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.)
)
Dryvit Systems, Inc.; 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 Scearce 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

ORDER
DENYING MOTIONS TO RECUSE
AND
TEMPORARILY STAYING MATTERS

Class action certification has been requested in both of the above-captioned cases. These cases present claims of legal malpractice (2008-CP-07-3145) against lawyers (hereinafter referred to as former class counsel) who served as class counsel in a products liability lawsuit against a stucco maker, and claims of breaches of fiduciary duties (2008-CP-07-0774) against individual homeowners (hereinafter referred to as former class representatives) who formerly served as class representatives in the same class action product liability lawsuit. Both of the present actions arise from alleged wrongful conduct committed by former class counsel and former class representatives in an underlying class action (2002-CP-07-1377).

The undersigned was appointed by the Chief Justice on August 31, 2006, as the judge with exclusive responsibility for the underlying class action. At the time of the appointment in the underlying class action, an order had previously been issued by another judge granting the request to certify a class[1].

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[1] In a class action, a judge has more significant duties and obligations than in traditional litigated matters. The South Carolina Rules of Civil Procedure contain a rule, SCRCP 23, that is focused directly on a Court's responsibility and duties in class action litigation. The reason for the increased role of the Court is because in class action litigation, the judicial process is being used to permanently adjudicate the rights of unknown persons who do not actually come before the Court. The Court's role is to monitor the lawyers and litigants who are before it so that the rights of those unknown members of the class are not abused, whether intentionally or not, by those who actually appear before the Court. While SCRCP 23 bestows general authority to the Court to grant appropriate orders during the entire class action process, the rule specifically creates responsibilities for the Court when granting class action status and when a class is dismissed or settled.

See, Managing Class Action Litigation: A Pocket Guide for Judges, where it is explained that FRCP 23 unambiguously places the judge in the position of safeguarding the interests of absent class members. "Some courts 'have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary to the class' and to impose 'the high duty of care that the law requires of fiduciaries.'" *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 280 (7th Cir. 2002).

> Because the class itself typically lacks the motivation, knowledge, and resources to protect its own interest, you (the judge) need to critically examine the class certification elements, the proposed settlement terms, and the procedures set out for implementing the proposed settlement.

Rothstein and Willing, *Managing Class Action Litigation: A Pocket Guide for Judges*. 2005, Federal Judicial Center. Pg 8.

In performing its SCRCP Rule 23 duties, extensive work has been performed in the underlying class action and this Court has been presented volumes of documents and other evidence. For purpose of this motion, it is assumed the evidence and information received by this Court in the underlying class action is relevant to the accusations of legal malpractice and breach of fiduciary duty claims in the present two cases.

Almost all of the evidence presented to the Court in the underlying class action dealt with issues coming within the Court's Rule 23 responsibilities[2]. In comparison to the allegations and

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[2] In class action litigation, Rule 23 expressly creates duties for a Court when granting (1) class certification and (2) dismissing or settling the case. Since this judge's Rule 23 work in the underlying lawsuit has been made a basis of the present motions, the following is a brief summary of the information received in the underlying class action. By way of an Order Dated August 30, 2002, Judge Thomas Kemmerlin granted class certification in the underlying class action. Generally speaking, the class consisted of South Carolina homeowners who had defective exterior stucco manufactured by a certain stucco manufacturer on their homes and who were going to be affected by a nationwide class action settlement in Tennessee. As has been explained to the Court, the filing of the litigation in South Carolina was an attempt to opt out the entire State of South Carolina from the Tennessee nationwide class action. When the request for class certification was granted in South Carolina, the judge expressly directed that the Plaintiffs "shall" provide a notice plan. No notice plan was ever submitted by prior class counsel.

This Court's involvement with the underlying South Carolina class action (2002-07-CP-1377) began in December of 2005 when the Court was assigned to conduct non-jury hearings in Beaufort County. On the Court's docket were certain motions related to the underlying class action. Included in these motions was a Motion to Intervene filed by a group of attorneys and a Motion for Summary Judgment filed by the Defendant to dismiss the South Carolina class action based on the Tennessee Nationwide class action having reach finality.

After several years of litigation and numerous hearings, the underlying 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 and prior class representatives came before the Court. These allegations first appeared before the Court in addressing a Motion to Dismiss and a 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 under the theories of collateral estoppel, res judicata, and the Full Faith and Credit Clause of the U.S. Constitution.

To defend against the presumptive validity (See, *Hospitality Management Associates, Inc. v. Shell Oil Co.*, 356 S.C. 664, 591 S.E.2d 611, 2004) of the Tennessee class action, 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 settlements it reached with former class representatives outside of the parameters of SCRCP 23. It was also asserted that the Defendant had paid former class counsel hundreds of thousands of dollars in attorney's fees for the purpose of stalling 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 to stage the summary judgment argument.

After numerous hearings, the Court issued a lengthy order denying the Defendant's motion for summary judgment. The Court's decision was, in part, based upon the belief that evidence existed from which a reasonable inference could be made that the Defendant (stucco manufacturer) had engaged in improper conduct in regards to the South Carolina class action thus preventing it from asserting a Full Faith and Credit argument to obtain a dismissal of the South Carolina class action. The Court's 36 page Order of January 13, 2009 is hereby incorporated by reference.

No final ruling and no final order was ever made by the Court concerning the issues raised in the summary judge proceedings about the conduct of former class counsel or former class representatives. The primary reason no judicial determination was made by this Court was that the underlying class action settled. During the spring and summer of 2009, the attorneys for the Defendant and class negotiated a settlement of the case and in November 2009, an order granting preliminary approval of the settlement was issued.

As part of numerous hearings conducted by this Court, information was presented related to accusations that some former class counsels and class representatives, along with the Defendant in the product liability litigation, wrongfully entered into agreements where one or more class representatives would be paid a bonus for being class representatives in the underlying class action as part of the settlement of his/her individual claim against the stucco manufacturer. As previously stated, information was also presented regarding accusations that former class counsel wrongfully were paid hundreds of thousands of dollars in attorney fees related to the underlying class action contrary to the requirements of *Premium Investments v. Green*, 283 S.C. 464, 324 S.E.2d 72 (1984). Therefore, the Court has been asked to determine if constructive trust should be established for any benefits wrongfully received by the present Defendants. This Court has indicated it will conduct a Rule to Show Cause hearing on these issues.

In the thousands of pages of documents which constitute the record of the underlying class action, very little information has been provided by former class counsel even though at one juncture, the Court sought information from them. In 2007, the Court was provided an indication of former class counsel's position concerning the accusations, when one of them submitted a Memorandum in Opposition to a Motion to Compel wherein it was asserted that the underlying class action has never finally been certified pursuant to SCRCP 23. It was also asserted that any fees received were in connection with the work done in the Tennessee nationwide class action and had been disclosed and confirmed through that class action. In 2010, the Court was also provided information by present counsel for one of the former class counsel that this Court lacked jurisdiction to conduct a hearing on an accounting.

The Court received additional information concerning the allegations involving former class counsel when it conducted a hearing in January 2011 related to the payment of attorney's fees in the underlying class action. The attorney's fee issue at this hearing was a dispute between the class counsel who intervened in litigation and remaining class counsel who were not dismissed from their duties as class counsel in December 2005. This hearing presented the Court the first opportunity to have live witness testimony as to what transpired in the Tennessee Court when original class counsel appeared in Tennessee as part of the nationwide settlement. Much of this testimony reflected on the witnesses' views of the tactical legal plan to opt out South Carolina from the Tennessee settlement. Part of the legal tactics explained to the Court involved an attorney appearing in Tennessee on behalf of a client he had never met to make an objection to the Tennessee settlement. It was explained that this lawyer was authorized to appear by one of the other former class attorneys. It was also explained to the Court that a class was not affected when the individual class members settled their claims and thus an acceptance of the belief that a class representative who has no vested interested in the class is proper. Also suggested to the Court was that the remaining original class counsel and former class counsel had a difference of opinion as to the purpose behind seeking and obtaining the certification of a class opt

evidence related to the conduct of prior class counsel and prior class representatives, only a de minimus amount of evidence was presented relating to the theory of products liability.

On August 10, 2010, Judge Perry Buckner assigned the two present cases to the undersigned. In the present two cases, a request for class certification has been presented to the Court but no final decision has been issued to grant class certification.

The Present Motions

These two cases are before the Court on the Defendants' motions for the undersigned to recuse himself from these cases and that the undersigned make no further decisions in these two cases[3].

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out of the Tennessee nationwide class action settlement from a South Carolina court and the proper method of proceeding once South Carolina was approved as an opt-out class. Also explained to the Court was a disagreement between the lawyers to the idea of merely consenting to the summary judgment motion. The Court was also presented information concerning the witnesses' recollections of the payment of attorneys and the disagreement with the statement made to Judge Kimmerlin when he was informed that the underlying case was settled. No final judicial determination was made concerning the issues raised in the attorney's fees hearing because the parties settled the issue related to the payment of attorney's fees.

The above is merely a summary of the information received by this Court. It is representative of the type of information that has been presented to the Court related to the former class counsel and former class representatives' involvement in the underlying litigation.

The only issues remaining in the underlying litigation is the issuance and conducting of a Rule to Show Cause hearing related to any alleged benefits, if any, received by the present Defendants in accordance with the mandates of *Premium Investment Co. v. D.W. Green, et al.*, 283 S.C.464, 324 S.E.2d 72 (Ct. App. 1984).

[3] The present motion was initially made on the second day of a hearing to determine whether class certification would be granted in the present two cases. The basis for the motion was articulated as being statements made by the Court during the prior day's hearing which gave rise to the belief that the Court had negative feelings about the Defendants and this Court's lack of ability to separate the two present cases from the underlying class action. Other than a general reference to "a very engaging conversation about a variety of issues" during the prior day's hearing and a reference to the Court's strong beliefs about the fiduciary duties and professional responsibilities lawyers owe to their clients and to the courts, no specific factual detail or other general characterization of the Court's prior day's comment was stated to support the motion. The Court appreciates the defense attorney's gracious remarks about the Court's demeanor.

In response, the Plaintiff's attorney stated his lack of surprise with the present motion and suggested that the purpose of the present motion, as with other motions to disqualify previously filed and/or threatened has been to

The factual basis for the motions stems from comments made by the Court during a colloquy with defense attorneys when the issue of class certification was being argued in the present two cases. At oral argument, defense counsel made a reference to the Court's strong belief about the fiduciary and professional responsibilities a lawyer owes to his or her clients and the Court. In their subsequent memorandum, the Defendants focused on the colloquy with defense counsel wherein the Court referenced the evidence presented in the underlying class action related to Rule 23 issues and the Court's statement as to the seriousness about which this Court views those issues. The colloquy included a statement by the Court that the issues had been documented in the prior case and a statement made by the Court encouraging defense counsel to obtain the record in the underlying case, if it had not already done so. Defendants' Memorandum pp. 4 to 6. The Defendants also supplemented the factual basis to include portions of the formal record in the underlying class action lawsuit to support their assertion that this Court is biased or prejudiced against the Defendants, and therefore this Court's impartiality can be reasonably questioned and thus recusal is mandated[4].

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avoid the deposition of the Defendants. Counsel also made unspecified references to the Court's statements that the Court looked forward to "hearing the Defendants explain what happened in the case," referenced that the Defendants had a prior opportunity to appear in the underlying litigation but did not appear, referenced the Court's statement that it will keep an open mind, argued the motion was tardy, and asserted that the motivation behind the motion was to delay class certification. He also asserted that the Court had made clear that the Court had no preconceived conclusions adverse to the Defendants and that the motion could not succeed because the requirement of showing an actual harm could not be met by the defense.

After the oral arguments on the motion, the Court stated that allegations against prior class counsel were serious to the Court because they involved officers of the Court. The Court opined that any judge in the state would view them in the same manner. To assist in easing any concern defense counsel may have had about the Court's comments, the Court noted that if it had come to the negative conclusions feared by counsel, the Court would have taken additional and collateral action. The Court also reminded counsel of its experience as a trial judge in hearing damning and damaging facts from one side of a case and knowing that until one hears from the other side, those facts may be completely wrong.

[4] Two (2) of three (3) motions are based on unspecified statements made by the Court during the present motion hearing and in its role as the judge in the underlying 2002-1377 class action. The motion filed on behalf of Defendant Robertson makes a specific reference to Canon 3E, "a judge shall disqualify himself or herself in a

The legal basis for the motions is *Rule 501, SCACR, Code of Judicial Conduct, Canon 3E(1)(a)* which provides that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: the judge has a personal bias or prejudice or personal knowledge of disputed facts concerning the proceeding."

As will be discussed herein, the factual basis for motions and the decisional authorities in South Carolina do not support the granting of the motions.

Decisional Authorities[5]

Under South Carolina decisional authority, an alleged bias or prejudice requiring a judge to recuse himself or herself must stem from an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in a case as a judge. *Appellate Court Rule 501, Code of Jud.Conduct, Canon 3(E)(1)(a), State v. Jackson,* 353 S.C. 625, 578 S.E.2d 744 (Ct. App. 2003). A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned. *Christy v. Christy,* 317 S.C. 145, 452 S.E.2d 1 (Ct App 1994). Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. *Ellis v. Proctor & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993).

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proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party." He goes on to assert that because of this Court's work in the underlying class action that the Court has a "personal" bias or prejudice concerning the Defendants and should not rule on matters in the present case. The third motion was filed on behalf of Defendants John and Sally Cardamone, Benjamin T. and Diane Clark, and Ramona Gianni. This motion simply incorporates the positions asserted by Leath in his memorandum of law. The sole memorandum to support the argument for recusal was submitted by Leath, et al. The Plaintiffs' memorandum opposing the motions contained other grounds supporting a denial of the motions which are not addressed in this order.

[5] In addition to the following summary of South Carolina authority, *see infra* note 8.

To warrant disqualification, the judge's alleged bias must be personal as distinguished from judicial, in nature. *State v. Cheatham*, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002). It is not sufficient for a party seeking a judge's disqualification to simply allege bias; the party must show some evidence of bias or prejudice. *Appellate Court Rule 501, Code of Jud.Conduct, Canon 3,E(1)(a), Patel v. Patel*, 359 S.C. 515, 599 S.E.2d 114 (2004), related reference, 359 S.C. 534, 599 S.E.2d 124 (2004) and reh'g denied, (July 12, 2004). Alleged judicial bias must be personal, as distinguished from judicial, in nature, in order to warrant disqualification. *State v. Howard*, 682 S.E.2d 42 (S.C. Ct. App. 2009). The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned in his or her participation in the case as a judge. *State v. Jackson*, citing *Payne v. Holiday Towers, Inc.*, 285 S.C. 210, 321 S.E.2d 179 (Ct. App. 1984).

In the present motions, the only factual basis is information the Court has acquired in its official capacity as a judge in the underlying class action. Therefore, the Defendants do not allege nor have they shown any personal bias or prejudice from which one could reasonable question this Court's impartiality. Additionally, the Defendants do not question the source of this Court's information. All of the information acquired by the Court was done so while performing its official duties. Also, the Defendants do not argue and have not asserted that this Court has made a decision which is adverse to the Defendants. Thus, no decision has been made from which one could reasonably infer had been made improperly based on an alleged improper bias or prejudice this Court has toward the Defendants.

Duty to Hear the Case

Rule 501, Canon 3.B(1), indicates that except in cases where disqualification is "required", the judge is under an ethical to decide the case assigned to him. The Court of Appeals has observed that in such situations where there exists no mandatory recusal, Canon 3.B(1) creates a "duty to sit" and suggests that not to do so would be contrary to the judge's ethical obligation. The Court has written:

> When disqualification is not required, the South Carolina Code of Judicial Conduct holds, "A judge *shall* hear and decide matters assigned to the judge...." Canon 3B(1) of the Code of Judicial Conduct, Rule 501, SCACR (emphasis added). This duty has been recognized and imposed in both state and federal courts. *See* McBeth v. Nissan Motor Corp. U.S.A., 921 F.Supp. 1473, 1477 (D.S.C.1996) ("No judge, of course, has a duty to sit where his impartiality might be reasonably questioned."); Barritt v. State, No. CACR06-1261, 2007 WL 2713593, at *6 (Ark.Ct.App. Sept. 19, 2007) ("When recusal is in issue, this court has held that a judge has a duty to sit on a case unless there is a valid reason to disqualify...."') (internal citations omitted); In re Turney, 311 Md. 246, 533 A.2d 916, 920 (1987) ("Moreover, a judge's duty to sit where not disqualified is equally as strong as the duty not to sit where disqualified."); Adair v. State, 474 Mich. 1027, 709 N.W.2d 567, 579 (2006) ("[W]here the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited.") (internal quotations and citations omitted); Millen v. Eighth Judicial Dist. ex rel. County of Clark, 148 P.3d 694, 700 (Nev.2006) ("Thus, a judge has a general duty to sit, unless a judicial canon, statute, or rule requires the judge's disqualification."); Tennant v. Marion Health Care Found., Inc., 194 W.Va. 97, 459 S.E.2d 374, 385 (1995) ("Also important, however, is the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal."). *Simpson v. Simpson*, 377 S.C. 519, 660 S.E.2d 274 (Ct. App. 2008).

In explaining the application of the federal statute related to recusal, it has been observed that recusal motions should not be granted by judges to avoid sitting on difficult or controversial cases. Also explaining that the inquiry to be made is that: Would a reasonable person with knowledge of all the facts and circumstances consider that the impartiality of the judge was so tainted as to make a fair trial for the Defendant impossible? *McBeth v. Nissan Motor Corp., U.S.A.*, 921 F. Supp. 1473 (D.S.C. 1996).

Exercise of Discretion

Even though trial judges are afforded great deference by appellate courts in deciding issues of recusal, trial judges must exercise that discretion soundly when the issue is raised upon a challenge to the Court's impartiality. The reason for this requirement is reflected in the Preamble to the *Code of Judicial Conduct* where the drafters included the statement "Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to the American concept of justice and the rule of law." This judge's opinion is that the integrity and independence of the judiciary can only be served when the litigants that come before it and the public at large have confidence that the judge will act impartially toward both parties and rule based on the facts and the law that is presented to him.

In its oral argument and memorandum, Defendants made gracious comments about this Court and also the uniqueness in which this Court finds itself with being appointed as the judge in the present two cases and in the underlying class action. This Court agrees that the present situation is unique. Nevertheless, this Court does not believe it would be a fair exercise of its discretion to hand the present two cases to another judge when the canons and decisional opinions do not support such a conclusion and when the request for recusal is properly opposed by counsel for the Plaintiffs. Granting the recusal would not only be inconsistent with the canons and the decisional authority, but would also create the appearance that the Court has improperly used its discretion to avoid deciding an obviously difficult decision, or worse, has acted inconsistently with the policy concerns expressed in the decisional authorities.[6]

[6] *See infra* Note 8.

Clearly the canons seek to preserve the public confidence in the judiciary serving as the bedrock of justice by requiring recusal of a judge whose impartiality reasonably may be questioned due to a bias or prejudice stemming from an extra-judicial source (ie., judge was previously a lawyer in the matter before him; or the judge's family has potential economic interest in the controversy or subject matter before him; the judge or a family member is a personal friend or is related within the third degree to a party or lawyer appearing before him; the judge is a trustee or officer in an organization before him as a party; or that the judge's judgment may otherwise be affected by a family, political, social, or other type of relationship)[7]. 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[8].

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[7] *See, Rule 501, SCARC, Canon 3E, subsections (1)(a), (b), (c), and (d)(i)-(iv).*

[8] The rule seems universal, if not axiomatic, that disqualification is not required in such situations where the claimed impartiality is based upon an assertion of bias or prejudice stemming from the judge's knowledge of facts gained while serving in his official capacity as a judge. The Plaintiffs present several cases in their memorandum which reflect the rule. See, *State v. Howard*, id.; *United States v. Carmichael*, 726 F.2d 158 (4th Cir. 1984); and *Lindsey v. City Beaufort*, 911 F. Supp. 962 (1995). They also correctly cite *United States v. Cowden*, 545 F2d. 257 (1st Cir 1976) as stating that a judge's participation in separate jury trials of co-Defendants does not constitute reasonable grounds for questioning the judge's impartiality in subsequent jury trials involving a remaining co-Defendant. Even after being reversed by an appellate court, the judge who was reversed is not disqualified from hearing the same matter again. Also, in *United States v. Carmichael*, 726 F.2d 160 (4th Cir. 1984) where alleged judicial bias stem from the judge's ruling in the instant case or related cases...or attitude derived from his experience on the bench.

Even the one case referenced by the Defendant in its brief supports the same conclusion and reflects a significant policy consideration behind the rule. *Davis v. Liberty Mutual Ins. Co*, 38 S.W.3d 560 (2001). In that case the trial judge had denied a motion to recuse. The trial judge had made disparaging remarks in another case that a psychiatrist, who was an expert witness in the case presently before him, when he stated that the witness did not practice psychiatry and that his evaluations were generally conducted in lawyers' offices. The judge, in the prior case, also commented that the witness left the state of Alabama under something of a cloud when his group was charged with bilking federal programs which the witness later settled. The Supreme Court noted that the fact that a judge had previously ruled adversely against a party or a witness in a prior proceeding is not grounds for recusal. After affirming the judge's decision not to recuse himself, the Court went on to note that:

> Thus, the mere fact that a witness takes offense at the court's assessment of the witness cannot serve as a valid basis for a motion to recuse. If the rule were otherwise, recusal would be

required as a matter of course since trial courts necessarily rule against parties and witnesses in every case, and litigants could manipulate the impartially issue for strategic advantage, which the courts frown upon.

The Court's policy statement concerning the rule seems consistent with the Code of Judicial Conduct where in the Preamble it is written, "the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding." *Rule 501, SCACR, Code Judicial Conduct, Preamble*. Similarly, the Court in *Mayberry v. Maroney*, 558 F.2d 1159 (3rd Cir. 1977), agreed that the policy behind the recusal statute (federal recusal statute that contained language requiring recusal when a judge's impartiality may "reasonably" be questioned) is concerned with matters which exist "outside the influence of the courtroom", The court directed that the primary inquiry ought to be into extra-judicial conduct. Thus the Mayberry court found it proper for a judge who had been reversed to retry the same case. *Id* at 1162.

Also, in *United Nuclear Corp. v. General Atomic Company*, 96 N.M 155, 629 P.2d 231 (1980), (a case that shares the level of complexity found in the history behind the present two cases), a denial of a recusal motion was being challenged on appeal. The Defendant wanted the judge removed based on a claim of bias and prejudice due to some prior adverse and sternly worded ("vituperative tone") discovery rulings and some in-court comments (judge accused the Defendant of "cover-ups" and "stonewalling") made by the trial judge. The "cover-ups" and "stonewalling" were the immediate precipitating event that lead to the motion to recuse. In affirming the judge's decision not to recuse himself, the Supreme Court noted the Defendant had not establish an extrajudicial source for the judge's alleged bias but rather relied exclusively on his in-court comments and rulings. The opinion contains an extensive explanation of the rationale behind the distinction between a claimed bias or prejudice arising from a judicial verses a non-judicial course. *Id.* at 109 to 114. In its analytical approach, it also includes the terms "impartiality might reasonably be questioned", and "avoid impropriety and the appearance of impropriety" when it opined:

> If the words "impartiality might reasonably be questioned" and "avoid impropriety and the appearance of impropriety" were to be interpreted to encompass judicial rulings in the course of a trial or other proceeding, . . . then there would be almost no limit to disqualification motions and the way would be opened to a return to "judge shopping", a practice which has been for the most part universally condemned. Certainly every ruling on an arguable point during a proceeding may give "the appearance of" partiality, in the broadest sense of those terms, to one party or the other. *Id at* 113.

Also see *US v. International Business Machines, Corp.*, 618 F2d. 923 (2nd Cir 1980). Under the federal recusal statutes, the determination of personal bias or prejudice should be made on the basis of conduct extrajudicial in nature as distinguished from conduct within a judicial context. Bias which requires recusal must be personal and cannot rest upon trial rulings or conduct.

> A reading of the cases supporting the general proposition that the bias which requires recusal must be personal and cannot rest upon trial rulings or conduct, reveals two practical considerations which have influenced the courts. The first is quite obvious. As the Supreme Court noted in *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 44, 33 S.Ct. 1007, 1010, 57 L.Ed.2d 1379 (1913), "(The recusal statute) was never intended to enable a litigant to oust a judge for adverse rulings made, for such rulings are reviewable otherwise . . .."
>
> This brings us to the second policy consideration underlying the rule that the bias necessary for recusal must be extrajudicial and not based upon what the judge has learned in this case. Chief Judge Edelstein is the sole finder of the fact here. His role is not that of a passive observer. His obligation is to determine the facts in a field which is exceedingly complex and technical. His function was well described by Judge Frank In *In re J. P. Linahan, Inc.*, 138 F.2d 650, 653-54 (2d Cir. 1943):

This Court has scrutinized the present motions and reviewed hundreds of pages of transcriptions and decisional authorities from South Carolina and other state and federal courts in deciding these motions. While this Court does not believe the Defendants are entitled to have their motions granted, the Court wishes to exercise its discretion and perform its administrative duties in a manner that promotes confidence in the judicial process that is fair to both the Defendants and the Plaintiffs This Court also wishes to ensure an efficient use of judicial resources that also promotes confidence in performance of its Rule 23 obligations under the unique circumstances of being the assigned judge in the underlying class action and in the present two cases.

Even though the underlying class action's settlement has received final approval through appropriate Rule 23 procedures, the one remaining unresolved aspect of the case is the Rule to Show Cause. As all attorneys were advised, the Court delayed the issuance of the Rule to Show Cause and conducting a hearing on it in an effort to encourage a global settlement of all three cases. The Court has been advised that mediation was not successful in reaching a global settlement. While this Court still desires to act in a manner which encourages the parties toward a global settlement, this Court does not wish to act in a manner from which one may improperly

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"But, just because his fact-finding is based on his estimates of the witnesses, of their reliability as reporters of what they saw and heard, it is his duty, while listening to and watching them, to form attitudes towards them. He must do his best to ascertain their motives, their biases, their dominating passions and interests, for only so can he judge of the accuracy of their narrations. He must also shrewdly observe the stratagems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not make child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions."

This particular Court warned that a judge who is afraid of creating the appearance of bias by making a ruling is as dangerous to the judicial system as a biased judge. In quoting Justice Frankfurter, the Court wrote that "A timid judge, like a biased judge, is intrinsically a lawless judge." Id., 929, citing Wilkerson v. McCarthy, 336 U.S. 52, 65, (1949).

infer that decisions this Court must make in one case are being affected by decisions in the other. After extensive research on the issue of recusal and this Court's obligations under Rule 23, the better approach at this time is for the present two cases to be temporarily stayed. The stay is effective immediately and will remain in place until this Court has issued its decision in the Rule to Show Cause.[9] Thus, the final decision, whatever it may be in the underlying litigation, will be subject to proper appellate review as to its substance and any decisions in the present two cases will not be blurred by an undecided issue in the prior class action.

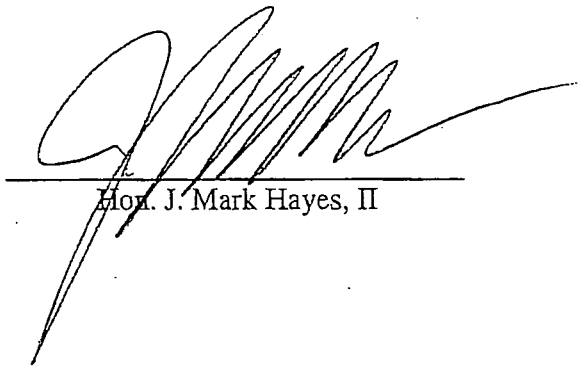
Based on the procedural history of the two present cases prior to this Court's appointment which includes, among other things, removal to federal court, various motions to dismiss and for summary judgment, motions to disqualify and relieve prior counsel, and motions to disqualify and relieve present counsel, the delay to the present cases should not be overly burdensome. Nevertheless, Plaintiffs' counsel should be mindful of the rules related to class counsel that may be applicable to class counsel even though a class has not been formally certified and should act accordingly.

THEREFORE, IT IS ORDERED that the Motions to Recuse are denied; and

IT IS ALSO ORDERED that the present two cases are temporarily stayed as outlined herein.

[9] The Court intends to move forward with the class settlement of the present case involving the Defendants Mullen Wylie and Grimball. Based on this Court's recollection and a review of transcript, this Court's incorporation of its knowledge from its work in the underlying class action was consented to by everyone for the purpose of preliminary approval of the settlement. Subsequent to the hearing, numerous documents related to the settlement have been afforded to all parties and no objections have been expressed. Therefore, the Court continues to believe the procedures related to settlement to be proper and without objection. Thus, the Court intends to proceed with performing its Rule 23 procedures related to the settlement.

IT IS SO ORDERED.



Hon. J. Mark Hayes, II

Date: 4/27/12
Spartanburg, SC