THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II
Beaufort County
Trial Court Case No. 2002CP0701377

Appellate Case No. 2013-001367

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, Jane Treon, and 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.

APPELLANTS' RETURN TO THE MOTION TO DISMISS

This is an appeal from three related orders entered in an action to which the Appellants are not now and have never been parties and in which Appellants have had no meaningful involvement in over seven years. The first order is the Rule to Show Cause Order issued by the Honorable J. Mark Hayes, II on June 3, 2012. This order purports to require the Appellants to appear before Judge Hayes and prove why they should not have to return attorneys' fees earned in a Tennessee class action some ten years ago. The second order is Judge Hayes's September 28, 2012 order denying Appellants' motion to dismiss the Rule to Show Cause. The third order is Judge Hayes's June 5, 2013 order

denying Appellants' motions for reconsideration of the September 28, 2012 order.[1] The net result of these orders is to deny the Appellants their right to a trial by jury on factual issues that are raised both in the Rule to Show Cause and in a related legal proceeding and to otherwise deprive these Appellants of fundamental mode of trial rights and protections to which they are entitled.[2]

Rather than addressing the salient issue of appealability, the bulk of Respondents' Motion to Dismiss this appeal instead focuses on the question presented on the ***merits*** of the appeal, namely, whether the trial court had the authority to issue a Rule to Show Cause pursuant to Rule 23, SCRCP.[3] This Return focuses on appealability, which is the only issue before this Court at this early stage.

PROCEDURAL HISTORY

There are three related South Carolina class actions involved in this appeal, two of which have now been consolidated. The first class action was filed in 2002 against Dryvit Systems, Inc. ("Dryvit"), and alleged defects in Dryvit's synthetic stucco product. This action was originally captioned *Cardamone, et al. v. Dryvit Systems, Inc.*, Case No. 2002-CP-07-1377 (referred to herein as the "-1377 class action"). The Appellants were

[1] This Appeal follows an Order from this Court dated December 3, 2012, dismissing without prejudice an earlier appeal (App. Case No. 2012-213083) of Judge Hayes' order denying Appellants' motion to dismiss the Rule to Show Cause in light of a pending post-trial motion. This Court's Order also granted Appellants leave to re-file the appeal within ten (10) days of the order disposing of the post-trial motion. Following resolution of the post-trial motion, Appellants timely refiled their appeal.

[2] The Appellants are now and have always been parties to that related proceeding, pending in Beaufort County Circuit Court, and until recently, Judge Hayes presided over it as well as the -1377 class action. *See* discussion infra at pp. 14-17. Judge Hayes recused himself from the *Treon/Tucker* case until the completion of the Rule to Show Cause in the -1377 class action.

[3] The Appellants dispute not only Respondents' arguments on the merits, but also their inaccurate and unsupported portrayal of the underlying facts.

the original class counsel in the -1377 class action. The Appellants were relieved as class counsel by Order of Judge Hayes entered January 19, 2006.

In the second class action, which was filed in 2008, the new class representatives in the -1377 class action sued the former class representatives in that action, along with Dryvit, alleging claims for civil conspiracy, breach of fiduciary duty, and fraudulent concealment. This class action was originally captioned *Treon, et al. v. Dryvit Systems, Inc. and Cardamone, et al.*, Case No. 2008-CP-07-774 (hereinafter referred to as "the *Treon* action"). The Appellants were not now and have never been parties to this action.

The third class action, also brought by a group that included some of the new class representatives in the -1377 class action and also filed in 2008, alleged claims for professional negligence and breach of fiduciary duty against the original named class representatives and the Appellants and other counsel who were class counsel in the -1377 class action. That action was captioned *Tucker, et al. v. Leath Bouch & Crawford, LLP, et al.*, Case No. 08-CP-07-1345. The *Treon* action and the *Tucker* action were consolidated (hereinafter referred to as the "*Treon/Tucker* action").

The -1377 class action and the *Treon/Tucker* action are integrally related: the plaintiffs in the *Treon/Tucker* action are members of the -1377 class, and some of the same named class representatives who represent the class in -1377 are also plaintiffs in the *Treon/Tucker* action; the attorney defendants in the *Treon/Tucker* action[4] are some of the attorneys who represented the original class representatives in the -1377 class action; and the claims in the *Treon/Tucker* action relate exclusively to the *Treon/Tucker* defendants' conduct as class counsel in the -1377 class action. Additionally, the

[4] Two of the attorney defendants in *Treon/Tucker*, Frank E. Grimball and Mullin Wylie, LLC, have settled with the plaintiffs and are no longer parties to that action.

Honorable J. Mark Hayes, II presided over both cases until his recent self-recusal from the *Treon/Tucker* action.

The present appeal challenges Judge Hayes's issuance of a Rule to Show Cause in the -1377 class action. Aside from the numerous procedural defects in Judge Hayes' Rule to Show Cause,[5] including that it was issued ***after*** the -1377 action had been settled, the Rule to Show Cause is improper—and immediately appealable—because it will be used to deny the Appellants their right to a trial by jury in the *Treon/Tucker* action, and will otherwise result in a forfeiture proceeding that is devoid of some of the most fundamental mode of trial protections. To explain why this is so, a detailed recitation of the procedural history of these two matters is necessary.

I. -1377: The Original Class Action

The current controversy stems from numerous legal actions filed against Dryvit in which various plaintiffs alleged defects in a synthetic stucco product that Dryvit manufactured. A nationwide class action known as the *Posey* action[6] was certified in Tennessee and, in April 2002, a settlement in that matter was preliminarily approved. Anyone wishing to opt-out of the settlement had to do so by September 3, 2002.

Prior to September 3, 2002, numerous individual actions against Dryvit were already pending in South Carolina. In addition to lawsuits Appellant Robertson had filed on behalf of individual plaintiffs not pertinent to this appeal, the firm of Mullen Wylie, LLC had filed suit on behalf of John and Sally Cardamone in Beaufort County on August

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[5] The Appellants' respective motions to dismiss the Rule to Show Cause outline these defects and will be discussed in the merits portion of the appeal.

[6] *Bobby R. and Sabrina Posey, et al. vs. Dryvit Systems, Inc., et al.,* Civil Action No. 17,715-IV (Circuit Court, Jefferson County, Tennessee). The Honorable O. Duane Slone ("Judge Slone") presided over the *Posey* action.

10, 1999, and on behalf of Ramona Gianni in Horry County on October 10, 2001. Appellants W. Jefferson Leath, Timothy W. Bouch, and William M. Bowen, and their respective law firms, had filed suit on behalf of Benjamin and Diane Clark in Beaufort County on May 24, 2002.

The Appellants' individual clients each filed a notice prior to September 3, 2002, opting out of the *Posey* action. However, in order to ensure that other homeowners in South Carolina were not bound by the proposed settlement in Tennessee—which they viewed as inadequate—the Appellants filed the -1377 class action in August 2002 in Beaufort County. The purpose of the class was to opt out all persons in South Carolina who might have claims against Dryvit, prevent those persons from being bound by the *Posey* action, and to permit those persons to file their own individual actions against Dryvit in South Carolina. The designated class representatives were the Cardamones, the Clarks, and Ms. Gianni. An Order granting the plaintiffs' motion for class certification of an "opt-out class action" was entered on September 3, 2002 (attached as **Exhibit A**), the very deadline for opting out of the *Posey* action in Tennessee.

After filing the -1377 class action, three attorneys who were part of the group that represented that class (Robert Wylie and Frank Grimball of Mullen Wylie, LLC and Appellant Robertson) not knowing whether the order opting out that class would be honored by the Tennessee court, traveled to Tennessee to oppose the proposed settlement in *Posey*. Over Dryvit's objection, Judge Slone permitted Mr. Grimball to make a presentation detailing the inadequacies of the proposed settlement. Judge Slone thereafter refused to approve the proposed settlement, but instead allowed the parties in *Posey* to engage in additional settlement negotiations.

These negotiations improved the terms of the *Posey* settlement substantially. According to the Order and Judgment Granting Final Approval of Settlement, entered by Judge Slone on January 14, 2003 (attached as **Exhibit B**), the proposed settlement ultimately approved included "an enhancement of the rights and options of Class Members and a substantial increase in the value of the benefits made available to persons who make claims under the Settlement." (*Posey* Order, p. 5). Judge Slone specifically noted the contributions of counsel from South Carolina in improving the *Posey* settlement. (*Id.*) (*See also* Affidavit of Everette L. Doffemyre, Co-Class Counsel in *Posey* (attached as **Exhibit C**)). Judge Slone ordered $11.6 million in attorney's fees be distributed "among counsel for the Class" (see *Posey* Order at p. 10) and specifically authorized class counsel in *Posey*, in its sole discretion, to "allocate and distribute this award of attorneys' fees and expenses among counsel for the Class." (*Id.*) After the *Posey* settlement was approved in Tennessee, the Cardamones, Clarks, Ms. Gianni, and all of the Appellants' clients who had filed individual lawsuits prior to the filing of the -1377 class action settled and dismissed their individual South Carolina lawsuits. The -1377 class action, however, remained pending.

Because the class representatives had all settled their individual claims, several new attorneys moved to intervene as class counsel in the -1377 class action and to substitute new class representatives. At the same time, the attorneys who had filed the -1377 class action—whose clients had resolved their individual claims against Dryvit, which predated the -1377 class action—moved to be relieved as counsel. Judge Hayes, who by then had been appointed by the Supreme Court to preside over the -1377 class action, granted the motion to intervene, substituted Timothy J. Treon and P. Jennings

Scearce as the class representatives, and substituted Gregory M. Alford, Thomas J. Finn, Thomas E. Williams, Robert B. Phillips, Richard Gleissner, and Donald E. Jonas as the new class counsel. By consent order dated January 19, 2006, Judge Hayes also granted a motion for some of the original class counsel, including the Appellants, to be relieved, which motion was unopposed (*See* Order Relieving Counsel (attached as **Exhibit D**)). The Appellants had no involvement in the -1377 class action after January 19, 2006, but were compelled to respond once Judge Hayes issued of the Rule to Show Cause six years later.

A. Motion for Accounting/Rule to Show Cause

On January 12, 2010, new class counsel filed a "Motion for an Accounting and Deposit into Court of All Attorneys' Fees Collected by All Class Counsel or in the alternative for a Rule to Show Cause Why Counsel Should Not Be Held in Contempt" (hereinafter "Motion for Accounting"). The Motion for Accounting alleged that original class counsel, including Appellants, failed to adequately represent the absent members of the -1377 class and received fees for their representation of the -1377 class without notice to the class or Court approval. Judge Hayes held a hearing on the Motion for Accounting on March 31, 2010, and orally announced his intention to grant the motion. However, this ruling was never reduced to writing or filed prior to the action being settled in June 2010.

B. Settlement and Dismissal with Prejudice

In June 2010, the parties to the -1377 class action brought a settlement agreement to Judge Hayes, which he approved. In the order granting final approval of the settlement, Judge Hayes dismissed with prejudice "[the -1377] Action and all claims,

rulings and motions against the Settling Defendant . . . , but the Court [retained] exclusive and continuing jurisdiction of the Action, all Parties, and Settlement Class Members, ***to interpret and enforce the terms, conditions and obligations of this Settlement Agreement consistent herewith***." (Order Granting Settlement Agreement, p. 22 (attached as **Exhibit E**) (emphasis added)). Thus, the Rule to Show Cause orally granted in March 2010, but never reduced to writing or entered, was dismissed with prejudice in connection with the final approval of the settlement, with Judge Hayes retaining jurisdiction only to the extent needed to interpret and enforce the settlement agreement.

II. The *Treon/Tucker* Action

In 2008—two years before the -1377 class action settled—new class counsel and class representatives in the -1377 class action sued the former class representatives alleging causes of action for civil conspiracy, breach of fiduciary duty, and fraudulent concealment. This matter is referred to as the *Treon* action. In the *Treon* action, the plaintiffs allege that the former class representatives reached "lucrative individual settlements which Dryvit conditioned on the dismissal of the [-1377] action" without informing the court. Dryvit was also named as a defendant in this action, and Dryvit removed the *Treon* action to federal court. The *Treon* plaintiffs then moved to remand the case back to state court.

While the motion to remand was pending, *Treon* plaintiffs' counsel (who included the new class counsel in the -1377 class action) filed yet another lawsuit against the former class representatives and, for the first time, against former class counsel. This case, known as the *Tucker* action, included all of the causes of action in *Treon* (civil conspiracy, breach of fiduciary duty, and fraudulent concealment) ***as well as*** a professional negligence cause of action directed only to the original class counsel. The

crux of the allegations against class counsel (including Appellants) is that they failed to adequately represent the absent members of the -1377 class and received fees for their representation of the class without notice to the class or court approval. In the *Tucker* action, the plaintiffs originally sought, among other things, disgorgement of all attorney's fees and settlement proceeds as well as special, compensatory, and punitive damages.[7]

After the *Treon* case was remanded back to state court, it was consolidated with the *Tucker* action and, as noted above, is referred to herein as the "*Treon/Tucker* action." In both *Treon* and *Tucker*, the plaintiffs demanded a jury trial, a mode of trial to which the defendants in those actions, including the Appellants, have a constitutional right.

A. Disqualification of Class Counsel in the *Treon/Tucker* Action

In the summer of 2009, counsel for the defendant Cardamones, who were some of the original class representatives in the *Treon/Tucker* case, realized that Thomas J. Finn, counsel for the plaintiffs, had formerly been an attorney at the Mullen Wylie law firm, which had represented the Cardamones in their action against Dryvit. While working for Mullen Wylie, Finn had participated in the *Cardamone* action by signing pleadings, attending at least one deposition, and receiving correspondence on behalf of the Cardamones. In other words, the Cardamones' former attorney from their lawsuit against Dryvit was now pursuing a lawsuit against them for their actions in the Dryvit matter. The Honorable Marvin H. Dukes III issued an order finding that this conflict of interest disqualified Finn and all of his co-counsel from representing the plaintiffs in the

[7] As will be discussed herein, during a hearing on a motion for class certification in the *Tucker/Treon* case, plaintiffs' counsel unilaterally withdrew the claim for disgorgement after counsel for Leath, Bouch & Seekings pointed out the conflict created by the named plaintiffs and class representatives in that action, who were also the named plaintiffs and class representatives in the -1377 action, seeking disgorgement of the same $600,000 in both actions.

Treon/Tucker action. (*See* February 2, 2010 Order of Disqualification, (attached as **Exhibit F**)). Thomas J. Pendarvis, I. Gregory Hodges, Timothy D. Roberts, and Williams J. Hunter now represent the *Treon/Tucker* plaintiffs.

Thus, Gregory M. Alford, Thomas J. Finn, Thomas E. Williams, and Donald E. Jonas no longer represent the class in the *Treon/Tucker* case, but continued to represent the class in the -1377 class action through its settlement. Judge Dukes' order prohibited -1377 class counsel "from conferring or sharing any information with newly hired counsel, lest the conflict be imputed to them." (Order of Disqualification, p. 15). On rehearing, Judge Dukes clarified this by Order dated March 17, 2010 (attached as **Exhibit G**) to allow -1377 counsel to return the file to their client and to provide newly hired counsel with non-confidential information regarding the status of the case. Judge Dukes also allowed newly hired counsel to file a motion with the Court if counsel believed additional information was needed to protect the clients' interests.

B. Judge Hayes's Appointment to the *Treon/Tucker* Action

In August 2010, two months ***after*** the -1377 class action had settled and was dismissed with prejudice, the chief administrative judge in Beaufort County appointed Judge Hayes to handle the *Treon/Tucker* case. At that point, the motion for class certification in *Treon/Tucker* was still pending, and Judge Hayes heard arguments on the motion in July 2011. After Kent Stair, counsel for defendants Leath, Bouch & Crawford, concluded his arguments as to why the plaintiffs had not carried their various burdens in relation to class certification, Judge Hayes stated that he "[did] not want to grant this class certification," but went on to explain:

> ***what I'm having a difficulty separating from***, sir [Mr. Stair], is the fact that there was a class action litigation in place, that the lawyers that this side of the courtroom is representing in all indications failed to do their job and sit – let this South Carolina case sit for an extremely long period of time, let that fruit rot on the vine and did not send out any notice. ... ***I have seen documents, I have seen letters, I have seen emails that highly suggest that there was a deal contemplated between Dryvit lawyers and class counsels and included these members of – that were the – these class representativ***es, a secret deal to make the South Carolina case rot on the vine while *Posey* went, while *Posey* up in Tennessee went through all the hurdles it went through to be ripened. If you have those types of allegations arising from a class action lawsuit and factual basis of the class action, a subsequent class action lawsuit that's the failure of the lawyers and class representatives to be able to do their job under Rule, ***under Rule 23 that I am obligated*** that gives me duties as well, ***I have to see that there is going to be a class***. I might agree with you that plaintiffs' counsel is not making it easy for me to apply these rules that need to be applied but give me some help, don't – I – ***your credibility in your argument is lost with me when the facts that I have heard for years are so clear, they're so documented.*** I've not come to any final conclusions on those facts, if I did my judicial obligations would be different. I have not heard from the defense and I want to hear from the defense but we are talking about the first stage class certification and there are certain facts that are screaming at me that we need to have a class certification as much as I do not want to do it.

(*See* Transcript on Motion for Class Certification Hearing, pp. 136-138 (attached as **Exhibit H**)).

In addition to the excerpt above, a review of the transcripts in the -1377 class action reveals that Judge Hayes has been exposed to seven years of a one-sided presentation attacking the motives and integrity of the Appellants. Numerous examples illustrating the negative arguments made against the Appellants, and Judge Hayes's unquestioning acceptance of those arguments, were outlined in the Memorandum in Support of Defendants Motion to Recuse in the *Treon/Tucker* action. (*See* Memo in

Support of Motion to Recuse (attached as **Exhibit I**)). In addition, during the March 31, 2010 hearing on the plaintiffs' Motion for an Accounting, Judge Hayes used Timothy McVeigh and his "known guilt" as an example of why he [Judge Hayes] was struggling with whether to issue a Rule to Show Cause. (See Transcript of Hearing held March 31, 2010, pp. 79-80, 156 (attached as **Exhibit J**)).

Additionally, the defendants in the *Treon/Tucker* action pointed out the inherent conflict created by the fact that the Treons and Mr. Scearce were class representatives in both the -1377 class action and in the *Treon/Tucker* action, and in both cases sought the same "pot of money" for the same alleged conduct in both lawsuits. Counsel for the *Treon/Tucker* plaintiffs attempted to cure this intractable problem by filing a Conditional Stipulation for Consent Order in the *Treon/Tucker* action that withdrew the Treons and Mr. Scearce as class representatives in that lawsuit and abandoned the claim for disgorgement of all attorneys' fees paid to original class counsel. (*See* Conditional Stipulation (attached as **Exhibit K**). *See also* n.7, *supra*.

Judge Hayes denied the motion to recuse on April 27, 2012. In addition to denying the motion to recuse, Judge Hayes stayed the *Treon/Tucker* action so that an accounting for the attorneys' fees and settlements received could be accomplished via a Rule to Show Cause in the -1377 class action. Specifically, Judge Hayes stated, "[a]fter extensive research on the issue of recusal and this Court's obligations under Rule 23, the better approach at this time is for the [*Treon/Tucker* case] to be temporarily stayed. The stay is effective immediately and will remain in place until this Court has issued its decision in the Rule to Show Cause [in the -1377 class action]." (*See* Order Denying Motion to Recuse and Temporarily Staying Matters, p. 14 (attached as **Exhibit L**)).

III. Issuance of Rule to Show Cause in the -1377 Class Action

On June 1, 2012—approximately one month after denying the motion to recuse and staying the *Treon/Tucker* case in which the defendants are entitled to a jury trial—Judge Hayes issued a Rule to Show Cause and Order for Accounting in the -1377 class action, which had been settled and dismissed with prejudice for nearly two years. (*See* Rule to Show Cause (attached as **Exhibit M**)). The Rule to Show Cause names both the original class representatives and original class counsel; it requires an accounting of all benefits received by the class representatives and all attorney's fees received by class counsel; requires the original class representative and original class counsel "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." The Order announced the Rule to Show Cause would be heard on October 1, 2012.

Former class counsel and former class representatives all filed returns to the Rule to Show Cause, seeking to have the Order dismissed. Former class counsel and class representatives lodged numerous arguments against the Rule to Show Cause, including but not limited to the trial court's lack of personal and subject matter jurisdiction to issue a Rule to Show Cause, as well as the fact that the Rule deprives them of a jury trial. A hearing on the motions to dismiss/quash the Rule was held in July 2012.

On August 31, 2012, Judge Hayes e-mailed the parties requesting new class counsel in -1377 to prepare an order denying the motions to dismiss/quash the Rule to Show Cause (attached as **Exhibit N**).[8] Although no order had been filed, Judge Hayes subsequently indicated he would allow testimony for the Rule to Show Cause to be taken

[8] On the afternoon of September 26, 2012, a proposed order was finally submitted by e-mail to Judge Hayes.

on Friday, September 28, 2012. (*See* e-mail string between Judge Hayes and all counsel (attached as **Exhibit O**)). In order to vigilantly protect their right to a jury trial, the Appellants filed a notice of appeal from Judge Hayes's written, albeit unfiled, order.

On September 28, 2012, the Respondents moved to dismiss this earlier appeal arguing, as they argue here, that it was not an order from which an appeal could be taken. Also on September 28, 2012, Judge Hayes issued a written order denying the motion to quash the Rule to Show Cause. The Appellants then moved for reconsideration of the written order pursuant to Rule 59(e) and, on October 10, 2012, filed a motion to hold the appeal in abeyance pending the resolution of the motions for reconsideration. On December 3, 2012, while Respondents' motion to dismiss and Appellants' motion to hold the appeal in abeyance were still pending, the Court of Appeals dismissed the appeal without prejudice pending resolution of the Rule 59(e) motions. (*See* Order dated Dec. 3, 2012) (attached as **Exhibit P**)). On May 31, 2013, Judge Hayes denied the motions for reconsideration and Appellants noticed this appeal on June 17, 2013.

IV. Judge Hayes's *Sua Sponte* Recusal From the *Treon/Tucker* Action

On September 7, 2012, while the *Treon/Tucker* case was stayed, the plaintiffs in that case asked Judge Hayes to temporarily lift the stay to permit discovery to proceed *in* that matter but *for* another matter. Specifically, the *Treon/Tucker* plaintiffs expressly requested that Judge Hayes lift the say so that he could resolve a motion to compel and determine whether a defendant's assertion of attorney-client privilege in the *Treon/Tucker* case was improper and, if so, order documents produced in that case *for use in the Rule to Show Cause proceeding in the -1377 class action*, then scheduled for hearing on September 28, 2012.

On September 17, 2012, Defendants Leath, Bouch & Crawford (hereinafter "LBC" or "LBC Defendants") filed a Memorandum in opposition to Plaintiffs' request for one-sided discovery in the *Treon/Tucker* case for use by Plaintiffs' counterparts in -1377. (*See* Memorandum in Opposition, attached as **Exhibit Q**). After discussing a variety of reasons why the request should be denied, LBC's counsel summarized some of the more fundamental problems with the mode of trial that awaited them under the unprecedented "Rule to Show Cause" that had been issued:

> Under that Order, these Defendants would be required to:
> 1. Appear before the same Judge who has already told their lawyer that the credibility in his argument is lost with the Judge because of what the Judge has seen and heard for so many years;
> 2. To answer charges that are so unclear that the Judge who issued the Order and the lawyer who considers it his role to act as "prosecutor" do not agree on what they are, and
> 3. Bear the burden of proof of showing why the Judge, *sitting now as both fact finder and Judge,* should not require the Defendants to forfeit their money in favor of a Class to which the Judge has stated he owes a fiduciary duty; and
> 4. They must do so without knowing everything the Judge has seen or heard over the previous seven years in their absence that would cause him to believe their money should be forfeited; and
>
> Their fate will be decided at a proceeding that has no established rules, other than the fact they cannot conduct any discovery to help them defend against the forfeiture being sought.

(See p. 9, Exhibit Q).

After filing the Memorandum referenced above, LBC's counsel received some additional things from the lawyers for the Class in -1377 that gave rise to the need to supplement the Memorandum. (*See* Supplemental Memorandum filed in the *Treon/Tucker* case on September 24, 2012 (attached as **Exhibit R**). As a part of the conclusory comments in that Supplemental Memorandum, LBC's counsel distinguished

the fair mode of trial that would have accompanied the Plaintiff's pursuit of disgorgement from these Appellants had that claim remained in the Treon/Tucker case from the unfair mode of trial that would permeate the Court's pursuit of that money in the Rule to Show Cause. As it relates to the first scenario, the Supplemental Memorandum noted:

> If those claims had remained in this case, and assuming the Court continued in his refusal to recuse himself, the LBC Defendants would still have been protected in their defense of the claims by having the following:
>
> - A fair and impartial jury of citizens, who would come to the trial and make their decisions unburdened by seven years of one-sided arguments, derogatory emails and other information that would necessarily influence their fact-finding process (and, of course, if they did have those traits they would be disqualified as jurors).
> - An established process for discovery that would allow the Defendants to prepare their case in a way that would be reflective of the due process rights that would be available to them in such a proceeding.
> - A recognized and established mode of trial, that would be known and understood by all parties, and that would insure the constitutional rights to which the Defendants are entitled when their property is sought to be taken.
> - The requirement that the Plaintiffs seeking the forfeiture of the Defendants' money bear the burden of proving their entitlement to Defendants' property, under standards long recognized by the Courts of this State.

(See pp. 8-9, Exhibit R).

After that, LBC's counsel then contrasted the fundamentally unfair mode of trial they would face in their defense of the forfeiture of property being pursued in the Rule to Show Cause:

> When, however, the forfeiture claims were summarily removed from this case and reappeared in the 1377 Case (albeit, at a time after that case had been dismissed with prejudice), all of the protections listed above were taken away. Instead, under the proceeding envisioned by the Rule to Show Cause:

- The sole fact-finder will have been subjected to seven years of one-sided arguments, derogatory emails and other information that would necessarily influence his fact finding process.
- There is no allowance for discovery that would allow the Defendants to prepare their case in a way that would be reflective of the due process rights that should be available to them in a forfeiture proceeding.
- There is no established mode of trial, that will be known and understood by all parties, and that would insure their constitutional rights;
- The Defendants, seeking to protect against the forfeiture of their money, will bear the burden of proving why the Court should NOT take their money. This improper and onerous task is compounded by the fact that the LBC Defendants have no record of everything the Court has seen or heard that might influence the Court to think that the money should be taken from the LBC Defendants.

(*See* pp. 9-10, Exhibit R).

Notwithstanding the concerns set forth above, by order of March 29, 2013, acknowledging that the plaintiffs in the *Treon/Tucker* case were asking for the stay to be lifted in hopes of obtaining documents "for use in the prosecution of the [-1377 class action] Rule to Show [Cause] hearing," Judge Hayes granted the motion and lifted the stay in the *Treon/Tucker* action. (*See* Order Lifting Temporary Stay and Recusal (attached as **Exhibit S**)).

In that Order, Judge Hayes also recused himself from the *Treon/Tucker* case until the completion of the Rule to Show Cause in the -1377 class action. (*Id.* at pp. 7-10).[9] Specifically, recognizing the extreme overlap between the two cases, Judge Hayes explained the specific reason for the recusal as follows:

[9] Specifically, Judge Hayes found that, in ruling on the pending motion to compel in the *Treon/Tucker* case, he might become aware of evidence that might "compromis[e] his role as fact finder" in the Rule to Show Cause. (*Id.* at p. 9, n.14).

> In the [-1377 Class Action] Rule to Show Cause, the court is acting as the final fact finder. In ruling on the [*Treon/Tucker*] motion [to compel documents claimed to be privileged], the undersigned may review evidence highly probative of issues relevant to the Rule to Show Cause but yet which may be properly protected from disclosure. Thus, potentially compromising his role as fact finder and unnecessarily frustrating or clouding the objectives of the undersigned's duties related to the Rule to Show Cause if he rules on the present [*Treon/Tucker*] motion [to compel].

(*Id.* at p. 9, n.14). Judge Hayes further explained that "[t]he undersigned continues to believe the integrity of the adjudicatory process is preserved by the undersigned refraining from ruling on any [*Treon/Tucker*] matter until after the [-1377 Class Action] Rule to Show is concluded." (*Id.* at p. 7).

By order of May 30, 2013, the South Carolina Supreme Court assigned the *Treon/Tucker* case to the Honorable Clifton Newman. The -1377 class action, from which the Rule to Show Cause was issued, remained before Judge Hayes. Accordingly, the Appellants now face a Rule to Show Cause in which Judge Hayes will be the finder-of-fact in a proceeding that is fraught with the absence of procedural and substantive protections that should be a fundamental part of any fair mode of trial. Further, Judge Hayes will make factual findings that the Plaintiffs in the *Treon/Tucker* action will then, most assuredly, argue are entitled to preclusive effect in *that* action. Because the claims in the *Treon/Tucker* action are legal, the Appellants are constitutionally entitled to have a *jury* decide those facts. If the Plaintiffs in *Treon/Tucker* prevail in their arguments for preclusion, however, by ordering the Rule to Show Cause to proceed before the *Treon/Tucker* action, Judge Hayes will have deprived the Appellants' of their right to a jury trial in that case. For all of the reasons outlined above, the Rule to Show cause is

therefore an order affecting a substantial right of the Appellants, the mode of trial, subject to immediate appeal.

ARGUMENT

The Rule to Show Cause is Immediately Appealable Because It Threatens to Violate Appellants' Constitutional Right to a Jury Trial on the Legal Claims in the *Treon/Tucker* Action.

South Carolina law entitles a litigant to immediate appeal of an interlocutory order that affects substantial rights. *See* S.C. CODE ANN. § 14-3-330(2) (1991). Moreover, an interlocutory order that affects a mode of trial *must* be appealed immediately, or the issue is waived. *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008). *See Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). When a litigant is entitled to a jury trial as a matter of right, any order that has the effect of denying that right affects the mode of trial, and therefore must be appealed immediately. *See id.* (citing cases); *see also Creed v. Stokes*, 285 S.C. 542, 542, 331 S.E.2d 351, 352 (1985) (holding that appellant waived right to appeal order of reference to a master-in-equity by not appealing the reference immediately).

The South Carolina Constitution provides that "[t]he right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14; *see Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) ("The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868."). This right is confirmed in Rule 38(a) of the South Carolina Rules of Civil Procedure, which provides that "[t]he right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate."

The Appellants, who are the defendants in the *Treon/Tucker* action, are entitled to a jury trial on the claims against them in that litigation. "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 494, 730 S.E.2d 328, 332 (Ct. App. 2012). All of the causes of action pleaded in the *Treon/Tucker* case—breach of fiduciary duty, civil conspiracy, fraudulent concealment, and professional negligence—are legal, and accordingly the defendants are entitled to trial by jury. In addition, the *Treon/Tucker* plaintiffs seek compensatory damages—a legal remedy.[10] *See* S.C. R. Civ. P. 38(a) ("Issues of fact in an action for the recovery of money only ... *must be tried by a jury*, unless a jury trial be waived." (emphasis added)).

Because there is no right to trial by jury in purely equitable actions, it has long been recognized that the constitutional entitlement to trial by jury mandates that "[i]f there are factual issues common to both the legal and equitable claims, the legal claim, absent the most imperative circumstances, must be tried ... first." *Gardner v. Travis*, 316 S.C. 315, 318, 450 S.E.2d 54, 56 (Ct. App. 1994) (internal quotation marks omitted); *see also C&S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986) (citing *Beacon Theatres v. Westover*, 359 U.S. 500 (1959)). This is so because some of the findings of fact made in the first action to be tried might be argued to have preclusive effect in the second. *See, e.g., Beall v. Doe*, 281 S.C. 363, 367-68, 315 S.E.2d 186, 188-89 (Ct. App. 1984).

[10] The complaint in the *Treon/Tucker* action also seeks disgorgement of fees, but counsel for the *Treon/Tucker* plaintiffs withdrew the claim for disgorgement during the class certification hearing. *See* Exhibit K, *supra* at p. 11.

Both the *Treon/Tucker* action and the Rule to Show Cause involve the same underlying allegations of fact. This commonality of facts is clearly illustrated in the *Tucker* Complaint: paragraphs 46 through 53 are labeled "Common Deficiencies Relating to Defendants' Conduct." Among those "common deficiencies" are allegations that the Appellants received $825,000 in attorneys' fees "that would be fully payable 'after the final dismissal of the' [-1377 original class action]." (*See Tucker* Complaint ¶ 50 (attached hereto as **Exhibit T**)). Similarly, Judge Hayes has made clear that the Rule to Show Cause revolves around the "attorney fees allegedly received by certain Class Counsels ... which were never disclosed to or approved by this Court." (*See* Rule to Show Cause p. 1 (Exhibit M)).

In the Rule to Show Cause, Judge Hayes will make factual findings regarding some of the same allegations that form the basis for the *Treon/Tucker* action. Given the numerous and fundamental mode of trial problems outlined above, those findings will come from a proceeding that is so procedurally deficient that they should have no fair place in *that* pro ceeding. Compounding the problem, however, is the fact that the plaintiffs in the *Treon/Tucker* action have a demonstrated history of attempting to impose preclusive doctrines upon the defendants in that case, based upon what had/has happened in the -1377 class action (*See* Motion for Class Certification, pp. 2-11, attached as **Exhibit U**)). It must be anticipated that they will make the same effort as it relates to any findings of fact that Judge Hayes issues in connection with his Order concerning the Rule to Show Cause. If the plaintiffs prevail in those arguments and any adverse findings of facts from the Rule to Show Cause are used in the *Treon/Tucker* action to establish liability against the defendants in that case, then the defendants (Appellants herein) will

be denied the right to a jury trial and, for that matter, to any fair trial at all. Under those circumstances, the Rule to Show Cause would not be the only victim of its mode of trial deficiencies, but it might also unfairly affect the mode of trial in the *Tucker/Treon* action. For all of these reasons, the Orders that are the subject of this Appeal are immediately appealable.

In similar circumstances, this Court has recognized that the legal action must be resolved before the equitable one (or in this case, the quasi-equitable one). *See Gardner v. Travis*, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994), *cert. dismissed*, 320 S.C. 60, 463 S.E.2d 94 (1995). *Gardner* was a foreclosure action in which the defendant homeowner pleaded legal counterclaims alleging that the notes and mortgages secured were void because they secured gambling debts. The circuit court recognized that Travis's claims were both legal and compulsory, *i.e.*, that he was entitled to a jury trial. The court severed the counterclaims from the foreclosure action and referred the latter to a master-in-equity. Without waiting for resolution of the counterclaims, the master proceeded with the foreclosure action. Based on his factual finding that the notes and mortgages did not secure gambling debts, the master ordered foreclosure to proceed.

On appeal, this Court reversed. The court recognized that Travis was entitled to trial by jury on his counterclaims and held that the master-in-equity had violated Travis's right to a jury trial by proceeding with the foreclosure action. *See id.* at 317-18, 450 S.E.2d at 56. The court vacated the master's order and remanded with explicit instructions that "all legal issues raised by Travis's compulsory counterclaims" must be resolved before the foreclosure action could proceed.

Here, Appellants are entitled to have a jury address the legal claims against them in the *Treon/Tucker* action *before* Judge Hayes makes any factual findings in the Rule to Show Cause that could be used by Plaintiffs' counsel in the *Treon/Tucker* case in an effort to unfairly/improperly set the mold for that action on issues that should – but would not – be the result of jury determination. .

CONCLUSION

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). The Editor's Notes to Rule 65, SCRCP, make clear that the "procedure" ostensibly used by Judge Hayes here, vis-à-vis the Appellants, is illusory: "An action ***may no longer be commenced by the service of an order or 'rule to show cause' only***" (emphasis supplied). When a trial court "shuts down" one case, in which the defendants are entitled to a jury trial, and *sua sponte* initiates a Rule to Show Cause, an old-fashioned means of acquiring jurisdiction over parties which no longer exists under the Rules of Civil Procedure, this Court has jurisdiction to immediately review the order. Absent an immediate appeal, the Appellants may forever lose their right to a jury trial on the very issue being decided in the Rule to Show Cause and will, under any circumstance, be denied a mode of trial that fairly and properly protects them in the defense of their property.

The only issue before this Court at this point is whether Judge Hayes's order is immediately appealable. Once this appeal is allowed to proceed, the parties will have the opportunity to argue about whether Judge Hayes erred in issuing the Rule.

Respectfully submitted this 14th day of August, 2013.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, II
Beaufort County
Trial Court Case No. 2002CP0701377

Appellate Case No. 2013-001367

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, Jane Treon, and 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

PROOF OF SERVICE

I certify that this 14th day of August, 2013, I have served the foregoing Return to Respondents' Motion to Dismiss via U.S. Mail, first class postage prepaid, on the following counsel:

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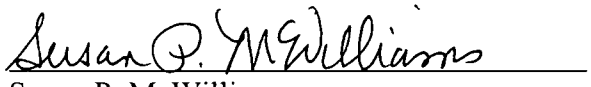

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