

EXHIBIT S

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

2008-CP-07-0774)

Timothy Treon and P. Jennings Searce,)
individually and on behalf of others)
similarly situated in the State of South)
Carolina,)

Plaintiffs,)

v.)

John Cardamone)
and his wife, Sally Cardamone; Benjamin)
T. Clark and his wife, Diane M. Clark;)
Ramona Gianni; Nathan W. Gordon; and)
John Doe and Mary Roe,)

Defendants.)

2008-CP-07-3145)

Steven and Jeaneen Tucker, Charles and)
Stephanie Davis, Timothy and Janie P.)
Treon, P. Jennings Searce and John Doe)
and Jane Doe individually and on behalf)
of others similarly situated in the State of)
South Carolina,)

Plaintiffs,)

vs.)

Leath, Bouche & Crawford, LLP,)
W. Jefferson Leath, Jr., William Dixon)
Robertson, III, Michael S. Seekings,)
Frank Grimball & Mullen Wylie, LLC,)
formerly Mullen, Wylie & Seekings, LLC,)
William M. Bowen, John Cardamone and)
his wife, Sally Cardamone, Benjamin T.)
Clarke and his wife, Diane M. Clark,)

Defendants.)

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2008-CP-07-0774
2008-CP-07-3145

13 APR -6 PM 3:38
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

ORDER
LIFTING TEMPORARY STAY
AND
RECUSAL

EXHIBIT
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THE PRESENT MOTION

These cases¹ are presently before the court on the Plaintiff's Motion for Limited Relief from Order Staying Case to Argue Motion to Compel². As part of their motion, the plaintiffs seek to have this Court partially lift a temporary stay of the prosecution of the Treon II cases. The stay of Treon II was issued in an effort to preserve the integrity of the adjudicatory process of Treon I and Treon II by creating an objective barrier between the undersigned's work in the cases. The stay was to have been only for a short duration. It was set to be ended once the undersigned issued a decision in the Treon I Rule to Show Cause.

The plaintiff seeks to reopen Treon II so that it can determine whether a claim of attorney-client privilege made by the Treon II defendants was improper and, if so, order documents produced for use in the prosecution of the Treon I Rule to Show hearing.³ Plaintiffs believe the information being withheld is relevant to the issues in the Rule to Show Cause and therefore the motion must be heard prior to conducting the Rule to Show Cause Hearing.

¹ These two cases present legal malpractice claims (2008-CP-07-3145) and breach of fiduciary duties claims (2008-CP-07-0774). The defendants in these cases had previously served as class counsel and class representatives in an underlying residential stucco products liability class action lawsuit (2002-CP-07-1377). The underlying products liability class action will hereinafter be referred to as "Treon I". The present malpractice and breach of fiduciary duties actions will be hereinafter referred to as "Treon II".

² In the underlying Motion to Compel, the plaintiffs seek access to 117 documents withheld by defendants Leath, Bouche, & Crawford, LLP; W. Jefferson Leath, Jr., and Michael S. Seekings (collectively "LBC Defendants".) and 19 documents withheld by defendant William Dixon Robertson, III ("Robertson"). As part of the present motion, a list of privilege logs defects were presented. Very few of the 126 documents sought by the plaintiffs do not involve a claim of attorney-client privilege inclusive of the crime-fraud-tort exception.

³ The Treon I Rule to Show Cause seeks, in part, to require former Treon I class counsel and former Treon I class representatives (Treon II defendants) to appear and explain certain allegation of misconduct related to the performance of their duties while serving in their official capacity as Treon I's class representative and Treon I's class counsel. The allegations include the non-court approved payment of hundreds of thousands of dollars in attorney fees to prior class counsel and the payment of bonuses to prior class representatives in exchange for settling their individual claims.



The Treon II defendants oppose the relief sought in present motion. Part of the argument in opposition to the present Treon II motion includes the assertion that Treon II plaintiff's counsel is attempting to wrongfully aid Treon I counsel in violation of previous Treon II orders that regulated the sharing of information between the attorneys in Treon I and Treon II.⁴

After careful review and consideration, the court is of the opinion that an inescapable conflict has arisen between the duties he must perform in Treon I and those he is being presently asked to perform in Treon II. After considering the limited possible means of remediation⁵, the court's most difficult opinion is that the best interest of the present Treon II litigants and its potential class, and in the best interest of the Treon I litigants and its class, is

⁴ After Treon II was removed to federal court and then remanded back to state court jurisdiction, by Order dated January 12, 2010 of the Honorable Marvin Dukes, Presiding Judge of the Fourteenth Judicial Circuit, found one of the plaintiff's attorneys had a conflict of interest and imputed that conflict to all the other plaintiffs' attorneys resulting in total disqualification of the attorneys who filed the present actions. In his original order, he also held that "Counsel is prohibited from conferring or sharing any information with newly hired counsel." In a subsequent order, wherein he denied the motion to reconsider his ruling, Judge Dukes clarified his restrictions on the disqualified counsel, prohibiting disqualified counsel from sharing information with any newly hired attorneys. He added that:

[N]ewly hired counsel shall have the right to move this court to allow newly hired counsel to receive additional information from Counsel if newly hired counsel deems the receipt of such information necessary for newly hired counsel to protect the client's interest in this case.

See, Order dated March 16, 2010, Denying Plaintiffs' Motion to Reconsider

In another subsequent order further clarifying his ruling, the undersigned is informed that the disqualification of the attorneys in Treon II did not extend to disqualify the attorneys from continuing to serve as class counsel in Treon I.

After filing a Notice of Appearance on March 30, 2010, newly hired counsel also faced a motion to disqualify. By order dated May 11, 2010, Judge Dukes denied the motion to disqualify present Treon II counsel.

⁵ The Court considered the possibility, pursuant to SCRPC Rule 53(b), of referring the present Treon II motion to a master or special referee. Given the protracted history of Treon I and of these two cases, and the court's opinion that it cannot now reasonably anticipate with any degree of certainty when the Treon I Rule to Show Cause will conclude, the court's opinion is that referring the present motion would not lead to a more efficient and expedited resolution of the cases. As is discussed herein, the undersigned's belief is that he must conclude the Treon I Rule to Show Cause before hearing other matters in Treon II. If at some future date after the Treon I Rule to Show Cause is concluded, the appropriate authority wishes to reassign Treon II to the undersigned, the undersigned could not object to the assignment since the present conflict would no longer exist.



better served by the undersigned recusing himself, at the present time, from the Treon II cases.

In order that the present Treon II Motion to Compel can be heard and the Treon II cases proceed without further delay due to the pending Treon I Rule to Show Cause, the provisions of the May 2, 2012 Order issued by the undersigned, which temporarily stayed the Treon II cases, are hereby lifted and withdrawn.

The undersigned respectfully requests that the Beaufort County Clerk of Court present this Order to the Chief Administrative Judge for the Fourteenth Judicial Circuit so that the Treon II case may be reassigned, at this time, to another judge.

PROCEDURAL BACKGROUND

On August 31, 2006, the Chief Justice assigned the undersigned as the circuit judge with exclusive jurisdiction over Treon I. Subsequently, the undersigned conducted numerous hearings in Treon I and a voluminous record has been made of these proceedings.

As part of the work performed in Treon I, the undersigned was requested to issue a Rule to Show Cause to require former class counsel (defendants in Treon II) to appear and answer allegations of misconduct in the performance of their duties in Treon I. At the time of the original request, the undersigned did not issue the Rule to Show Cause but rather believed prosecution of the underlying product's liability class action should occur prior to addressing the collateral allegation of misconduct. After numerous other hearings, settlement of the class action litigation occurred. Subsequent to the final settlement hearing, the parties to Treon I implemented an extensive claims process whereby certain qualifying homeowners



in South Carolina were able to receive compensation for having the defective product on their homes.⁶

While Treon I was being prosecuted by class counsel, some of Treon I's class counsel instituted the present Treon II cases. In both of the present Treon II cases, class certification is sought.

By Order dated August 10, 2010, the Chief Administrative Judge of the Fourteenth Judicial Circuit assigned the Treon II cases to the undersigned. At the request of Treon II defense counsel, discovery was limited to the issue of class certification. Memorandums and briefs from all parties were submitted on the issue of class certification and arguments were presented. On the second day of argument, defense counsel made an oral motion for the undersigned to recuse himself based upon some comments made by the undersigned during the prior day's arguments. It was asserted that these comments reflected a bias or prejudice arising from the undersigned's service in Treon I that wrongfully compromised the undersigned's ability to serve impartially in Treon II. After denying the oral motion, the court allowed the parties to submit briefs on the issue of recusal. After receiving the briefs and researching the issue, an order formally denying the recusal motion was issued on May 2, 2012.⁷

⁶ Even though the settlement plan was approved by the Court and in spite of the fact that contained in the settlement plan itself was a provision for a Special Referee to resolve disputes, the undersigned continued to conduct hearings to resolve disputes concerning implementation of the settlement.

⁷ As part of the analysis, the Court examined the factual basis asserted for the motion, SCACR Rule 501 Canon 3(E)(1), and the numerous decisional authorities. As indicated in the order, the burden which the moving party must meet to succeed with a motion to recuse requires (1) that the bias or prejudice requiring a judge to recuse must stem from an extra-judicial source and (2) result in a decision based on information other than what the judge learned from his participation in a case as a judge; i.e, the alleged bias must be personal, as distinguished from judicial, in nature. This Court ruled that the movants failed on both elements and therefore the motions could not be granted.

In the prior order, the Court also examined the more expansive duties of a trial judge in class action cases. The SCRCR Rule 23 expressed obligations of approving class settlements and dismissals of class actions were noted as well as a fiduciary obligation which some other courts have recognized that a class

After being informed that the formal mediation of a global settlement of Treon I and Treon II had not been successful and after considering the SCRCRCP Rule 23 obligations owed to both the Treon I class litigation and the Treon II potential class litigation, the undersigned stayed the Treon II case until after completion of the Treon I Rule to Show Cause. As previously noted, the temporary stay of Treon II was an attempt to create an objective barrier between Treon I and II and the undersigned's role in the two cases. The undersigned felt the better approach was to proceed with an expedited Treon I Rule to Show Cause hearing, thus concluding the last remaining aspect of Treon I. The undersigned believed conducting the Rule to Show Cause hearing first would cause only a comparatively short delay in Treon II. The undersigned also felt the delay in Treon II would not be overly burdensome.⁸

The Rule to Show Cause in Treon I was issued and a date was set for the hearing for the week of October 1, 2012. Preliminary issues were briefed and a hearing conducted on July 18 and 19, 2012. On August 31, 2012, the parties were notified by email of the court's pending decision concerning the preliminary issues and the preparation of a formal order was requested.

action judge owes to those unknown class members whose rights are being affected by his/her decisions. See Note 1, p 2 Order Denying Motion to Recuse and Temporarily Staying Matters, dated May 2, 2012. The defendants' attorneys and the Court both recognize the "unique" situation which the undersigned is placed in by being the judge in the present matters and the underlying products liability class action. Id p 10. The undersigned's opinion was that it would not be a fair exercise of its discretion to abandon his Rule 501, Canon 3.B(1) Duty to Hear the Present matters when the Canons do not suggest, and no decisional authority was presented to the Court that suggests, recusal is mandatory when a judge's impartiality is being questioned due to information he gained in his prior service as a judge in a related case. Id. P 8 and footnote 8. The undersigned went on to note that while he did not believe the defendants were entitled to have their motions granted, he also wished to ensure an efficient use of judicial recourse that promotes confidence in the performance of its Rule 23 obligations under the unique circumstances of being assigned the judge in the underlying class and in the present matters.

⁸ *Id.* pp 11-14. Since the undersigned is removing himself from being presently involved in the Treon II cases, the need for the previously issued stay of Treon II cases no longer exist and therefore the stay is hereby withdrawn with the issuance of the present order.



On September 27, 2012, an appeal was filed of the undersigned's earlier email requesting a formal order be proposed. As a result of the filing of the notice of appeal, previously scheduled *de bene esse* of certain parties were cancelled. On September 28, the undersigned filed a formal order which was subsequently appealed by way of an amended notice of appeal dated October 1, 2012. By order filed December 3, 2012, the appeal was dismissed without prejudice by the Court of Appeals.⁹

THE CONFLICT

The conflict that requires the undersigned to now recuse himself from the Treon II case arises from the competing duties this court owes to the class in Treon I and potential class in Treon II. Additionally, the temporary stay of Treon II, which was meant as an effort to preserve the integrity of the adjudicatory process, is now unnecessarily a hindrance to the process. The undersigned continues to believe the integrity of the adjudicatory process is preserved by the undersigned refraining from ruling on any Treon II matter until after the Treon I Rule to Show is conducted. However, the present motion and the further prosecution of Treon II should no longer be delayed simply based upon the Rule to Show Cause not being concluded.

With any case assigned to a particular judge, the judge has a duty to dispose of the matter promptly, efficiently, and fairly. SCACR Rule 501Canon 3(8). In carrying out this duty, a judge must demonstrate due regards for the rights of all parties to be heard and issues

⁹ By correspondence from Treon II defense counsel, the undersigned was made aware of the filing of a motion for reconsideration of the Court of Appeals December 3, 2012 Treon I order, and that the undersigned should anticipate the Court of Appeals submitting a remittitur back to the circuit court. The undersigned was provided a copy of a correspondence dated March 20, 2013 addressed to the Beaufort County Clerk of Court that informed her of the Court of Appeals Remitter back to the circuit court. Delays due to these types of challenges were not contemplated when the Treon II temporary stay was initially issued. As a result, the undersigned cannot, with any degree of certainty, determine when the Treon I Rule to Show Cause will be ruled upon. An open ended stay of Treon II is not justified.



resolved without unnecessary cost or delay. A judge should also monitor and supervise a case so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary cost.¹⁰

These are general duties owed by a judge to any case assigned to him or her. These are duties which are being unfulfilled in Treon II by the decision that the Treon I Rule to Show Cause must be decided prior to making further decisions in Treon II.

In class action litigations, the duties imposed upon a judge go beyond the mere general duties of fairly and efficiently administrating justice. Those general duties are always important, but in class action litigation the judge's duty is more important and unique.¹¹ It has been observed that the high stakes of the litigation heighten the judge's responsibility, and what more, a judge cannot rely exclusively on adversaries to shape the issues that a judge must resolve in the class context.¹² Some courts have gone so far as characterizing the judge's role in the settlement phase of a class suit as a "fiduciary of the class" and to impose "the high duty of care that the law requires of fiduciaries."¹³ Even though these are duties the undersigned is attempting to perform in both cases; the sole and exclusive essence of the undersigned's remaining duties in Treon I are paramount. In the Rule to Show Cause the

¹⁰ A judge should also act as a facilitator to seek settlement. Even though the undersigned has been advised that a global settlement of Treon I and II has not occurred, the undersigned's opinion is unchanged that such a settlement is possible and the undersigned remains available to the parties to be such a facilitator.

¹¹ Barbara J. Rothstein and Thomas E. Willging, authors of Managing Class Action Litigation: A Pocket Guide for Judges, have written on the judge's role, that "class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties.... Such claims might otherwise evade legal enforcement." Pg. 1.

Class actions demand that judges play a unique role. There is no such thing as a simple class action. Your role includes anticipating consequences of poorly equipped class representatives or attorneys, inadequate class settlement provisions, and overly generous fee stipulations.... [A]nd, once the adversaries agree on a settlement, you must decide – largely without any clash of views from class counsel, class representatives, or the defendant – whether that settlement is fair, reasonable, and adequate to satisfy the interests of the class as a whole. *Id.* Pg. 2.

¹² *Id.* Pg. 2.

¹³ *Id.* pg 8 (citing, *Reynolds v. Beneficial National Bank*, 288 F.3d. 277, 280 (7th Cir. 2002)).

duties are directed to addressing alleged wrongs committed against the due administration of justice versus supervising cases addressing private wrongs.

Even though the Treon II cases came before the Court upon the present motion for Limited Relief from Order Staying the Case and to argue the Motion to Compel, the present motion in and of itself does not create the conflict which requires recusal from Treon II. It is, nevertheless, emblematic of the unique and ongoing process which will most likely continue and prevent the timely and efficient prosecution of the Treon II cases.¹⁴ The delay of Treon II until completion of the Treon I Rule to Show Cause, can no longer be justified.

In the prior order, the undersigned anticipated that the Treon I Rule to Show Cause would proceed to final resolution in an expeditious manner. The temporary stay of Treon II was issued in an effort to preserve the integrity of Treon I and the undersigned felt the delay of Treon II would be minimal. The undersigned continues to believe that Treon I and Treon II should not be blurred together. Both cases, while arguably arising from a similar history, have different objectives and require a judge's involvement from a different perspective.¹⁵

Therefore, the undersigned removes and lifts the previous Temporary Stay issued on May 12, 2012, in the Treon II cases;

¹⁴ See *Infra*. footnote 8. Also, even though the undersigned would be, in ruling on the present motion, receiving in his judicial capacity and in the typical setting not a concern, in this unique and rare setting it is of high concern. In the Treon I Rule to Show Cause, the court is acting as the final fact finder. In ruling on the Treon II motion, 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 II motion.

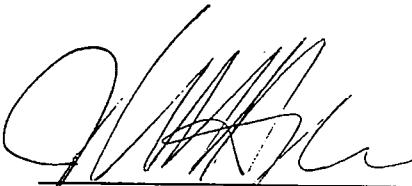
¹⁵ Moreover in Treon I, the court is exercising its inherent powers and Rule 23 supervisory authority over class action litigation. The power to punish is inherent in all courts at all times. Its existence is essential to the preservation of order in judicial proceedings and consequently to the due administration of justice. *Cheap-O's Truck Stop v. Cloyd*, 350 S.C. 596, 567 S.E.2d 514 (Ct. App. 2002). Rule 23 powers are broad. While not without bounds, Rule 23 powers may be employed when the court believes it is necessary to curtail the opportunities for abuse of the judicial system in class actions. See, *Eldridge v. Greenwood*, 308 S.C. 125, 417 S.E.2d 532 (1992). Given that the objective of the Treon I Rule to Show Cause is to address alleged abuses to the administration of justice and the objective of Treon II is to address alleged private wrongs of an alleged class, the undersigned believes his initial obligation must be to conclude Treon I.

Also, the undersigned hereby recuses himself from the Treon II cases until such time as the Treon I Rule to Show Cause is decided and until such time, if ever, he receives further order from the Court; and

The Clerk of Court for Beaufort County is requested to notify the Fourteenth Circuit Chief Administrative Judge of this recusal so that the present cases can be re-assigned and the present motion heard in a proper and timely manner.

IT IS SO ORDERED

Date: March 29, 2013
Beaufort, South Carolina



J. Mark Hayes, II
Circuit Court Judge