# EXHIBIT Q

STATE OF SOUTH CAROLINA )
) IN THE COURT OF COMMON PLEAS
) THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT ) CASE NO.: 2008-CP-07-3145
)
STEVEN TUCKER, JEANEEN )
TUCKER, CHARLES H. DAVIS, )
STEPHANIE H. DAVIS, individually and )
on behalf of others similarly situated in the )
State of South Carolina, )
)
Plaintiffs, )
)
vs. )
)
LEATH BOUCH & CRAWFORD, LLP, )
W. JEFFERSON LEATH, JR., WILLIAM )
DIXON ROBERTSON, III, MICHAEL S. )
SEEKINGS, FRANK E. GRIMBALL & )
MULLEN WYLIE, LLC FORMERLY )
MULLEN WYLIE & SEEKINGS, LLC, )
JOHN CARDAMONE, and his wife )
SALLY CARDAMONE, BENJAMIN T. )
CLARK and his wife DIANE M. CLARK, )
RAMONA GIANNI, NATHAN W. )
GORDON, )
Defendants. )
)
TIMOTHY J. TREON AND P. )
JENNINGS SCEARCE, individually and )
on behalf of others similarly situated in the )
State of South Carolina, )
)
Plaintiffs, )
vs. )
)
Dryvit Systems, Inc., John Cardamone and )
his wife, Sally Cardamone, Benjamin T. )
Clark and his wife Diane M. Clark, )
Ramona Gianni, Nathan W. Gordon, John )
Doe and Mary Roe, )
)
Defendants. )

**DEFENDANTS LEATH BOUCH & CRAWFORD, LLP, W. JEFFERSON LEATH, JR., AND MICHAEL S. SEEKINGS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR LIMITED RELIEF FROM ORDER STAYING CASE TO ARGUE MOTION TO COMPEL**



IN THE COURT OF COMMON PLEAS
THE FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2008-CP-07-0774

## Background and Argument

The Plaintiffs' filing of their Motion for Limited Relief From Order Staying Case to Argue Motion to Compel ("Motion") can, these LBC Defendants[1] submit, most fairly be described as audacious. It should be denied and sanctions should be entered.

## What are Plaintiffs asking to do?

(1) They seek to use this case as a vehicle to conduct discovery to be used in the 1377 Case,[2] despite the facts that: (a) this Court has entered an Order of Stay in this case that has prohibited these Defendants from pursuing any discovery;[3] (b) Plaintiffs' Counsel in this case are blatantly seeking to help Plaintiffs' Counsel in the 1377 Case circumvent the prohibition of discovery in *that* case by conducting their one-sided discovery from the LBC Defendants in *this* case; and (c) Plaintiffs' Counsel in this case have previously filed a (pre-stay) motion in this case arguing that the Defendants should not be allowed to do the very thing the Plaintiffs are now seeking to do.[4]

(2) They seek to actively involve this Court in their violation of Judge Dukes's prior Orders prohibiting Disqualified Counsel (Alford, Jonas, and Finn) and New Counsel (Pendarvis, et. al.) from "conferring or sharing information" except under limited circumstances that are not involved here.[5]

(3) They seek to further compound the unfairness of the two separate proceedings that are being directed against the LBC Defendants.

Defendants will address each of these issues in the order numbered above.

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[1] The LBC Defendants are collectively defined as Defendants Leath Bouch & Crawford, LLP, W. Jefferson Leath, Jr., and Michael S. Seekings.

[2] The "1377 Case" is defined as Civil Action No.: 2002-CP-07-1377, in the Court of Common Pleas, Fourteenth Judicial Circuit.

[3] See April 27, 2012 Order Denying Motions to Recuse and Temporarily Staying Matters ("Stay Order"), attached as Exhibit 1.

[4] See Plaintiffs' Motion to Quash, attached as Exhibit 2.

[5] See February 1, 2010 Order, attached as Exhibit 3 and March 16, 2010 Order, attached as Exhibit 4.

**(1) Plaintiffs seek to use this case as a vehicle to impermissibly conduct discovery to be used in the 1377 Case**

There is no subtly involved in the Plaintiffs' intentions and motives in seeking to lift this discovery stay. In their September 7, 2012, email to the Court, requesting an expedited hearing, Mr. Pendarvis said:

> The Motion for Limited Relief from the Order Staying Case also asks for an expedited hearing on this motion in light of the upcoming Rule to Show Cause. If the stay is lifted to allow this motion to be argued and assuming the motion to compel is successful, my clients intend to provide copies of the documents obtained to their lawyers in the Underlying #1377 case for use at the Rule to Show Cause hearing.[6]

That same intention is stated in the first section of their Memorandum in support of their motion:

> Plaintiffs intend to provide to their lawyers in the Underlying #1377 Case any and all documents this Court were to order the certain Original Class Counsel Defendants to produce pursuant to Plaintiffs' Motion to Compel so that those documents could be used in the Rule to Show Cause hearing.[7]

Plaintiffs' "heading" for the first point in their Memorandum casually states that "There is No Prejudice to Defendants." That erroneously assumes, of course, that one side being permitted to conduct discovery in a case while the other side is prohibited from doing so is *not* prejudicial.

The "no prejudice" assertion also disregards the compounding of the problems with Due Process that this Court, acting in its capacity as the Judge in the 1377 Case, has already recognized exist in that case. On July 18 and 19, 2012, the Court held a hearing in the 1377 Case on a variety of motions, including the LBC Defendants' Motion to Dismiss.[8] During that hearing the Court recognized that various Due Process protections, such as the right of both parties to

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[6] See September 7, 2012 email from Pendarvis to the Judge Hayes, attached as Exhibit 5.
[7] See Plaintiffs' Motion at p.3.

[8] See LBC Defendants' Motion to Dismiss filed in the 1377 Case, attached as Exhibit 6.

fully engage in the discovery process, would exist in this action, but would not be available in the 1377 Case.[9] On that point, the Court said:

> You see, in the other lawsuit that is being, the breach of fiduciary duties suit, the Court has a comfort level of knowing that proper due process will be followed, rules of procedure will be followed, that positions will be taken, and ..... discovery will be conducted according to established rules.[10]
> ....
>
> ...And, so, we have a process in the other, in the actual lawsuit. We have a process already established by the rules of procedure that they, that they can rely upon that [sic] that assures them they will be treated fairly.[11]

In the midst of that discussion, the Court expressed concern that the Respondents might feel that they were being brought before a "firing squad".[12] While he was referring at the time to the Original Class Representatives, the LBC Defendants would, of course, be entitled to the same Due Process protections as should be available to non-lawyer litigants.

After hearing those concerns, counsel for the plaintiffs in the 1377 Case attempted to place the Court's mind at ease by noting that they (the Plaintiffs) were not entitled to conduct any discovery in that case either (disregarding the fact that they had been conducting it for years). On that point, Mr. Phillips said:[13]

> It is the nature of a Rule to Show Cause proceeding is we put forward our prima facie case. The burden now shifts to them. There's, there's no limitation on what evidence they can put on.
>
> **I mean it's, it is -- <u>it's a hearing where the other side doesn't get to do any discovery.</u> So, I'm not sure if it's inherently unfair proceeding for them...**

[9] See Transcript of Record from hearings held on July 18 and 19, 2012, pgs. 84-86, attached hereto as Exhibit 7.
[10] Id. at pg. 84.
[11] Id. at pg. 85.
[12] Id.
[13] Id. at pg. 88. (emphasis added).

So, having pronounced the hearing as not necessarily being "inherently unfair" to the Defendants because it would be equally unfair to both sides as it relates to discovery, it appears that Plaintiffs' Counsel then enlisted Mr. Pendarvis to conduct his one-sided discovery for him through the use of *this* case. In taking up that charge and suggesting that it is proper to use *this* case to conduct discovery for *that* case, Plaintiffs' Counsel apparently forgot, or simply chose to disregard, the directly opposite position he took prior to the time the Stay Order was entered. On April 4, 2012, Mr. Pendarvis filed "Plaintiffs' Motion to Quash Subpoenas and Deposition Notice, or in the alternative, For Protective Order Limiting the Scope Defendants' Discovery," seeking to prevent certain discovery efforts that had been served in this case by LBC's Counsel.[14] In support of that motion, Mr. Pendarvis stated:

> Because Defendant's Subpoenas and deposition notices seek documents and information related to the Underlying Lawsuit in which the Court has provided with Notice of its intent to conduct a Rule to Show Cause hearing, any discovery information related to the Underlying Lawsuit should be made in the Underlying Lawsuit, under the supervision of the Court and not in the instant consolidated lawsuits." (emphasis added).[15]

The discovery that was the subject of that motion (which, incidentally involved issues in this case and not the 1377 Case) was never allowed to proceed because this Court entered the Stay Order a few weeks after Plaintiffs" motion was filed, staying all proceedings in this action. In that April 27, 2012 Stay Order, the Court stated:

> ...this Court does not wish to act in a manner from which one may improperly infer that decisions this Court must make in one case are being affected by decisions in the other. ..... The stay is effective immediately and will remain in place until this Court has issued its decision in the Rule to Show Cause.[16]

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[14] See Exhibit 2.
[15] Id. at pg. 3.
[16] See Exhibit 1 at pgs. 13-14.

It is incredible that under all the circumstances outlined above and that otherwise exist, Plaintiffs' Counsel would come back to this Court and ask it to set aside the Stay Order for Plaintiffs' unilateral benefit, so that they might use this case as one more tool to further slant the playing field against the Defendants.

**(2) Plaintiffs' seek to actively involve this Court in their violation of Judge Dukes's prior Orders prohibiting Disqualified Counsel (Alford, et. al.) and New Counsel (Pendarvis, et. al.) from "conferring or sharing information"**

On February 1, 2010, Judge Dukes issued an Order in this case disqualifying Gregg Alford and others from participating in this case. The last sentence of the Order provided:

> Moreover, Counsel [Mr. Alford, et. al.] is prohibited from conferring or sharing information with newly hired counsel, lest the conflict be imputed to them.[17]

On March 16, 2010, the Court entered Order Denying Plaintiffs' Motion to Reconsider, Alter or Amend Pursuant to SCRP Rules 59(e) and 60(b). This Order confirmed the Court's February 1, 2010 Order regarding the prohibition upon "conferring" or "sharing" information", but did provide certain limits on the type of information that could be shared between Plaintiffs' Disqualified Counsel and the New Counsel.[18] It is clear that conferring about discovery and sharing documents discovered in one case for use in the other are prohibited under either Order.

An email from Mr. Pendarvis sent after this Motion was filed demonstrates the continued disregard of Judge Dukes' Order.[19] On the evening of Wednesday, September 12, 2012, Mr. Pendarvis wrote LBC Defendants' Counsel, showing the "Subject" to be: "Tucker, st. al. v. Leath, Bouch, Crawford, et. al." Even though they have been disqualified from participation in this case, Mr. Pendarvis sent carbon copies of the email to Messers. Alford and Williams. In the body of the email, Mr. Pendarvis said, among other things, that "Gregg Alford advised recently that the

[17] See Exhibit 3, p. 15.
[18] See Exhibit 4, p.3.
[19] See Exhibit 8.

Class Representatives in the #1377 case long ago waived any privilege or protection," In that same email, Mr. Pendarvis says that "Yesterday Dawes Cooke advised that his clients, the Original Class Representatives, have agreed to waive any claims of client-lawyer privilege and work product protection with regard to the documents on the these privilege logs" (an assertion also made by Mr. Pendarvis in the pending Motion),[20] but no evidence has been produced of such a waiver and subsequent correspondence from Mr. Cooke indicates both statements to be incorrect.

Whether or not there has been, or might be, any waiver of any privilege by anyone, the legitimate questions are: (1) Why is Mr. Pendarvis - who has no role in the 1377 Case - "working" this case that has, by this Court's Order been "stayed (2) Why are Messers. Alford and Williams - who not only do not have a role in this case, but who have been disqualified from any involvement in it - being copied on whatever Mr. Pendarvis is doing? and (3) Why are Mr. Pendarvis and Messrs. Alford and Williams "conferring and sharing information" about these matters when they have been prohibited by an Order entered in this case from doing so?

Further compounding the incestuous nature of the relationships between the various Plaintiffs' lawyers in each of these cases, Mr. Pendarvis announces in Section 4 of this Memorandum in support of this Motion, that:

> Plaintiffs...have no objections whatsoever if this Motion to Compel is argued by counsel in the Underlying #1377 Case leaving in place the stay imposed by the Order dated April 27, 2012.[21]

So, the alternative remedy Plaintiffs' Counsel promotes to circumvent the Stay in *this* case is to allow their counterparts in *that* case to argue the motion that was filed in *this* case in that case, as though it had been filed in *that* case. Interestingly, as it relates to the "no conferring

[20] See Motion at p. 13.
[21] See Motion, p. 13.

and sharing information" Order, the only condition Mr. Pendarvis puts on that consent is that anything Counsel in the 1377 Case get from *that* case, must be shared with him for use in *this* case.[22]

The restrictions in Judge Dukes' Order were not complex: "Counsel is prohibited from conferring or sharing information with newly hired counsel, lest the conflict be imputed to them.". These various lawyers should be following those instructions, rather than seeking this Court's involvement in the violation of them.

**(3) Plaintiffs seek to further compound the unfairness of the two separate proceedings that are being directed against these Defendants.**

At the hearing on the Motion for Class Certification held in this case. LBC Defendants' Counsel was told by this Court, at the conclusion of his argument, that:

> 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.***[23]

The next day, LBC's Counsel felt compelled to ask the Court to recuse himself, which request was followed by a written motion. That Motion was supported by numerous references to the record in the 1377 Case that the LBC Defendants contended (and still contend) demonstrate this Court's inability to be impartial in this case.[24] Instead of granting the Motion and letting the case be heard by a Judge and jury who would be new to the issues and could hear and consider them without any preconceptions, this Court denied the motion and simultaneously entered the "stay" which Plaintiffs now seek to "lift" for the unilateral benefit of their counterparts in the 1377 Case. Even more problematic than the denial of the Motion to Recuse, the Court's Rule to

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[22] Id.

[23] See July 21 and 22, 2011, class certification hearing transcript at pgs. 136, ln. 21 through p. 138, ln. 4, attached as Exhibit 9.

[24] See Motion in Support of Defendants Leath Bouch & Crawford, LLP, W. Jefferson Leath, Jr., and Michael S. Seekings' Motion to Recuse, attached as Exhibit 10.

Show Cause Order in the 1377 Case[25] seeks to place the Defendants in a proceeding that is far more unfair than this case. 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,[26] 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
5. Their fate will be decided at a proceeding that has no established rules,[27] other than the fact they cannot conduct any discovery to help them defend against the forfeiture being sought.

These "lack of fairness" issues are in addition to the other fundamental objections the LBC Defendants have made to the jurisdiction, service, venue and other issues raised in the Motion to Dismiss, they have filed in that case.

At the July, 2012 hearing in the 1377 Case on the various Motions to Dismiss, Mr. Bruner suggested that the entire case be returned here (to this case) for resolution, so that

[25] See Rule to Show Cause, attached as Exhibit 11.
[26] See Ex. 7, pgs. 179-200.
[27] Id.

whatever Due Process is available here might go to some useful purpose. As the Court was rejecting that proposal, LBC's undersigned counsel noted:

> Mr. Bruner has made a suggestion that we take it back and go to one forum where the due process is all heard in one place, and I will tell you, as -- to have you be the judge, jury and executioner in a case is not gonna relieve my concerns about your ability to be fair.[28]

It is against that backdrop that Plaintiffs' Counsel in the 1377 Case seek to now utilize Plaintiffs' Counsel in this case to further slant the field against these Defendants in *that* case by conducting unilateral discovery in *this* case. For what seem to these Defendants to be obvious reasons, that effort should be rejected by this Court.

Beyond the unfairness of the discovery effort being sought in this particular situation, the boldness with which the two sets of Plaintiffs' Counsel have each proceeded (sometimes alone and sometimes, such as here, together) further adds to the concerns of the LBC Defendants that the playing field is tilted badly and improperly against them. Two examples will serve to demonstrate their concern.

In the 1377 Case, one of the attorneys for the "Original Class Representatives" wrote Mr. Alford concerning the issue of disqualification as it related to that case.[29] The email was written in a most professional way and did not include a copy to the Court, because the effort was to resolve any dispute without unnecessarily burdening the Court. The "COME ON MAN" response, which speaks for itself,[30] was unnecessarily copied to the Court. Without regard to the merits of the issues being discussed, the fact that Mr. Alford would feel sufficiently comfortable addressing opposing counsel in the way he did, and go out of his way to include the Court in the communication, is a matter of concern to these Defendants.

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[28] Id. at p. 137
[29] See Exhibit 12 (June 21, 2012 email from Mr. Jay Jones to Mr. Gregory Alford.).
[30] Id. (June 22, 2012 email from Mr. Gregory Alford to Mr. Jay Jones).

Similarly, in this case, the Court issued a Form 4 Order regarding certification of the class,[31] and directed Plaintiffs' counsel (Mr. Pendarvis) to prepare a final order based upon the Court's specific instructions regarding how to define the class to be certified. In response, Mr. Pendarvis sent correspondence that stated the class should be defined in a different and broader way, and without requesting the ability or right to alter the Court's direction.[32] He then presented a proposed Order that defined the Class the way he (Pendarvis) thought it should be defined, rather than the way he was directed to define it by this Court. Again, the air of confidence with which that action was undertaken is problematic as these Defendants consider the levelness of the field.

**Conclusion**

The current Motion to Lift the Stay - so that one side of the case can conduct discovery while the other cannot - epitomizes the concern that these Defendants have with the unfairness of these proceedings. At the very least, the Motion should be denied. Additionally, the Court should award these Defendants their fees and costs for responding.

Respectfully submitted,

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[31] See Form 4 Order, attached as Exhibit 13.
[32] See April 13, 2012, correspondence from Mr. Pendarvis to Judge Hayes (with proposed order), attached as Exhibit 14.

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| STATE OF SOUTH CAROLINA | ) IN THE COURT OF COMMON PLEAS |
| | ) THE FOURTEENTH JUDICIAL CIRCUIT |
| COUNTY OF BEAUFORT | ) CASE NO.: 2008-CP-07-3145 |
| | ) |
| STEVE TUCKER, JEANEEN TUCKER, et al | ) **CERTIFICATE OF SERVICE** |
| Plaintiffs, | ) |
| vs. | ) |
| LEATH BOUCH & CRAWFORD, LLP, et al | ) |
| Defendants. | ) |
| TIMOTHY TREON, et al | ) IN THE COURT OF COMMON PLEAS |
| | ) THE FOURTEENTH JUDICIAL CIRCUIT |
| Plaintiffs, | ) CASE NO.: 2008-CP-07-0774 |
| vs. | ) |
| DRYVIT SYSTEMS, INC., et al | ) |
| Defendants. | ) |



I hereby certify that I have this day served a copy of the within and foregoing **Memorandum in Opposition to Plaintiffs' Motion For Limited Relief From Order Staying Case To Argue Motion To Compel** to upon all parties to this matter via email addressed to counsel of record as follows:

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This 14 day of September, 2012.