

EXHIBIT R

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

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.)

IN THE COURT OF COMMON PLEAS)
THE FOURTEENTH JUDICIAL CIRCUIT)
CASE NO.: 2008-CP-07-3145)

**DEFENDANTS' SUPPLEMENTAL
MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR LIMITED
RELIEF FROM ORDER STAYING CASE
TO ARGUE MOTION TO COMPEL**

CLERK OF COURT
BEAUFORT COUNTY, S.C.
SEP 24 4 46 PM '08

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

CLERK OF COURT
BEAUFORT COUNTY, S.C.
SEP 24 4 46 PM '08



One week ago, these LBC Defendants¹ filed a Memorandum in Opposition to Plaintiffs' Motion to Lift Stay², which opposed Plaintiffs' effort to conduct unilateral discovery for the benefit of the Plaintiffs in the 1377 Case.³ Since that time, the LBC Defendants have received additional correspondence from Plaintiffs' Counsel in the 1377 Case that highlights the additional unfairness that would result from granting Plaintiffs' Motion in this case. For those reasons, the LBC Defendants will supplement their initial Memorandum.

The day after serving their Memorandum, LBC's Counsel and the Court received an email from Mr. Gregory Alford.⁴ Mr. Alford's email responded to Defendants Benjamin and Diane Clark's attorney's (Mr. Jay Jones) request to allow the testimony of his clients be given in the 1377 Case by video, as the result of a scheduling conflict.⁵ On Sunday, September 16, 2012, Mr. Alford took issue with Mr. Jones' belief that Mr. Alford had been disqualified from participating in that deposition, when he stated:

So you have once again made a misstatement of fact. Kind of like your clients [sic] settlement documents that you could not locate but magically appeared when you needed them.⁶

Two days later, the LBC Defendants' counsel and the Court received an email, which is dated September 17, 2012, from Mr. Thomas E. Williams – who for no stated or apparent reason – interjected the following comment after Mr. Jones had provided the Court with the Clarks' travel itinerary, showing they would be out of the country during the week of October 1st:

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

² Hereinafter referred to as "Memorandum."

³ The "1377 Case" is defined as Civil Action No.: 2002-CP-07-1377, in the Court of Common Pleas, Fourteenth Judicial Circuit.

⁴ See September 13, 2012 email from Jay Jones to Judge Hayes, which includes the email from Gregg Alford, attached as Exhibit A.

⁵ *Id.*

⁶ *Id.*

What a coincidence, Judge Hayes issues his ruling on June 7, 2012 and the Clarks make plans to be out of country during the exact week of the hearing.⁷

On September 11 and 19, 2012, LBC Defendant's Counsel received letters from Mr. Alford enclosing various documents that he advised the Plaintiffs would or might use in the upcoming Rule to Show Cause Hearing ("RTSC").⁸ The documents that were included are listed on the attached Exhibit D.⁹ As noteworthy as what was included, was what was not included. For the purposes of this Memorandum, however, one of the included documents will be highlighted.

Attached as Exhibit E is a document that purports to be a letter from Dryvit's General Counsel, Mr. Kenneth Nota, to Mr. Alford (as attorney for the Plaintiffs in the 1377 Case).¹⁰ Without attempting to analyze what relation, if any, that letter bears to the RTSC, the letter exemplifies the problems created by the manner in which the forfeiture action against the LBC Defendants has proceeded:

1. Initially, the forfeiture claims now being pursued in the RTSC were asserted against these Defendants in this action.

2. At the hearing on the Motion for Class Certification held in this case on July 21 and 22, 2011, and after LBC's Counsel had presented a vigorous opposition to Plaintiffs' Motion, the Court said:

THE COURT:---but what I'm having a difficulty separating from, sir, is the fact that there was a class action litigation taking 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.

⁷ See September 17, 2012 email from Thomas E. Williams, attached as Exhibit B.

⁸ See September 11 and 19, 2012 correspondence from Gregg Alford, attached as Exhibit C.

⁹ See Exhibit D. In addition, Gregg Alford provided these documents without a list, so the list, as attached, was prepared by the LBC Defendants' office.

¹⁰ See Exhibit E.

There are class representatives that are named in this litigation that received settlements that on their face seem to be extremely favorable to them. 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 representatives, 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 of 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.¹¹

3. The morning after the Court's comments (as quoted above), the Plaintiffs in this case began the proceedings by announcing their withdrawal of the forfeiture claims.¹² That withdrawal was followed by a formal dismissal of those claims.¹³

4. That same morning, and as a result of the Court's comments, the LBC Defendants requested the Court to recuse himself.¹⁴ That request was also followed by a formal Motion to Recuse.¹⁵

5. While the Motion for Recuse was pending, the Court issued a Form 4 Order, indicating he would certify a Class utilizing a definition outlined in that Order,¹⁶ but to date the Court has not issued any follow up Order.

¹¹ See Memorandum, Exhibit 9.

¹² See Hearing Transcript from July 21-22 2011 hearing, attached as Exhibit F.

¹³ See Plaintiffs' Dismissal of Claim for Disgorgement, attached as Exhibit G.

¹⁴ See Hearing Transcript, attached as Exhibit H, pgs. 178-188.

¹⁵ See Memorandum, Exhibit 10.

¹⁶ See Memorandum, Exhibit 13.

6. After receipt of the Form 4 Order, the various Defendants in this case (including the LBC Defendants) attempted to conduct discovery in this case, including obtaining discovery from Mr. Alford. On April 4, 2012, that discovery was opposed by the Plaintiffs in this case.¹⁷ On April 11, 2012 the Plaintiffs' resistance to the discovery was informally supported by this Court.¹⁸ On April 27, 2012, that and all other discovery efforts were put to an end by this Court's entry of the Stay Order in this case.¹⁹

7. On June 1, 2012, and notwithstanding the fact that the 1377 Case had been dismissed with prejudice by an Order of this Court (acting as Judge in that case) entered on June 5, 2010, a Rule to Show Cause was entered in the 1377 Case, seeking to require the LBC Defendants to carry the burden of proving to this Court, sitting as judge and jury in that case, why he should not Order the forfeiture of money that had previously been the subject of Plaintiffs' claims in this case.²⁰

8. The LBC Defendants, appearing through special appearance in the 1377 Case, filed a Motion to Dismiss the RTSC, contesting the proceedings on a variety of substantive and procedural grounds.²¹ A two day hearing was heard on those motions on July 18 and 19, 2012.

9. On August 31, 2012, this Court (acting as Judge in the 1377 Case) sent the following email²² to the attorneys who had been involved in the hearing, as well as the Plaintiffs' Counsel in this case (who have no role in that case):

The court requests that Mr. Phillips prepare an order denying the motions to dismiss/quash the Rule to Show Cause for lack of personal jurisdiction and subject matter jurisdiction filed by former class counsel and former class representatives.

¹⁷ See Memorandum, Exhibit 2.

¹⁸ See Order Denying Motions to Recuse and Temporarily Staying Matters, attached as Exhibit I.

¹⁹ See Memorandum, Exhibit 1.

²⁰ See Memorandum, Exhibit 11.

²¹ See Memorandum, Exhibit 6.

²² See August 31, 2012 email from The Honorable Mark Hayes, attached as Exhibit J.

As to Judge Dukes orders related to disqualification of counsel, the Court does not read his orders as extending to disqualification of class counsel doing work in 1377. Nevertheless, in the order direct that work related to former class representatives be handle by Mr. Phillips and/or lawyers who were not lawyers associated with the collateral professional malpractice suit.

10. On September 4, 2012, in responses to the Court's request for a phone conference in the 1377 Case, Counsel for the LBC Defendants responded via email,²³ as follows:

We have made a special appearance in this action, and do not feel we should participate in any other hearing until an Order has been issued dealing with all outstanding motions. If that can't be done before Friday, then we would ask that the phone conference be postponed until an Order has been signed and served.

Additionally, we request that all proceedings or conferences of any type in this case be officially reported and made a part of the record of the case. Please let me know if I need to make that request more formally.

11. On September 5, 2012, the Court responded to that email, with an email²⁴, stating:

I am in Gaffney this week doing criminal court. We started with a docket yesterday of 151 defendants plus probation cases and motions. As of this email, we have done 29 pleas, over 10 probation revocation cases and numerous bond hearing. The solicitor's office has graciously given me Friday afternoon for our conference.

If we need to have the conference recorded, then you all will need to travel to Gaffney and I suggest we plan on starting at 2:00.

²³ See September 4, 2012 email from Kent T. Stair, attached as Exhibit K.

²⁴ See September 5, 2012 email from The Honorable Mark Hayes, attached as Exhibit L.

12. The efforts of LBC Counsel to assure that all conferences and other proceedings associated with the 1377 Case be on the record are chronicled in the series of emails attached as Exhibit M.

13. Despite a series of representations²⁵ that a more formal Order denying the Defendants' Motions to Dismiss would be forthcoming in the 1377 Case, no such Order has prepared or entered. The Court and Plaintiffs' Counsel in the 1377 Case have, however, proceeded on the apparent basis that the motions have been denied and the RTSC hearing is proceeding forward.²⁶

14. Focusing on the letter from Mr. Nota to Mr. Alford, that Plaintiffs Counsel in the 1377 case have indicated they will or might use at the hearing:

- The LBC Defendants do not know how that letter might be relevant to that proceeding and they have no right to conduct any discovery in that case to assist them in determining such a thing.
- The author of the letter is from out-of-state and the LBC Defendants have no ability to compel his testimony, by discovery deposition or by subpoena for the hearing.
- The recipient of that letter is one of the attorneys for the Plaintiffs and he cannot be compelled to give a discovery deposition in that case and efforts to depose him in this case were rebuffed before a Stay put an end to all discovery whatsoever in either case.
- For the reasons just stated, the LBC Defendants are not currently able to discover and further show (beyond the letter itself) why Mr. Alford should be disqualified

²⁵ See September 6, 2012 email from Robert B. (Sam) Phillips, attached as Exhibit N.

²⁶ See September 19, 2012 letter from Gregg Alford, attached as Exhibit O.

from his role as prosecutor in the 1377 Case, in favor of his apparent role as witness, although it appears that Mr. Alford should be able to make that determination on this own.²⁷

- In short, the rights of discovery and to compel testimony that would have been available to the LBC Defendants concerning that letter - had the forfeiture claims remained in this case - have now been taken from these Defendants.

The issues associated with the emails and letter discussed above, are demonstrative of the overall problems with the fundamental unfairness that permeates the forfeiture proceedings directed against the LBC Defendants. 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).

²⁷ The December 5, 2005 transcript produced by Plaintiffs (as a part of the "might be used" package) contains other information that demonstrates why Tom Williams should also be disqualified as a result of his status as a witness. On page 15, line 18 through page 19, line 25 of the transcript (See Exhibit P), George Mullen is explaining to this Court the purpose behind filing of the 1377 Case and how it differed from the strategy that had been expressed by Mr. Williams to Mr. Grimboll before the hearing that was then underway. If given the opportunity for discovery, the LBC Defendants would explore those differences of approach and Mr. Williams' factual knowledge of such things. Even without the right to discovery, it is apparent that Mr. Williams is a witness to what had or had not occurred. (*Id.*)

Similarly, for the reasons highlighted by the statements he made at the recent hearing in the 1377 Case, Mr. Phillips should be disqualified from his role as "prosecutor". As indicated at the hearing, he was "there" in Posey and was "there" with the Creasys and his contribution to the RTSC should be as a witness and not as a "prosecutor." (See Hearing Transcript from July 21 and 22 2012, attached as Exhibit Q)

Again, the activities of Mr. Phillips, like those of Messrs. Williams and Alford, that predated their involvement as counsel of record in the 1377 Case make them witnesses in the RTSC. One of the many problems with that proceeding is, of course, that there is no discovery permitted in that case. Moreover, the discovery in this case has been "stayed", so the LBC Defendants have been prohibited from pursuing these issues as they should be permitted to do.

- 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.

When, however, the forfeiture claims were summarily removed from this case²⁸ 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,²⁹ that will be known and understood by all parties, and that would insure their constitutional rights;

²⁸See Exhibit G.

²⁹See Hearing Transcript from July 21 and 22, 2012 attached as Exhibit R.

- 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.

It is in the context of this gross imbalance of justice that the Plaintiffs in this case seek to aid the Plaintiffs in the 1377 Case by conducting unilateral discovery in this case for their use in 1377 Case. Clearly, that effort must be denied by the denial of Plaintiffs' Motion to Lift Stay.

Respectfully submitted,

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STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) THE FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2008-CP-07-3145

COUNTY OF BEAUFORT

STEVE TUCKER, JEANEEN TUCKER, et al

Plaintiffs,

vs.

LEATH BOUCH & CRAWFORD, LLP, et al

Defendants.

TIMOTHY TREON, et al

Plaintiffs,

vs.

DRYVIT SYSTEMS, INC., et al

Defendants.

CERTIFICATE OF SERVICE

12 SEP 24 PM 1:46
BEAUFORT COUNTY, S.C.
CLERK OF COURT

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

I hereby certify that I have this day served a copy of the within and foregoing **SUPPLEMENTAL MEMORANDUM** to upon all parties to this matter via email addressed to counsel of record as follows:

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This 21st day of September, 2012.

Amy R. Wasole