v. Green, 282 S.C. 464, 324 S.E.2d 72 (Ct.App. 1984) (recognizing the fiduciary duty owed by class representatives and their lawyers to unnamed class members and imposing a constructive trust on any benefits obtained as a

[12] Class representatives may not enter into settlements of their individual claims because of their fiduciary duty to the class. [*Prem. Investment Corp. v. Green*, 324 S.E.2d at 77; *See In re Green*, 354 S.E.2d 557 (S.C. 1987); *Rogers v. U.S. Steel Corp.*, 70 F.R.D. 639 (1976)]

result of a breach of that duty). These obligations are merely specific applications of, and possibly enhancements to, a court's inherent power to protect the legal process in all matters that come before it.

It is therefore Ordered that Original Class Counsel and Original Class Representatives appear before this Court on October 1, 2012 at the Spartanburg County Court House at 9:30 am in Courtroom West-B to be examined and account to this Court for all fees and benefits, if any, received and or promised in connection with this action, specifically as follows:

1) An accounting for the $825,000 referenced herein;

2) An Accounting of all fees received from the settlement of the individual cases of the Original Class Representatives;

3) An accounting of all benefits received by the Original Class Representatives;

4) To show why the court should not require that all fees and/or benefits, if any, be paid into the court to be held in a constructive trust for the class.

This Order is to be served upon the Original Class Counsel and the Original Class Representatives in accordance with Rule 4 of the SCRCP.

AND IT IS SO ORDERED.

J. Mark Hayes, II
Presiding Judge

This 1st day of June 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From the Beaufort County
Court of Common Pleas

The Honorable J. Mark Hayes, II
Civil Action No. 2002-CP-07-1377

Ex parte: William Dixon Robertson, III, William M. Bowen, W. Jefferson Leath, Jr., Michael S. Seekings, and Timothy W. Bouch.....Appellants,

Timothy J. Treon and his wife, Frances Treon, and P. Jennings Scearce, individually and on behalf of others similarly situated in the State of South Carolina.....Respondents,

v.

Dryvit Systems, Inc., Estate Builders, Inc. and American Way Applicators of South Carolina of whom Dryvit Systems, Inc., ...Defendant.

PROOF OF SERVICE

I certify that this 12th day of July, 2013, I have served Respondents' **Motion to Dismiss Appeal** & **Memo in Support of Motion to Dismiss Appeal** via U.S. Mail, first class postage prepaid, on the following counsel:

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