

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2002-CP-07-1377

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SC Court of Appeals

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

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

v.

Dryvit Systems, Inc.....Defendant.

**RESPONDENTS' REPLY TO APPELLANTS' RETURN
TO THE MOTION TO DISMISS APPEAL**

The appealed order is entirely interlocutory. It requires Appellants to submit to an inquiry that is routinely conducted by the presiding trial judge in Rule 23 class action litigation. The order decides nothing about the merits of the underlying dispute and does not prevent a further appeal of a ruling in the future. Because the appealed order decides nothing of the merits of this matter, Appellants urge this Court to let their appeal go forward by claiming that the trial court's Rule 23 inquiry will affect their rights in another matter. As explained more fully below, Appellants grounds are too speculative

to support an appeal and do not meet the requirements of S.C. Code Ann. §14-3-330 (1976 & Supp. 2012) regarding the appealability of an interlocutory order. Because the appealed order merely requires an inquiry into conduct, rather than reaching any final determination about that conduct, Appellants notice of appeal should be dismissed and the case remanded to the trial court.

A. Appellants Misstate the Record Below in Their Return.

Appellants materially misstate the facts in the underlying matter in order to create grounds for bringing this appeal:

[T]he Rule to Show Cause order issued by the Honorable J. Mark Hayes, II on June 3, 2012 ... 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.

Return at p.1 (emphasis added). The claim that Appellants "earned" a fee in the Tennessee class action of *Posey v. Dryvit Systems, Inc.* is neither true, nor a fair summation of the factual basis of the appealed order. Although one of the Appellants made appearance in Tennessee,¹ the gravamen of the appealed order is an inquiry into an undisclosed agreement Appellants and their co-counsel reached with Defendant Dryvit Systems, Inc. and others to compromise and dismiss this action in exchange for, *inter alia*, the payment of \$825,000 in attorneys' fees. *Rule to Show Cause & Order for Accounting* filed June 5, 2012 at pp.5, 7-9 (attached to Motion to Dismiss Appeal as Exhibit A) (hereinafter "*Order*"). Although the existence of this agreement was not disclosed to either the presiding judge or the unnamed class members prior to the

¹ Several members of Original Class Counsel in this matter filed affidavits of appearance in *Posey* on behalf of William and Allison DeLoache: Francis E. Grimball, Robert L. Wylie, and Appellant Michael S. Seekings. Allison DeLoache has testified that she neither retained these attorneys to represent her in any legal matter nor knew they had purported to represent her in the Tennessee action.

Appellants withdrawal from this matter in 2006, it was eventually established by overwhelming evidence.²

[T]he vast majority of the record relates to the use of a South Carolina Circuit Court Judge's order granting class certification [in this South Carolina case] as a sword against a sister state's attempt to finalize [Posey's] nationwide class action settlement [in Tennessee] and the subsequent conduct of Original Class Counsel [including the Appellants] and Original Class Representatives.

Order at p.2. Appellants used their position as class counsel in this matter for their personal benefit and to advance the interest of their individual clients at the expense of the unnamed members of this class action:

After the agreement [with Dryvit] to settle the [Original] Class Representatives' cases and to pay attorneys' fees to Original Class Counsel, it appears that the present case was allowed to lie dormant until December 2005. During the nearly three (3) intervening years, Dryvit and Original Class Counsel [including Appellants] finalized individual settlement with each of [Original Class Representatives].

Order at p.5-6. Appellants were relieved as class counsel in the instant case by consent order entered on January 19, 2006. At no time prior to their relief did Appellants or any member of Original Class Counsel or the Original Class Representatives disclose the existence of this agreement to the presiding judge or unnamed class members as required by Rule 23(c), SCRPC and related authority, e.g. *Premium Investment Corp. v. Green*, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984). As the presiding judge in this matter, Judge Hayes summarized the factual predicate for the Court's inquiry, and the jurisdictional basis for making that inquiry:

In this matter, there is evidence that Original Class Counsel [including Appellants] participated in the *Posey* action while representing this Class to which they owed a fiduciary duty. It appears that Original Class

² Judge Hayes notes that the discovery of this evidence and litigation over its significance with Defendant Dryvit and Appellants' co-counsel dominated the litigation below until a settlement was reached with the Defendant in 2010. *Order* at pp.1-2.

Counsel may have negotiated attorneys fees for themselves based on a willingness to compromise the prosecution of this action. Original Class Counsel did not disclose to nor have they sought approval for the payment of any attorneys' fees or for approval of the settlement of the claims of the Original Class Representatives. ... Original Class Representatives and Original Class Counsel [including Appellants] invoked the jurisdiction of this Court to make themselves the fiduciaries of this Court and the Class under Rule 23 SCRPC and therefore this Court feels it appropriate to exercise its jurisdiction over them.

Order at pp.8-9. Appellants ignore the factual predicate of the appealed order and claim the facts are not relevant to this Court's decision regarding appealability. *Return* at p.2 & fn.3. Nevertheless, they advance an inaccurate and unsupported portrayal of the underlying facts with their claim of having earned the attorneys' fee in Tennessee. Appellants' conduct while serving as class counsel in this matter is the gravamen of the trial court's inquiry. An email produced by Dryvit appears to contradict Appellants claims. On April 22, 2004, Appellant Jeff Leath wrote Dryvit's counsel and *Posey* class counsel to memorialize the terms of the undisclosed agreement.

Subject: SC Class. Hi to both of you. We are preparing to attend and agree to the motion to decertify the [instant] class which will take place Monday in Beaufort, S.C. Some of my SC lawyers are concerned about not having any memorialization of the agreement Frank Grimball and I reached with the 2 of you in Tennessee about class counsel compensation, and I agree we should at least have an e-mail writing of it prior to Monday at 1PM. Here is my understanding of it: [*Posey*] Class counsel will earmark 600K [a.k.a. \$600,000.00]³ of its national class fees for SC counsel and in addition Dryvit will contribute 225K [a.k.a. \$225,000.00] which can be distributed by class counsel to the SC group. I would appreciate confirmation of this understanding.

Order at p.6. The email suggests that Appellants are willing to dismiss this class action if Dryvit and *Posey* class counsel are willing to pay them substantial attorneys' fees. In light of the evidence developed during the course of this action, Judge Hayes concluded

³ Checks entered into the record of this matter demonstrate that Appellants and their co-class counsel received the \$600,000.00 payment from *Posey* class counsel.

he was required to conduct the inquiry into the conduct of Original Class Counsel and the Original Class Representatives.

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

Order at p.9. Of these two groups, only Appellants have sought to delay the inquiry with an appeal. That inquiry is especially necessary in light of conflicting explanations offered by Appellants and others regarding the purpose of the attorneys' fees and individual settlements paid by the Defendant:

the different reasons or justifications given by different members of Original Class Counsel [a group that includes the Appellants] in statements and testimony before this Court compels the Court to inquire further. One theory proffered by Original Class Counsel is that the [attorneys' fees] were paid solely for the representation of Posey Objectors William and Allison DeLoache.⁴ Another theory is that it was for work done for the Posey class. However, from the documents in the record in this case, one can reasonably conclude that the payments were based on Original Class Counsel's status as being named "Class Counsel" and the agreement to compromise and ultimately dismiss this case; again, the substance of which was never presented to Court in accordance with SCRPC Rule 23(c) and (d).

Order at p.8.

As noted in the Motion to Dismiss this Appeal, there is not a single decision in all of Rule 23 jurisprudence that contradicts the trial judge's assertion of jurisdiction to perform an inquiry into the conduct of the Original Class Representatives and their counsel while they represented this class. Appellants do not cite a single Rule 23 case

⁴. Mrs. DeLoache refuted the contention that attorneys' fees were earned by representing her or her husband in Posey. *Order* at fn.10.

in support of their position and simply ignore any discussion of the trial court's Rule 23 obligations. Instead, Appellants argue from a false factual premise and claim the appealed order is a type of independent civil action by class members that seeks to deprive Appellants of a legitimately "earned" fee in an unrelated matter for which they are entitled to a jury trial. Alternatively, Appellants claim the order essentially advances the equitable claims brought by another class of plaintiffs in a **separate and distinct legal malpractice action** against the Appellants. Appellants require such a fiction so that they may rely on non-Rule 23 cases such as *Wells Fargo Bank v. Smith*, for the proposition that "the relevant question in determining the right to trial by jury is whether **an action** is legal or equitable" in order to support their claims of appealability. 398 S.C. 487, 494, 730 S.E.2d 328, 332 (Ct. App. 2012) (quoted in Return at p.20)(emphasis added). As the language of the appealed order makes clear, the trial court's inquiry is necessitated by "[t]his Court's responsibility to unnamed class members and to the integrity of the judicial process requires that this Court exercise its authority and duty to inquire of the issues contained in this Rule to Show Cause and to account for all funds paid, or promised to be paid, in connection with this action." *Order* at p.10. Contrary to the claims that this order creates a separate civil action or advances the equitable claims of the malpractice action, the court's inquiry is an obligation of Rule 23, SCRPC which Judge Hayes characterizes as "specific applications of, possibly enhancements to, a court's inherent power to protect the legal process in all matters that come before it." *Order* at pp.10-11.

B. There is No Basis for an Appeal in this Matter.

The right to an appeal is controlled by statutory law, primarily S.C. Code Ann. §14-3-330 (1976 & Supp. 2012), and “generally must fall into one of several categories set forth in that statute in order to be immediately appealable.” *Hagood v. Sommerville*, 362 S.C. 191, 194-95, 607 S.E.2d 707, 708 (2005). Appellants’ claim that Judge Hayes’ order harms their rights in another proceeding is not grounds for an appeal under Section 14-3-330. Appealability is not determined by claims about the “ultimate” effect of an appealed ruling, but rather focuses on whether the appealed order “prevents a judgment from which an appeal might be taken or discontinues the action.” *Baldwin Construction Co. v. Graham*, 357 S.C. 227, 593 S.E.2d 146, 147 (2004). The *Baldwin* Court characterized this requirement as a determination of whether the appellant has “arrived at the end of the road” with the entry of the appealed order. By that standard, the appealed order is a long way away from appealability.

Appellants’ claim that the appealed order violates their “substantial rights” is not only inaccurate, it is a perversion of class action jurisprudence. The requirement to disclose attempts to compromise a class action is the substantial right of **Rule 23 class members**, not class counsel and therefore cannot be the basis for an interlocutory appeal, jury trial, or anything other than an inquiry by the presiding trial judge. Section 14-3-330(1) of the South Carolina Code sets forth the basis of a substantial rights appeal from an interlocutory order when the order “involve[s] the merits” of a cause of action or defense. Our appellate courts have held that the 330(1) exception only applies to orders that “**finally** determine some substantial matter forming the whole or a part of some cause of action or defense.” *Green v. City of Columbia*, 311 S.C. 78, 79-

80, 427 S.E.2d 685, 687 (Ct. App. 1993) (emphasis added). Again, the appealed order merely requires the customary inquiry of an attempt to compromise a class action by the presiding judge, it is far from a final determination of this matter, in either this case or Appellants' malpractice action.

Appellants essentially ask this Court to prevent Judge Hayes' inquiry because his ruling may "ultimately" prejudice them in another case. Such a request is contrary to public policy because such a rule would prevent trial judges from controlling proceedings before them when allegations of attorney or litigant misconduct arise. The case of Brandt v. Gooding provides a case in point. In the midst of litigation, Gooding alleged that Brandt relied on a forged document to prosecute his civil action against her. 368 S.C. 618, 630 S.E.2d 259 (2006). The presiding judge ordered an inquiry into the authenticity of the alleged forgery. If this Court were to accept Appellants' interpretation of appealability, Brandt could appeal the trial judge's decision to hold such an inquiry because an adverse ruling may possibly affect his substantial right to defend himself against an action by Gooding for civil contempt or deprive Brandt of his right to a jury trial in a separate criminal prosecution for forgery, both of which were actions that actually arose from Brandt's use of a forged document.

Because Appellants can cite no Rule 23 authority in support of their position, they essentially seek to have the presiding judge removed from a process that both the Legislature and courts have approved in order to ensure the integrity of class action litigation and protect the interest of unnamed class members. Under Rule 23 jurisprudence, the presiding judge has the jurisdiction, and corresponding duty, to review and rule upon attempts to compromise and dismiss a Rule 23 class action. See

Fed. R. Civ. P. 23(e) (“the claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval [after it follows the procedures set forth in the Rule.]”) and Rule 23(c), SCRCF (“A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.”). Appellants cannot avoid the trial court’s review of their undisclosed agreement simply because their attempt to compromise this action failed. See *Dixon v. Commissioner of Internal Revenue*, 316 F.3d1041, 1046 (9th Cir. 2003). The reason a Rule 23 court has “broad powers” to “impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the [class] action is brought” is to protect the integrity of the judicial process and ensure that the rights of unnamed class members are not abused by those who undertake to represent them. *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992).

C. Appellants Mischaracterize the Procedural Posture of this Matter.

Contrary to Appellants’ Return, this matter was not dismissed in its entirety and the procedural history of the case does not create a procedural bar to the inquiry required by the appealed order. Although the underlying litigation against Defendant Dryvit Systems, Inc. was concluded by order of the presiding judge, the entire action was not dismissed. Earlier in this matter, Judge Hayes delayed the court’s inquiry into the conduct of the Original Class Representatives and Original Class Counsel, including the Appellants, until after the completion of the case against Dryvit. Appellants deliberately omit language from the Class’ Settlement Agreement with Dryvit, which was

adopted by the trial court and not appealed by anyone. The Settlement Agreement specifically continues the proceedings against the Appellants:

1. Definitions. ... Settled Claim(s): Notwithstanding anything else to the contrary in this Settlement Agreement, the Parties do not intend to and do not release any Person other than the Released Parties [a defined settlement term that primarily includes Dryvit]. "Settled Claims" does not include any claim that may be asserted against Persons other than the Released Parties....

17.4 Notwithstanding anything to the contrary in this Settlement Agreement, nothing in this Settlement Agreement shall be construed to operate to release or compromise in any way (a) claims asserted against Persons other than Released Parties in that certain action known as Steven and Jeaneen Tucker, et al. v. Leath, Bouch & Crawford, LLP, et al., Beaufort County Case Number 2008-CP-07-03145, (b) the claims which remain against Persons other than Released Parties in Timothy J. Treon et al. v. Dryvit Systems, Inc. et al., Beaufort County Case Number 2008-CP-07-00774, **(c) any request that Persons other than Released Parties account for or tender funds to this Court** or (d) any and all claims by any of the Parties against any other Persons who are not Release Parties, Class Representatives or Intervening Class Counsel including, but not limited to, other Persons such as builders, architects, subcontractors and other material suppliers. All claims described in this Section 17.4 expressly are not release and are reserved and preserved.

Settlement Agreement attached hereto as Exhibit B at pp. 10-11 & 32-33 (emphasis added). The aforementioned language makes it clear that Judge Hayes retained jurisdiction over the matters set forth in the appealed order.

Contrary to Appellants' claims, the Court has not instituted a new action with the filing of the appealed order. Judge Hayes summarized the lengthy procedural history of this matter in an Order denying Appellants' Motion to Recuse him in the separate legal malpractice case:

This Court's involvement with [this] South Carolina class action (2002-CP-07-1377) began in December of 2005.... After several years of litigation and numerous hearings, [this] class action resolved itself through a court approved settlement in June of 2010. However, prior to this Court approving the settlement, the conduct of prior class counsel [including

Appellants] and prior class representatives came before the Court. These allegations first appeared before the Court in addressing [Defendant Dryvit Systems, Inc.'s] Motion to Dismiss and Motion for Summary Judgment in the underlying litigation based upon the assertion that a Tennessee nationwide class action barred the prosecution of the South Carolina class action.... To defend against the presumptive validity of the Tennessee class action [settlement], it was asserted, in part, that the Defendant should be estopped from maintaining the preclusive effect of the Tennessee Class Action because of irregularities and improper conduct by the Defendant which included the settlement it reached with former class representatives outside the parameters of Rule 23. It was also asserted that the Defendant had paid former class counsel [including Appellants] hundreds of thousands of dollars in attorney's fees for the purpose of staling the prosecution of the South Carolina class action so that the Tennessee class action could become final in Tennessee in order that its finality could be used to dismiss the South Carolina case. To support the position, numerous documents were presented, including but not limited to, emails purportedly reflecting conversations between the Defendant's lawyers and some former class counsel. The conversations in these documents indicate, among other things, a pre-summary judgment agreement between Defendant's attorneys and certain members of prior class counsel [including Appellants] to stage a summary judgment argument. ... No final ruling and no final order was ever made by the Court concerning the issues raised in the summary judge [sic] proceedings about the conduct of former class counsel [including Appellants] or former class representatives. The primary reason no judicial determination was made by this Court was that the underlying class action settled. ... In thousands of pages of documents which constitute the record of [this] class action, very little information has been provided by former class counsel [including Appellants] even though at one juncture, the Court sought information from them. ... The only issues remaining in [this] litigation is the issuance and conducting of a Rule to Show Cause hearing related to any alleged benefits, if any, received by the present Defendant in accordance wit the mandates of *Premium Investment Co. v. D.W. Green, et al.*, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984).

Order Denying Motions to Recuse and Temporarily Staying Matter entered May 2, 2012

at fn. 2. attached hereto as Exhibit C.

In light of the foregoing, the claim that the Appealed Order creates "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" is a blatant fabrication and

part of the Appellants ongoing duplicity and refusal to disclose to the Court that which they were obliged to disclose during their service as Original Class Counsel.

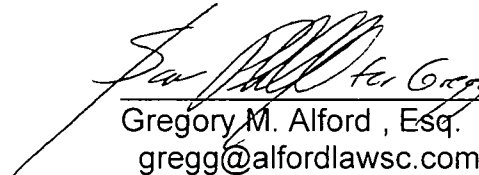
South Carolina law specifically allows Judge Hayes to postpone his inquiry into Appellants conduct until after the litigation with Dryvit was completed. In fact, South Carolina law permits a trial court to retain jurisdiction over collateral matters after the conclusion of a suit on the merits. *Ex parte TLC Laser Eye Centers (Piedmont/Atlanta)*, 745 S.E.2d 105 (2013). In *TLC*, our Supreme Court held that a trial court retained jurisdiction over a matter after the conclusion of the suit on the merits in order to enforce its protective order. The Court also held that a party's delay in pursuing an order from the trial court also was not grounds for dismissing a subsequent order issued after the main case was dismissed. Accordingly, there is more than sufficient jurisdiction for the trial court's inquiry to proceed.

Conclusion:

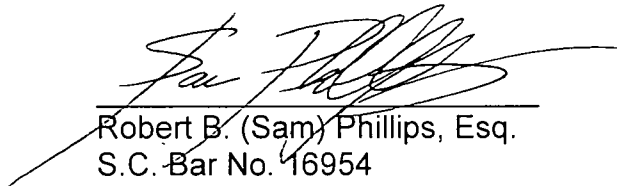
The appealed order is entirely interlocutory. The substance of the inquiry called for by that order is well supported by Rule 23, SCRPC and related Rule 23 jurisprudence both in this State and every other jurisdiction that has adopted the Federal Rules of Civil Procedure. Appellants offer no Rule 23 authority in support of their claim that this action is immediately appealable. Rather than addressing the substance of the appealed order, Appellants seek to characterize the inquiry required by that order as a part of another case, a legal malpractice action pending against them in another court. Such an argument does not meet the requirements of S.C. Code Ann. §14-3-330 (1976 & Supp. 2012) regarding the appealability of an interlocutory order. Because the appealed order merely requires an inquiry into conduct, rather than

reaching any final judgment about that conduct, Appellants claim that the order is immediately appealable is without merit. The appealed order neither affects Appellants' "substantial right" nor deprives them of a right to a jury trial in the related legal malpractice action.

Respectfully submitted,


Gregory M. Alford, Esq. *Williams w/ express permission.*
gregg@alfordlawsc.com
Thomas E. Williams, Esq.
tom@alfordlawsc.com

Alford Law Firm
Post Office Box 8008
Hilton Head Island, SC 29938
843-842-5500


Robert B. (Sam) Phillips, Esq.
S.C. Bar No. 16954
sphillips@finkellaw.com

Finkel Law Firm, LLC
Post Office Box 1799
Columbia, SC 29202
803-765-2935 (phone)
803-252-0786 (fax)

Attorneys for Respondents

Columbia, South Carolina
19 August 2013

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal From the Beaufort County
Court of Common Pleas

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

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

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

v.

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

PROOF OF SERVICE

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

Susan P. McWilliams, Esquire
Tanya A. Gee, Esquire
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29202-2426

M. Dawes Cooke, Jr., Esquire
John A. Jones, Esquire
Barnwell Whaley Patterson
& Helms, LLC
Post Office Drawer H
Charleston, SC 29402-0197

Robert E. Fields, III, Esquire
Sasser Fields LLP
2300 Rexwood Drive, Suite 320
Raleigh, NC 27607

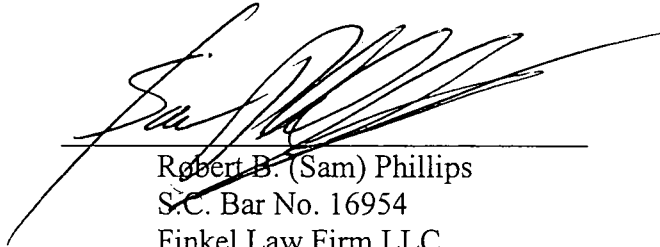
Samuel W. Outten, Esquire
Womble, Carlyle, Sandridge & Rice, LLC
550 S. Main Street, Suite 400
Greenville, SC 29601

Gregory M. Alford, Esquire
Thomas Williams, Esquire
The Alford Law Firm
Post Office Drawer 8008
Hilton Head, South Carolina 29938-8008

James L. Bruner, Esquire
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260

Kent T. Stair, Esquire
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401

Kenneth C. Anthony, Jr., Esquire
The Anthony Law Firm, PA
250 Magnolia Street
Spartanburg, SC 29304



Robert B. (Sam) Phillips
S.C. Bar No. 16954
Finkel Law Firm LLC
P.O. Box 1799
Columbia, SC 29202
sPhillips@finkellaw.com

Columbia, South Carolina
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