THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2002-CP-07-1377
Appellate Case No. 2013-001367

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 Scearce;
and Steven Christian individually and on behalf of other similarly
situated in the State of South Carolina .....Respondents

v.

Dryvit Systems,
Inc.....Defendant

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Facts 2

Arguments

I. The Rule to Show Cause is an Interlocutory Order that is Not Subject to Immediate Appeal and Does Not Impact Appellants' Right to a Jury Trial in Another Matter.....14

II. The Trial Judge Has the Power to Compel Appellants to Be Questioned Under Oath Regarding Lawyer Misconduct in this Matter.....16

III. The Rule to Show Cause is Consistent with Rule 23 of the South Carolina Rules of Civil Procedure and Related Law, and Does Not Deprive Appellants of their Due Process Rights.....25

Conclusion 32

TABLE OF AUTHORITIES

CASES

Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984) 16

C&S Real Estate Services v. Massengale, 290 S.C. 299, 350 S.E.2d 191 (1986) ..16, 17

Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003).....27, 28

Dewey v. Volkswagen, 681 F.3d 170 (3rd Cir. 2012) 20

Dixon v. Commissioner of Internal Revenue, 316 F.3d 1041 (9th Cir. 2003).....28

Eldridge v. City of Greenwood, 308 S.C. 125, 417 S.E.2d 532 (1992) 18

Ex Parte: TLC Laser Eye Centers v. Woolfson, Op.No.27280
(S.C.Sup.Ct. filed July 3, 2013 30

Fulmer v. Cain, 320 S.C. 466, 670 S.E.2d 652 (2008).....15, 16

Gardner v. Travis, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994).....16

Green v. City of Columbia, 311 S.C. 78, 79-80, 427 S.E.2d 685, 687 (Ct. App. 1993)..14

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944).....27, 28

In re: E. Sugar Antitrust Lit., 697 F.2d 524 (3rd Cir. 1982) 22

In re: General Motors, 55 F.3d 768 (3rd Cir. 1995) 25

Link v. School Dist. of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990).....14

Miller v. Miller, 375 S.C. 443, 652 S.E.2d 754 (2007) 26, 27

Moore v. Simpson, 322 S.C. 518 (Ct. App. 1996).....30

Premium Inv. Corp. v. Green, 282 S.C. 464, 324 S.E.2d 72
(Ct.App. 1984) 17, 19, 21, 22

Reynolds v. Beneficial Nat. Bank, 288 F.3d 277 (7th Cir. 2002) 19

Rodriguez v. Disner, 688 F.3d 645 (9th Cir. 2012) 21

Salmonsen v. CGD, 377 S.C. 422, 661 S.E.2d 81 (2008).....17

Schweiker v. McClure, 456 U.S. 188 (1982).....31

Shelton v. Pargo, 582 F.2d 1298 (4th Cir. 1978) 19

Stanton v. Boeing Co., 327 F.3d 938 (9th Cir. 2003) 19, 20

State v. Brantley, 279 S.C. 215 (1983) 30

State v. Duncan, 269 S.C. 510 (1977).....32

State v. Hite, 272 S.C. 303, 251 S.E.2d 746 (1979) 27

State v. Langford, 400 S.C. 421 (2012).....31

Waller v. Seabrook Island POA, 300 S.C. 465, 388 S.E.2d 799 (1990) 19

Williams v. Borden, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980).....27

STATUTES

S.C. Code Ann. §14-3-330 .....14, 15

RULES

Rule 23, FRCP.....25

Rule 23, SCRCP 17, 19, 20, 21, 24

Rule 240, SCACR 15

Rule 407, SCACR, Rules of Prof. Conduct (2005).....29

STATEMENT OF ISSUES ON APPEAL

I. The Rule to Show Cause is an Interlocutory Order that is Not Subject to Immediate Appeal and Does Not Impact Appellants' Right to a Jury Trial in Another Matter.

II. The Trial Judge Has the Power to Compel Appellants to Be Questioned Under Oath Regarding Lawyer Misconduct in this Matter.

III. The Rule to Show Cause is Consistent with Rule 23 of the South Carolina Rules of Civil Procedure and Related Law, and Does Not Deprive Appellants of their Due Process Rights.

STATEMENT OF THE CASE

In their Statement of the Case, Appellants materially misstate the background of this matter and attempt to conflate it with other cases in order to cobble together grounds for an appeal that would not otherwise exist. Appellants, along with attorneys Timothy W. Bouch; Francis E. Grimball; Robert L. Wylie, IV; and George E. Mullen originally served as class counsel in this matter when it was filed on August 12, 2002. Hereinafter Appellants and their co-counsel will be referred to collectively as "Cardamone Counsel." In their Statement, Appellants claim to "have had no involvement in the case since January 19, 2006 where they were relieved as counsel." However, the record demonstrates that Appellants were actively resisting Respondent's attempts to discover what had transpired prior to Respondent's intervention. For example, in November of 2006 Appellants and the original class representatives of this action refused to turn over any documents or information pertaining to the case to current class representatives and their counsel. (R. Vol. III, pp. 1113-124) Cardamone Counsel Timothy Bouch appeared before Judge Hayes seeking to quash those subpoenas. The trial court issued no order regarding Appellants' motion to quash those subpoenas preferring to have the parties focus first on the prosecution of the products liability action against Dryvit, before addressing the misconduct of Cardamone Counsel. As the

parties neared settlement of the products liability action, undersigned counsel for the class filed a Motion for Accounting from Appellants and Motion for an Order Requiring Appellants' Appearance, both filed in 2010. (R. Vol. I, pp. 322-60; 1178-194) The Motion was heard on March 31, 2010 and again, the presiding trial judge chose to defer action involving Appellants until after the resolution of the underling action. (R. Vol. I, pp. 1, 38 at n.2)

FACTS

Appellants, along with attorneys Francis E. Grimball; Timothy Bouch; Robert L. Wylie, IV; and George E. Mullen served as Cardamone Counsel in this action when it was filed on August 12, 2002 and captioned John Cardamone, et al. v. Dryvit Systems, Inc., et al. The Cardamone action was a reaction to a Tennessee action known as Bobby R. Posey, et al. v. Dryvit Systems Inc. that purported to have reached a preliminary nationwide class action settlement with Defendant Dryvit, a manufacturer of a synthetic stucco product known as EIFS. (R. Vol. II, p.488-502; 489)

The Posey Settlement had been the subject of an extensive, nationwide notice campaign that required class members who wanted to either object to the Settlement or be removed from it (opt out) to file certain material stating their intentions with the Posey court by September 3, 2002. (R. Vol. III, pp. 1150; 1151-59) The distinction between an objector and an opt out is significant in that to be an objector, a person had to file a claim with the Posey Settlement thereby submitting themselves to the jurisdiction of the Posey Court before his or her objection would be heard. (R. Vol. III, p. 1075 at ¶9.1 (Opt outs); 1061 & 1075-76 at ¶9.2 (Objections) Opt outs did not have to bind themselves to the terms and conditions of the Posey Settlement, but were unable to lodge any objection to it. Id.

Cardamone Counsel sought to opt every South Carolinian who owned a home clad with Dryvit EIFS out of the Posey Settlement. (See R. Vol. IV, pp.1234-1238) On September 3, 2002, the Honorable Thomas Kemmerlin certified class in the Cardamone action and agreed to opt the entire Class out of the Posey settlement. (R. Vol. I, pp. 80-86) This Order was not appealed and became the law of the case.

On September 26, 2002, Appellant Michael S. Seekings, Co-counsel Francis E. Grimball and others made an appearance in Tennessee purporting to represent South Carolina homeowners Allison and William DeLoache who wished to object to the Posey Settlement. (R. Vol. III, pp. 1125-138) Appellant William Dixon Robertson, III; Mr. Grimball, and other members of Cardamone Counsel appeared before the Posey Court at a hearing on October 1, 2002 wherein the presiding judge, the Honorable O. Duane Slone of the Jefferson County, Tennessee circuit court, was considering the fairness of the Posey national settlement and whether to grant it final approval. (R. Vol. III, p. 1000 at "Page 2", lines 16, 17, & 25 and "Page 3", lines 15 to 21; p.1004 at "Page 115", line 17 to "Page 116", line 13 [noting appearance of Cardamone Counsel on behalf of SC objectors, Mr. & Mrs. DeLoache])

Although Mr. Grimball claimed to be representing the DeLoache objectors[1] at this Fairness Hearing, he also informed Judge Slone he was a member of Cardamone Counsel and explained that Judge Kemmerlin had opted the entire state of South Carolina out of the Posey class settlement. (R. Vol. III, pp. 1004-006 at "Page 113", line 11 to "Page 123", line 18) Under the terms and conditions of Posey's settlement, a class member could either receive a payment of $6.00 per square foot of EIFS cladding on their home to defer repair costs or a

1 Although the purported objection of South Carolinians Allison and William DeLoache were the basis of Cardamone Counsels' appearance at the First Posey Fairness Hearing, the DeLoaches claimed to have never spoken with any member of Cardamone Counsel, were unaware they were represented in the Posey Settlement and the Cardamone class action, and were unaware of the use of their name in both actions. (R. Vol. III, pp. 1139-40)

three (3) year MoistureFree Warranty that would pay for the repair of EIFS-related moisture damage. Mr. Grimball spoke in opposition to the terms of the Posey settlement arguing, *inter alia*, the $6.00 repair option was inadequate in South Carolina given that "the cost to do repair work in South Carolina can run from a minimum of $18.00 or $20.00 a square foot to $25.00 to $30.00 a square foot." (R. Vol. III, pp. 1007 at "Page 125", line 5 to "Page 126", line 1) Mr. Grimball also argued the MoistureFree Warranty was a "myth" because it contained "so many exclusions in it so as to make it meaningless." (R. Vol. III, p. 1010 at "Page 137", line 19 to "Page 138", line 21) Although MoistureFree Warranty purported to have a maximum benefit of $10,000.00 per year, Grimball explained "it only pays $500.00 per moisture location ... [and] I would submit to you that $500.00 to repair damage in an area where water has intruded into a residence is grossly insufficient." (R. Vol. III, p. 1010 at "Page 140", lines 4-8) In recognition of Mr. Grimball's representation of the Cardamone class in South Carolina, Judge Slone granted him much more time to argue in opposition to the Posey settlement than counsel for individual objectors. (R. Vol. III, p. 1006 at "Page 123", lines 11-18)

Grimball's objections to the Settlement at the First Posey Fairness Hearing mirrored the objections Appellant W. Jefferson Leath, Jr. set forth in an affidavit to Judge Kemmerlin as the basis for opting the Cardamone class out of Posey. (See R. Vol. IV, pp. 1232-1233) In pleadings filed in this action, Cardamone Counsel vehemently opposed Posey's warranty benefit arguing it was based on the "patently false" premise that Dryvit's barrier EIFS system is a viable exterior cladding that can be repaired and maintained. (See R. Vol. IV, p. 1201-1206). Remarkably, Cardamone Counsel's opposition to the Posey settlement disappeared less than two (2) month later at a second fairness hearing Judge Slone conducted on December 18, 2002.

Although Mr. Grimball argued at the First Posey Fairness Hearing that a typical EIFS repair in South Carolina cost between $18 to $30 per square foot, he claimed at the Second Posey Fairness Hearing that an increase in the Settlement's cash benefit from $6.00 to $7.00 per square foot "cures a lot of the problems that are being raised by the objectors here today concerning re-clad issues because my goal in being able to get cash in the hands of the homeowners was so that they would have the flexibility and the option to be able to re-clad their homes." (R. Vol. III, p. 994, lines 7-13)

Further, Mr. Grimball did not explain how the minimal increase in benefit would be sufficient in light of the $18 per square foot repair cost he claimed during the First Fairness Hearing. (R. Vol. III, p.1007 at "Page 125", line 5 to "Page 126", line 1) More importantly, Grimball made no mention of his original opposition to the MoistureFree Warranty during his support of the revised Posey Settlement at the Second Fairness Hearing. In fact, the revised settlement made no material change to the terms of the MoistureFree Warranty that Cardamone Counsel had assailed as a "myth" that provided "meaningless" financial contributions towards the "patently false" premise that EIFS can be repaired. (R. Vol. III, p.1010 at "Page 137", line 19 to "Page 138", line 21 and "Page 140", at lines 1-8) The vast, majority of claimants (except as noted below) in Posey received the MoistureFree warranty rather than cash compensation.

After the conclusion of the Second Posey Fairness Hearing in December 18, 2002, Cardamone Counsel did nothing more to advance the interests of the unnamed class members of the Cardamone action. No action was taken at all, despite the specific command of Judge Kemmerlin in his certification Order for Cardamone Counsel to prepare a notice plan to those class members. (R. Vol. I, p.86) Additionally, there is no evidence in the record that

Cardamone Counsel made any effort to contact unnamed class members, explain the terms and conditions of the modified Posey Settlement, or to inform them of the actions Counsel were taking on their behalf. No contact was made with any absent class member to seek their consent to approve of the modified Posey Settlement, or assist class members with the filing and prosecution of their claims in the Posey settlement. Eventually, Defendant Dryvit Systems Inc. filed a motion to dismiss this case on September 22, 2005. (R. Vol. II, pp.503-04)

After learning Dryvit was attempting to decertify and dismiss the Cardamone action, Timothy and Frances Treon, and P. Jennings Scearce successfully moved to intervene in the action and became the named class representatives (hereinafter collectively and individually referred to as "Intervening Class Representatives"). Additionally, their attorneys, Richard R. Gleissner, Robert B. (Sam) Phillips, Gregory M. Alford, Thomas J. Finn, Thomas E. Williams, and Donald E. Jonas successfully moved to intervene as class counsel (hereinafter collectively referred to as "Intervening Class Counsel"). (R. Vol. I, pp.108-111) Although Appellants voluntarily withdrew from this action, attorneys George Mullen and Frank Grimball stayed on as class counsel after the appointment of the Intervening Class Representatives and their Counsel. It was only after the Appellants withdrew from this matter in January of 2006 did Intervening Class Counsel discover that Appellants had pursued their own interests, rather than those of the unnamed class members, prior to their withdrawal from this matter.

Intervening Class Counsel compelled the production of certain emails from Dryvit that set forth the actions Appellants took before withdrawing, but failed to disclose to either the Cardamone Class or the presiding trial judge. An email from Appellant Jeff Leath to Dryvit's Posey counsel Peter Morgan and Posey co-Lead Class Counsel Everette Doffemeyer dated

April 22, 2004 set forth the terms of an "agreement" Cardamone Counsel Frank Grimball and Appellant Jeff Leath reached with Posey class counsel and Dryvit's counsel in Tennessee:

> Subject: SC Class. Hi to both of you. We are preparing to attend and agree to the motion to decertify the [Cardamone] class which will take place Monday [April 26, 2004] 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 1 pm. Here is my understanding of it: Class counsel will earmark 600K of its national class fees for SC counsel and in addition Dryvit will contribute 225K which can be distributed by class counsel to the SC group. I would appreciate confirmation of this understanding.

(R. Vol. I, p.6; Vol. III, p.1097) A subsequent email on April 26, 2004 from Appellant Leath to Morgan and Doffemeyer revealed that Cardamone Counsel's concern about memorializing the terms of their "deal" was the only reason the hearing to dismiss this case was not conducted:

> We will reschedule [the April 26 hearing on Dryvit's motion to dismiss the Cardamone action]. I just was having some problems with my troops going forward until we had our deal memorialized. The e-mails received from you and Everette will do it as far as I am concerned. Thanks.

(R. Vol. I p. 338) Other emails obtained from Dryvit suggest that Cardamone Counsel's "deal" included settling the claims of individual clients who were represented by various members of Cardamone Counsel, including the Appellants:

> Subject: NEED SOME HELP. [Dryvit Counsel] Peter, I know you have talked to [Appellant Dixon Robertson]. He of course is one of our team and I have promised him attention in an inventory settlement capacity as part of our agreement. I need to hold this group together especially pending Posey [Settlement] approval and dismissal of the SC class. His case is No. 1 on the Greenville docket Monday: Randy Taylor v. Dryvit et al. He is looking for his historical average of $11/sq. ft. (lower than mine) which would settle Dryvit out at about 32K. I really need you to call Nikki Perkins in [Dryvit corporate counsel's Ken] Notas office to get this done. I am concerned that if not, we may have some unfortunate repercussions with our group. I don't think any of us need this now, and this was clearly an integral part of our deal. Thanks!!

(See R. Vol. 1 p. 328, 356) An email from Leath five (5) days later on January 7, 2003 demonstrates that Cardamone Class Counsel's deal with the Posey lawyers did nothing to advance the interests of the unnamed members of the Cardamone Class as Appellant Leath advises Dryvit's counsel on how to "eliminate" this action:

> Dear [Dryvit counsel] Peter, Attached is the list of cases we discussed. There may possibly be a few additions. The most important case to be resolved early is the Cardamone case with [Appellant] Mike Seekings and probably the settlement will need to be completed after Posey is certified in order to eliminate the SC class.

(See R. Vol. I, pp. 328,335) Rather than fighting Dryvit's efforts to dismiss or decertify this class action, Appellant Leath seeks information from Dryvit counsel Peter Morgan in an email dated August 22, 2005 that would help Leath compromise this case in the face of opposition from lawyers who are trying to represent the best interests of the unnamed class members:

> Peter, in discussing this with everyone, as you know, we need to decertify the Cardamone Class here. You will recall that the Finkel Firm per Mr. Gleissner has attempted to intervene here and we need to know if they are still milling around this issue or not. I feel certain that you worked something out with them to get them out of Posey and this should have effected [sic] a global resolution with them. Do you have any memo of that agreement sufficient to let me know that I don't have to have a hearing with notice to them in order to decertify so that I can do this by consent order between Dryvit and the Plaintiffs.

(R. Vol. III, p.1098) This email encapsulates Appellants total disregard of their obligations to unnamed class members, whose interests are of no concern as Leath attempts to learn whether anyone will be watching as he plans to compromise this action without the notice required by Rule 23, SCRCP. It is this overwhelming and arrogant disregard for the rules and the interests of unnamed class members that led Cardamone Class Counsel to reach a "deal" with Posey class counsel Doffemeyer and Dryvit that was not, and could not, be disclosed to either Judge Hayes or the unnamed class members.

Although Cardamone Counsel did nothing to advance the interests of the unnamed class members in this action, they did ensure that the Original Class Representatives received lucrative cash settlements from Dryvit rather than the MoistureFree Warranty from the Posey Settlement. For example, Dryvit acknowledged it paid a "bonus" to Original Class Representative John Cardamone for his service in this action:

> the [$90,000.00] that Dryvit has agreed to pay [Original Class Representatives John & Sally Cardamone] includes a bonus reflecting Mr. Cardamone's status as a named plaintiff in the South Carolina class action. This settlement, of course, ends his participation in that class action, which it is anticipated will be entirely dismissed following resolution of the limited number of cases previously, listed.

(See R. Vol. 1 p.359) Dryvit similarly agreed to lucrative settlements with Original Class Representatives Nathan and Jill Gordon ($45,000.00), Ramona Gianni ($25,000.00), and Benjamin T. and Diane M. Clark ($50,000.00). (See R Vol.I p 435) By contrast, of more than 8000 notices sent to South Carolina residents in the Posey settlement, only six (6) individuals received a monetary award of more than $10,000.00, the remainder were "approved" for Posey's MositureFree Warranty option. (R. Vol. III, pp.1160-1168) Significantly, there is no evidence that any person individually represented by Appellants ever accepted a MoistureFree Warranty or cash benefit from the Posey settlement.

Ultimately, Appellants received the $600,000 set forth in their deal from Posey counsel Doffemeyer between November 15, 2005 and September 18, 2006. (R. Vol. III, pp.1099-1101) The scope of Appellants service to the Posey action, and whether they have received the additional $225,000 set forth in Leath's April 22, 2004 email are matter for inquiry at the Rule to Show Cause proceeding ordered by the trial judge.

Nothing in the record suggests Cardamone Counsel did anything to assist unnamed class members in filing either individual claims against Dryvit or filing claims in the Posey

Settlement. In contrast, there were extensive efforts made to assist unnamed class members in the prosecution of their claims when the instant matter was settled in 2010. (R. Vol. I, pp.138-39 at ¶¶14 & 15; R. Vol. III, pp. 1195-99)

The aforementioned conduct is part of the basis for the Rule to Show Cause Order that is the subject of this appeal wherein the trial judge is seeking "an accounting of attorney fees allegedly received by certain Class Counsels [including the Appellants] and for benefits paid to prior Class Representatives which were never disclosed to or approved by this Court." (R. Vol. I, p.1) In the appealed order, the Honorable J. Mark Hayes, II acknowledged he delayed an inquiry into Cardamone Counsel's conduct during the course of the underlying litigation. (R. Vol. I, p.1) Nevertheless, he concluded that "[b]ased on the record of this case, this Court believes a sufficient showing has been made for it to invoke its power under SCRCP Rule 23 and its inherent judicial power to issue this Rule to Show Cause and Order for Accounting. (R. Vol. I, p.2) The appealed order requires the Appellants to appear before Judge Hayes and respond under oath to evidence discovered after the Appellants withdrew as class counsel in this case. (R. Vol. I, p.8) Judge Hayes noted that none of the aforementioned "payments" to Cardamone Counsel or "arrangements" for their individual clients "were disclosed to the Court." (R. Vol. I, p.8) Instead, the Court was given "different reasons or justifications given by different members of [Cardamone counsel] made in statements and testimony before this Court." (R. Vol. I, p.8) Cardamone Counsel Frank Grimball claimed "that the monies were paid solely for the representation of Posey Objectors William and Allison DeLoache [whereas] [a]nother theory [advanced by the Appellants] is that it was for work done for the Posey class." (R. Vol. I, p.8)

The claim that the funds were paid for the representation of the DeLoaches was eventually disproved before Judge Hayes when it was discovered that the DeLoaches were unaware of the Posey Settlement, did not authorize anyone to represent them in that matter, and received no benefit for the use of their identity by Cardamone Counsel. (R. Vol. I, p.8 at fn. 10; Vol. III, pp.1139-40) From the evidence compelled from Dryvit during the course of this litigation, Judge Hayes concluded that "one can reasonably conclude that the payments were based on [Cardamone 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 SCRCP Rule 23(c) and (d)." (R. Vol. I, p.8)

It is against these facts that Appellants' flippantly seek to characterize this matter with references to children's fairy tales and mythological Greek monsters. (See App. Bf. at p.4) Respondents urge this Court to consider the undisputed documentary evidence that Appellants secretly negotiated lucrative cash payments for themselves, their colleagues, and individual clients in exchange for abandoning the majority unnamed members of the Cardamone class to the "meaningless" MoistureFree Warranty benefit, then imagine a legal justification for such conduct that does not rely on a fantasy worthy of either Alice in Wonderland or Greek mythology – and there you will find the essence of Appellant's appeal.

Appellants claim they participated in negotiations that "substantially improved the terms of the Posey settlement." (See App. Bf. at p.6). The only "change" in the Posey Settlement that developed between the First and Second Fairness hearings was the meager 16% increase of the cash benefit from $6.00 to $7.00, still quite a ways away from the actual cost of repairing EIFS that Cardamone Counsel established in the Posey Record. (R. Vol. III, pp. 1102-09 at ¶¶ 21-23)

As set forth above, the cash option was only available to a few South Carolinians, the vast majority were stuck with a MoistureFree Warranty which, in an early display of their literary sensibilities, Appellants characterized as a "myth" because it provided "meaningless" benefits pursuant to a "patently false premise." Of course, good fantasy requires a break from reality and Appellant's Brief doesn't disappoint in that it provides no support for the claim for a "substantial increase in the value of the benefits" other than the self-serving Affidavit of Everette L. Doffemyre, who after all was able to obtain an $11.6 million attorney fee award from the Posey Court after Cardamone Counsel withdrew their objection to the Posey Settlement. (R. Vol. I, pp.295-301 at ¶16) While there may be undisclosed benefits to Posey Class Members in other states that have disappeared down Appellants' "bizarre legal rabbit hole," it is more likely that the real "service" provided by Cardamone Counsel was their support of the Posey Settlement at the crucial Second Fairness Hearing.

At the Second Posey Fairness Hearing, Appellants Jeff Leath and Dixon Robertson appeared along with fellow Cardamone Counsel Frank Grimball. At this Hearing, Mr. Grimball shed the artifice of the DeLoache objection and appeared on behalf of Objectors for the "South Carolina Class" in full support of the revised Posey Settlement. (R. Vol. 3, p.960 at lines 1-14) Posey class counsel needed the support of Cardamone Counsel because no other objector had agreed to support the revised Settlement with its meager changes. Mr. Doffemeyre claimed to have worked "hand in hand" with the lawyers who represent "a certified South Carolina class opting out their state in its entirety [who] wanted to see improvements made so that their state would not be in a position of being opted out." (R. Vol. 3, p.947, lines 4-21) Doffemeyre identified Appellants Leath, Robertson and other members of Cardamone Counsel as "South Carolina objectors, their counsel are here present today" and announced "they

believe that the changes that have been made are such that now the settlement in their view ... should be approved as fair and reasonable." (R. Vol. 3, p.960, lines 3-25) Because of the numerousity of the South Carolina Class, their approval of the Settlement was of obvious significance to Posey trial judge who began the Second Fairness Hearing with a decided reluctance to approve the Posey Settlement:

> Gentlemen, this is really just on today for final Court approval. I'll tell you what I read causes the Court a great concern about approving the agreement as it is and as it has been amended. The Court's primary concern is that this is the State of Tennessee, and we're trying – I want to know what in the world we're doing in the business of trying to approve a settlement for the entire nation. That's the first concern, primary concern that ... I have. The second, I'd like you to point to some authority – you've already submitted ... hundreds and hundreds and hundreds [of pages of documents] that you submitted to the Court to review, this Court that has no law clerk, that has no lawyer, has nothing other than itself and its wonderful administrative assistant.

(R. Vol. 3, p. 924, line 6 to p.925, line 4) After this introduction to the Hearing, Posey Counsel Doffemeyer was understandably interested in providing Judge Slone with justification for imposing a Settlement on class members in other states that was timely provided by Cardamone Counsel. Although Mr. Grimball admitted in open court that he and Appellant Leath had engaged in "intense negotiations" with Dryvit counsel and Posey class counsel to reach a revised settlement, he did not disclose the lucrative financial benefits that accrued to counsel and their individual clients. (R. Vol. 3, p. 994, lines 7-21) Instead, Grimball took it upon himself to try and speak for all objectors when he claimed that the revised Settlement "cures a lot of the problems that are being raised by the objectors here today concerning reclad issues." (R. Vol. 3, p. 994, lines 7-21) Judge Slone appears to have been encouraged by Mr. Grimball's observations in that he "commended" Grimball for his efforts and acknowledged that Cardamone Counsel's support for the revised Posey Settlement gave him "more comfort in approving the settlement" because he "thought you'd give me an honest

answer." (R. Vol. 3, p.993, line 6 to p.995, line 18) While Mr. Grimball's comments appear to be a reference to the "deal" that Appellant Leath references in his April 22, 2004 email to Dryvit counsel Morgan and Posey counsel Doffemyer, a full inquiry into the deal on behalf of this Class can only be accomplished by going forward with the appealed order.

ARGUMENTS

I. The Rule to Show Cause is an Interlocutory Order that is Not Subject to Immediate Appeal and Does Not Impact Appellants' Right to a Jury Trial in Another Matter.

The order appealed from "require[s] each member of Cardamone Counsel and the Original Class Representatives to appear before it and account for the funds and or benefits, if any, they received as a result of their representation of this Class." (R. Vol. 1, p.9) The Order is entirely interlocutory because it merely requires an "examination" of the Appellants and does not grant any relief, make any finding of fact, or otherwise resolve this action or any distinct branch thereof. See generally, S.C. Code Ann. §14-3-330(1) and Link v. School Dist. of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990). Intermediate or interlocutory orders are not immediately appealable unless they meet an applicable exception set forth in Section 14-3-330 or one of several specialized appellate statutes. The first pertinent exception can be found in Section 14-3-330(1) and pertains to interlocutory orders "involving the merits" of a cause of action or defense. Our appellate courts have interpreted the 330(1) exception to apply 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). The Order decides nothing involving the merits of the matter, but merely requires Appellants to account for their conduct while serving as class counsel. The second applicable exception is found in Section 14-3-330(2) and pertains to an interlocutory order that

"affects a substantial right" and "determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." Again, the inquiry ordered by the Order is merely the beginning of a process; it makes no findings, grants no relief and does not determine any issue with finality. No other specialized appellate statute pertains to this matter.

Because the appealed order is interlocutory and does not meet one of the exceptions set forth in either Section 14-3-330 or one of the specialized appellate statutes, Respondents renew their request that the instant appeal be dismissed pursuant to Rule 240, SCACR.

Significantly, Appellants offer no support for their claim that this class action lawsuit is "integrally related" to two other class actions that have been filed against Cardamone Counsel. Appellants incorrectly claim that every member of Intervening Class Counsel was also counsel in the two other class actions. This is not accurate in that attorneys Richard Gleissner and Robert B. (Sam) Phillips, both of the Finkel Law Firm, were not class counsel in either of the other class actions. Although Respondents do not believe that the make-up of class counsel in these actions, or the fact they both arise from the same subject matter, create grounds for an appeal, that issue has become moot given that Judge Clifford Neuman recently decertified both of the malpractice class actions. (R. Vol. 1, pp.64-79) Even if those actions were still pending, Appellants offer no support from Rule 23 jurisprudence to support their position.

Appellants cite Fulmer v. Cain to contend that the Rule to Show Cause order is immediately appealable because it affects the mode of trial. The Appellants base this argument on their incorrect claim that they have a right to a jury trial. This contention is simply untrue. Furthermore, Fulmer cuts against the Appellants' assertion. The Fulmer court cited Justice Pleicones' dissent in Salmonsen v. CGD, Inc. which states that the "'mode of trial' exception to the general rule that only final orders are appealable is confined to orders which

abridge a party's constitutional right to trial by jury. Fulmer involved an appeal from a court's order denying appellant's motion to remove. The court held that the order denying was not a final, appealable order and that it did not abridge the appellant's right to a jury trial. Id. Similarly, the Rule to Show Cause is not a final order nor does it affect the Appellants' right to a jury trial because, as Appellants concede, they have no such right for a Rule to Show Cause. See Initial Brief of Appellants, p. 19.

Appellants cite a number of cases (Gardner v. Travis, C&S Real Estate Services, Inc. v. Massengale, and Beall v. Doe) in an attempt to claim a right to a jury trial even though such a right does not exist in this case. These cases involve an action with combined legal and equitable issues, which is not the case here. The Rule to Show Cause seeks only to have the Appellants answer for their conduct before the trial court where the conduct took place. There will be no "trial" of legal and equitable issues because no legal issues are implicated by the Rule to Show Cause. Appellants' argument is analogous to a polluter who seeks to dismiss investigation by an appropriate regulator upon the argument that the regulator may find some pollution that can be used against it in a subsequent civil action. The apprehension about the discovery of misconduct and its potential for future harm in other litigation is not grounds for creating a right to a jury trial where one did not previously exist.

II. The Trial Judge Has the Power to Compel Appellants to Be Questioned Under Oath Regarding Lawyer Misconduct in this Matter.

Appellants claim the presiding trial judge in a Rule 23 action is without the power to inquire into the undisclosed activities of class counsel and the class representatives or to defer that inquiry until after the merits of the case are resolved. In other words, Appellants ask this Court to ignore the clear meaning of Rule 23, SCRCP which in pertinent part allows that "[t]he court may at any time impose such terms as shall fairly and adequately protect the interest of

the persons on whose behalf the action is brought or defended." Rule 23(d)(2). This Rule "specifically permits the trial court to maintain continual control over class action proceedings." Salmonsen v. CGD, Inc., 377 S.C. 422, 454, 661 S.E.2d 81, 88 (2008). A trial court has a specific responsibility to account for the benefits derived by Cardamone Representatives and their Counsel in this action in accordance with Rule 23 SCRCP. Premium Investment Corp. v. Green, 283 S.C. 464, 324 S.E. 2d 72 (Ct. App. 1984) (recognizing the fiduciary duty owed by class representatives and their lawyers to unnamed class members and that a constructive trust is the appropriate remedy for a violation of that duty.). "It is now generally conceded that a plaintiff who sues on behalf of a class and the attorney representing the class assume a fiduciary obligation to absent members of the class." Premium Investment Corp. v. Green, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct. App. 1984) (noting the similarity of the fiduciary duty of class counsel and class representatives). Class counsel breached their fiduciary obligation to unnamed class members by using a class action to obtain a benefit for themselves, even if the benefit received "is not at the expense of the class." Id. As our Court of Appeals explained, the assumption of this fiduciary obligation means "[t]he class representative also surrenders the right to settle the action in return for individual gain alone." Id. It goes without saying that class counsel, who is ethically prohibited from having a personal interest in the litigation, is similarly prohibited from settling a class action for individual gain.

Appellants point to C&S Real Estate Services v. Massengale, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986) for the proposition that "legal claims must be tried by a jury before the equitable claims can be resolved." Of course, the instant actions could not be more distinguishable from the Massengale case. Where Massengale involved one action with certain equitable and legal causes of action between the same parties, the instant matter

involves a class of South Carolina homeowners whereas the now decertified malpractice class actions merely involve individuals. Without the Rule to Show Cause required by the Appealed Order, the unnamed class members in this action will never get their day in court to inquire into the nature and propriety of Appellants' undisclosed agreements that appear to have been bought at the expense of the unnamed class members.

Judge Hayes is simply exercising the widely recognized jurisdiction and power of a Rule 23 trial court to require class counsel to **truthfully and fully** disclose the circumstance and terms of the agreement(s) they reached with the Defendant and Posey class counsel on behalf of the unnamed class members and the monetary benefits they received from that agreement. Appellants cite no authority, and indeed none exists, where the court would lack jurisdiction over such a matter.

A Rule 23 Court must have the jurisdiction and power to investigate misconduct. The long history of abuse in the class action setting has made it absolutely necessary that courts have broad powers to protect the integrity of the process. To ensure that class representatives and class counsel do not abuse their fiduciary obligations, trial courts have "broad powers" under Rule 23 to "impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the [class] action is brought" so that the judicial system may not be used to abuse the rights of unnamed class members. Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992). Many courts have recognized that the trial judge must police the actions of class representatives and class counsel to ensure that they do not violate their fiduciary obligations. Our Supreme Court recognized that "the kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy" such as when the class representatives or their counsel have "a claim which

conflicts with the economic interests of the class." Waller v. Seabrook Island Property Owners Ass'n., 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). Some courts have characterized the role of the trial judge in a Rule 23 action as that of a fiduciary because the court must be the guardian of the rights of absent class members at every stage of class litigation from pre-certification to settlement in order to guard against the inherent risk of conflict developing between class members and their representatives. See e.g., Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978) (setting forth the duty of the trial court to unnamed class members prior to class certification) and Premium Investment Corp. v. Green, 283 S.C. 464, 472, 324 S.E.2d 72, 77 (Ct. App. 1984) (noting that the proposed dismissal of a class action requires court approval and notice to unnamed class members). The trial court's obligation to unnamed class members was universally recognized when South Carolina adopted its modern rules Rule of Civil Procedure in July of 1985. Those Rules included a provision that prohibited a class action from being "dismissed or compromised without the approval of the [trial] 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." Rule 23(c), SCRCP; see also Reynolds v. Beneficial National Bank, 288 F.3d 277, 280 (7th Cir. 2002) (noting the trend amongst courts "to term the district judge in the settlement phase of a class action suit a fiduciary of the class" and to impose on the trial court the same "high duty of care that the law requires of a fiduciary.").

A trial court's obligation to the unnamed members of a Rule 23 class is especially critical when the court is asked to approve a class action settlement. In Stanton v. Boeing Co., the United States Court of Appeals for the Ninth Circuit set forth a lengthy explanation of the "real" and "inherent dangers" of class action settlement to unnamed class members. 327 F.3d 938, 959-60 (2003).

> [C]lass representatives have their own incentives to advance their interests at the expense of the class. ... The incentives for the [class counsel] negotiators to pursue their own self-interest and that of certain class members [which] can influence the result of the negotiations without any explicit expression or secret cabals. That is why [trial] court review of class action settlements includes not only consideration of whether there was **actual** fraud, overreaching or collusion but, as well, substantive consideration of whether the terms of the [settlement] decree are fair, reasonable and adequate to all concerned.

Id. at 960 (emphasis in original). Although the Ninth Circuit's policy is to let the trial judge decide whether a proposed class action settlement is **fair** to all concerned, the Court retains to itself the critical review of whether the terms of a class action settlement "directly lend themselves to **pursuit of self-interest** by class counsel and certain members of the class - namely, attorneys fees and the distribution of ... monetary relief among class members." Id. (emphasis added); see also Dewey v. Volkswagen Aktiengesellschaft, 681 F.3d 170, 183 (3rd Cir. 2012) (recognizing "the linchpin of the adequacy [of representation] requirement is the alignment of interests and incentives between the representative plaintiffs and the rest of the class.").

By concealing the agreement with Dryvit to pay Cardamone Counsel a substantial attorneys' fee that was contingent on the dismissal of this action, Counsel ignored the requirements of Rule 23(c), SCRCP and prevented the trial court from fulfilling its fiduciary duty to the unnamed class members. Specifically, Cardamone Counsel failed to provide the trial judge with any information concerning the two areas thought most important by the Ninth Circuit regarding the pursuit of self-interest, namely: (1) payment of attorneys' fees to class counsel and (2) distribution of enhanced monetary relief to certain class members. Certainly, the trial judge had no way to, nor reason to, inquire whether the Appellants' interests conflicted with those of the unnamed class members. It was only after Appellants withdrew from this matter that evidence was discovered which suggested that Cardamone Counsel's participation

in both Posey and this action was guided by personal financial reward rather than a good faith attempt to obtain something of value for the unnamed class members.

Appellants' argument suggests that a Rule 23 trial court lacks the authority to review attorneys' fees after they have been received by class counsel, regardless of whether they were disclosed to the trial judge or unnamed class members. This argument is disingenuous at its core as this trial court specifically reserved its right to review attorneys' fees issue in the settlement agreement and two (2) separate orders. The trial court first reserved its right to review fees in the final paragraph of the Order that relieved the Appellants as class counsel filed on or about November 20, 2006. (R. Vol. 1, pp.110 & 113) The trial court renewed that reservation in paragraphs 11, 12, and 30 in its order granting final approval of the settlement Respondents negotiated with Defendant Dryvit Systems, Inc. (R. Vol. 1, pp.137-38, 149-50) Even if Judge Hayes had not reserved the attorney fee issue in its November Order, he has the power to review fees already paid. In Rule 23 actions, a trial "court has broad equitable powers to deny attorneys' fees (or to require an attorney to disgorge fees already received) when an attorney represents clients with conflicting interests." Rodriguez v. Disner, 688 F.3d 645, 653 (9th Cir. 2012) citing Silbiger v. Prudence Bonds Corp., 180 F.2d 917, 920 (2d Cir.1950) ("Certainly by the beginning of the Seventeenth Century it had become a commonplace that an attorney must not represent opposed interests; and the usual consequence has been that he is debarred from receiving any fee from either [client], no matter how successful his labors."); see also Premium Investment Corp. v. Green, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984) (imposing a constructive trust on benefits obtained by class representatives and counsel in violation of their fiduciary duty to unnamed class members). In an early Rule 23 case, the United States Court of Appeals for the Third Circuit recognized the expansive powers

of a trial judge to perform a post-settlement review of an attorneys' fee award where class counsel had failed to inform the presiding judge of crucial information relevant to counsel's possibly self-serving motives. In re: E. Sugar Antitrust Litig., 697 F.2d 524, 533 (3rd Cir. 1982).

In this matter, Judge Hayes concluded that he is "compelled to ascertain why fees of $825,000 were promised to Cardamone Counsel which the e-mails and other documents in the record say are conditioned upon the dismissal of this case." (R. Vol. 1, p.7) He notes that "the record of this case is substantial in its size," but "the vast majority of the record relates to the use of a South Carolina Circuit Court judge's order granting class certification [in this matter] as a sword against a sister state's attempt to finalize a nationwide class action settlement [in the Tennessee action of Posey, et al. v. Dryvit Systems, Inc.]." (R. Vol. 1, p. 2) Judge Hayes explained that the September 2003 order certifying a class of absent South Carolina homeowners against Defendant Dryvit Systems, Inc. pursuant to Rule 23, SCRCP placed Cardamone Counsel in "a representative capacity for absent class members and imposed upon them fiduciary duties and Rule 23 obligations." (R. Vol. 1, p. 3) The fiduciary duties owed by class counsel and class representatives to the unnamed members of a certified class are well established in Rule 23 jurisprudence. (R. Vol. 1, 10-11), See Premium Investment Corp. v. Green, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct. App. 1984) ("It is now generally conceded that a plaintiff who sues on behalf of a class and the attorney representing the class assume a fiduciary obligation to absent members of the class, including the obligation to inform them of proposed compromises of the group action."). In light of the evidence that Appellants failed to act in a manner required of class counsel in a certified Rule 23 class action, Judge Hayes concluded:

> This 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. Rule 23 of the South Carolina Rule of Civil Procedure "specifically permits the trial court to maintain continual control over class action proceeding."

(R. Vol. I, p.10) (citation omitted)

The evidence referenced in the Order begins with Cardamone Counsel's failure to provide absent class members with notice as required by the order certifying this case as a class action pursuant to Rule 23, SCRCP. Although Cardamone Counsel provided no notice of this action to unnamed class members, it did use it to appear in Posey when a member of Cardamone Counsel informed Posey's presiding judge that "the entire state of South Carolina at this point ... has opted out of the Posey Settlement." (R. Vol. 1, p.3 at n.5) Shortly after that appearance in Posey, Appellant Mike Seekings returned to this action and announced that Cardamone Counsel had settled this case with Dryvit and Posey class counsel:

> [Cardamone Counsel] went to Tennessee and opted our class out [of Posey.] Participated in additional negotiations with both Dryvit and counsel for the [Posey] plaintffs at the direction of the [Posey] court. The [Posey national] settlement changed. We as our certified class then went to a hearing and told the [Posey] judge we thought now it is fair. ... Now this class de facto doesn't exist anymore. The [instant] case underline has been settled. The Dryvit settlement [in Tennessee] has been changed to the satisfaction of all involved.

(R. Vol. 1, p.5)(internal punctuation omitted). Despite the Order's explicit requirement to provide notice of the action, and Rule 23's requirement to provide notice of a proposed settlement, Cardamone Counsel made no attempt to comply with these two (2) requirements. (R. Vol. 1, pp.3&8)

An attempt to settle a Rule 23 class action requires class counsel to: (1) provide absent class members with notice of the proposed settlement and (2) seek judicial review of the

fairness of the settlement and the adequacy of the representation leading to that settlement. Rule 23, SCRCP ("A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromised shall be given to all members of the class in such manner as the court directs."). Despite this clear and universally recognized requirement[2], Appellants took no action to provide notice of the proposed settlement to class members or have it reviewed and approved by the Cardamone trial judge. In fact, after Seekings' announcement of a settlement in September of 2003, Cardamone Counsel did nothing more to prosecute this case and eventually withdrew on February 19, 2006. (R. Vol.1, p.5) It was only after the Appellants' withdrawal that evidence was discovered which suggested Cardamone Counsel used this period of inactivity to finalize an undisclosed agreement with Defendant Dryvit and class counsel in the Posey matter whereby Cardamone Counsel would receive an attorneys' fee award of $825,000 upon the dismissal of this action and Dryvit would pay lucrative individual settlements to the Original Class Representatives and other persons designated by Cardamone Counsel. (R. Vol. 1, pp.5&8)

> [I]t appears to this Court that following the Posey fairness hearing, Cardamone Counsel and Dryvit's attorneys and Posey Class Counsel agreed to settle the individual lawsuits of certain [South Carolina] class members who were represented by Cardamone Counsel and pay Cardamone Counsel a significant attorneys' fee.

(R. Vol. 1, p.5) Judge Hayes made this observation based on emails and other evidence obtained by the Current Class Representatives and their counsel from Dryvit after Appellants withdrew from this action.

Judge Hayes notes that Cardamone Counsel did not reveal the substance of the April 22, 2004 "deal" to the presiding judge or their receipt of the first $600,000.00 from Posey class

2 The notice and judicial review requirements of Rule 23(c), SCRCP were identical to the language used in Rule 23 of the Federal Rules of Civil Procedure as well as every other state (including Tennessee) that had adopted Rule 23 when Appellant Seekings announced the proposed settlement in 2003.

counsel. (R. Vol. 1 at pp.7-8, n.9) The court explained it only learned of the payments to Cardamone Counsel after Appellants withdrew and the Current Class Representatives (Timothy & Frances Treon and P. Jennings Scearce) intervened into in this case and conducted discovery with Dryvit. (R. Vol. 1, pp.5-6)

III. The Rule to Show Cause is Consistent with Rule 23 of the South Carolina Rules of Civil Procedure and Related Law, and Does Not Deprive Appellants of their Due Process Rights.

The inquiry Judge Hayes seeks to make of Appellants' conduct is no different than the inquiry every Rule 23 judges must make of a proposed class action settlement; albeit, the instant inquiry comes after the settlement was reached because Cardamone Counsel and Dryvit did not timely disclose their agreements to the court as required by Rule 23, SCRCP. Appellate courts and legal scholars recognize that the presiding judge in a Rule 23 class action must supervise settlement proceedings to a degree not found in "conventional bipolar litigation" due to the potential for the named plaintiffs ("class representatives") and their counsel ("class counsel") to abuse the rights of absent class members ("absentees") who are often bound to the outcome of the action without being "real parties to the suit." E.g. Fed.R.Civ.P. 23; In re: General Motors Corp. Pick-Up Truck Fuel Tank Products, 55 F.3d 768, 784-86 (3rd Cir. 1995). The trial judge "plays the important role as protector of the absentees' interests, in a sort of fiduciary capacity, by approving appropriate representatives and class counsel." 55 F.3d at 784. Where the trial court lacks sufficient information to perform this function, there is a danger "that the court cannot properly discharge its duty to protect the interests of the absentees during the disposition of the action." 55 F.3d at 787. This danger is especially grave when a settlement is reached without court oversight, such as where a class settlement is reached before the actual class action lawsuit is filed and/or certified as a class, as was the

case with Posey's national settlement. In the absence of sufficient information about settlement negotiations or the class representatives' conduct, a Rule 23 judge can not effectively monitor for:

(1) "collusion" between the defendant and the class representatives and/or class counsel,

(2) "individual settlements,"

(3) "buy-offs (where some individuals use the class action device to benefit themselves at the expense of absentees)," and

(4) "other abuses."

Id. In this matter, Cardamone Counsel did not disclose the agreements they reached with the Defendant and others to the trial judge. As a result, this action was beset with the exact types of misconduct that Rule 23 procedures were designed to avoid:

(1) Cardamone Counsel **colluded** with Dryvit to dismiss both this action and their objection to the Posey settlement in Tennessee, without any notice to absent class members nor judicial oversight. (R. Vol. 1, pp.4-5)

(2) Dryvit negotiated lucrative **individual settlements** that only benefited the Original Class Representatives and others persons designated by Cardamone Counsel. (R. Vol. 1, p. 6 & n.8)

(3) Dryvit offered to **buy-off** Cardamone Counsel with a large attorney's fee in exchange for their agreement to dismiss this action. (R. Vol. 1, p.7)

(4) Cardamone Counsel otherwise **abused** their position by failing to notify absent class members of the existence of this action as required by the September 2002 certification order and by not disclosing Dryvit's agreement to pay individual settlements and attorneys fee as required by Rule 23(c), SCRCP. (R. Vol. 1, p.8)

Although Appellants claim the delay in Judge Hayes' inquiry excuses them from having to comply with it, a trial judge's power to resolve matters of class counsel misconduct are broad enough to permit this inquiry. Trial courts possess the inherent power to preserve order in judicial proceedings and enforce the administration of justice. Miller v. Miller, 375 S.C. 443,

453, 652 S.E.2d 754; 759 (2007). That power allows a court to exercise its adjudicative power "to safeguard the rights of litigants,"[3] modify or set aside orders and judgments that are the product of fraud, and investigate & punish "fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudicating cases that are presented for adjudication."[4] This is an "implied and necessary power" that is required to ensure the "due administration of justice" and it is so important to the functioning of the judiciary that it may not "be taken away nor abridged by the legislature." State v. Hite, 272 S.C. 303, 305, 251 S.E.2d 746, 747 (1979). In the Rule 23 context, other courts have recognized a trial court's inherent power to inquire into irregularities. Regarding attempts to defraud a trial judge, our Supreme Court has adopted the position of the U.S. Supreme Court in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944):

> This matter does not concern only private parties. They are issues of great moment to the public.... Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which **fraud cannot complacently be tolerated**.

Chewning v. Ford Motor Co., 354 S.C. 72, 79, 579 S.E.2d 605, 609 (2003) quoting 322 U.S. at 245-46 (emphasis added). Both the Hazel-Atlas and Chewning courts emphasized the need to give trial judges a great deal of flexibility in combating fraud. "Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Id.* The Chewning court specifically held that "[a]ttorney fraud calls into question the integrity of the

3 Williams v. Borden, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883-84 (1980).
4 Chewning v. Ford Motor Co., 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003) (defining a "fraud upon the court.").

judiciary and erodes public confidence in the fairness of our system of justice." 354 S.C. at 83-84, 579 S.E.2d at 611.

The Ninth Circuit Court of Appeals reached a similar conclusion in Dixon v. Commissioner of Internal Revenue, 316 F.3d 1041 (9th Cir. 2003) wherein attorneys representing the Internal Revenue Service ("IRS") were defending the claims of approximately 1,800 tax payers who participated in a certain tax shelter. The parties agreed to try several representative cases in order to determine the tax treatment that would be afforded the entire group. Unbeknownst to the other tax payers and the presiding judge, counsel for the IRS reached secret settlements with two (2) of the representative taxpayers before the trial of their cases. In an opinion entitled "**Truth Needs No Disguise,**"[5] the Dixon Court noted that the secret settlements allowed the IRS to portray the proceedings before the trial court as a "legitimate, representative proceeding" when in fact the undisclosed settlements "corrupt[ed] the adversarial nature of the proceeding, the integrity of witnesses, and the ability of the trial court to judge impartially." 316 F.3d at 1044-47. The IRS argued that the discovery of the secret settlements before the entry of a final judgment in the matter did not cause any injury to the class members. Dixon rejected that argument finding that "[f]raud on the court occurs when the misconduct harms the integrity of the judicial process, regardless of whether the opposing party is prejudiced." 316 F.3d at 1046. It went on to find "the perpetrator of the fraud should not be allowed to dispute the effectiveness of the fraud after the fact." Id. (citing Hazel-Atlas, 322 U.S. 238, 247 (1944)).

In the instant matter, it is hard to imagine conduct more injurious to the integrity and public confidence in the court system than to permit Appellants to delay the trial court's inquiry

5 This is a quote from the Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 247 (1944) (emphasis in original).

into overwhelming evidence of misconduct with the filing of a spurious appeal. As explained above, the entire procedural scheme set forth in Rule 23 is designed to be conducted by a presiding judge to guard against and rectify just the sort of misconduct engaged in by Appellants. There can be no public confidence in Rule 23 class action litigation if the presiding judge's inquiry into lawyer misconduct can be delayed with the filing a meritless appeal from an interlocutory order.

The legal profession is, and by necessity must be, a self-regulating profession. "An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice." Preamble: A Lawyer's Responsibilities, Rule 407, SCACR, Rules of Prof. Conduct (2005). Lawyers are entrusted with the unique responsibility of safeguarding and advocating for the rights of their clients. "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." Id. Although the lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen with an interest in earning a satisfactory living are usually harmonious, conflict can arise between the three. The public must have confidence that the attorneys who represent them will harmonize these different responsibilities. See e.g. Preamble, Rule 407(8&9). The need for lawyer integrity is never more necessary than when a lawyer is representing absent class members in a Rule 23 action and is required to provide certain information to those absentees and the trial judge. The Order notes the substantial amount of evidence from which "one can reasonably conclude that the payments [of attorneys fees and

individual settlements] were based on Cardamone 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 SCRCP Rule 23(c) and (d)." (R. Vol. 1, p.8) The Order also notes the contradictory "theories" regarding Cardamone Counsel's conduct and the evidence that appears to contradict them. Contrary to Appellants claims below and during their last attempt to lodge this appeal, the Order makes no findings of fact or rulings on the merits of these issues. Rather, Judge Hayes is simply complying with his obligations as a Rule 23 trial judge. Such an inquiry under the circumstances of this action is supported by the nationwide body of Rule 23 jurisprudence and South Carolina law. See e.g. Ex Parte: TLC Laser Eye Centers (Piedmont/Atlanta), LLC, et al. v. Dr. Jonathan Woolfson, et al., Op. No. 27280 (S.C.Sup.Ct. filed July 3, 2013).

In support of their argument, Appellants rely on Moore v. Simpson, 322 S.C. 518 (Ct. App. 1996) for the proposition that the Rule to Show Cause must strictly comply with the requirements of a summons or complaint. However, Moore v. Simpson does not discuss a Rule to Show Cause at all, but instead merely discusses the requirements of service of process. The Appellants fail to cite a case that properly supports their proposition.

Appellants argument also misstates the holding in State v. Brantley, 279 S.C. 215 (1983), claiming its holding implicates the power of a trial court to order lawyers from a former case to appear as **parties** in a new case, whereas the actual holding only pertains to the power of a trial court to compel a witness, who is also an officer of the court, to appear at hearing. This misrepresentation does not render Brantley inapplicable to this matter, in fact its actual holding is very relevant as its holding stands for the proposition that "[a] trial court has the inherent 'power to protect itself from indignities and to enable it effectively to administer its

judicial functions.'" The court in the instant case has as much inherent power to order the appearance of a party as inherent power to order the appearance of a witness. Both situations endanger the dignity and effectiveness of the court, triggering its inherent power to protect itself.

Appellants also cite Schweiker v. McClure, 456 U.S. 188 (1982), and State v. Langford, 400 S.C. 421 (2012), in support of their due process argument. Neither provides any support for their position. In Schweiker, the Court recognizes that "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." The opinion goes on to counsel that an inquiry into impartiality "must start, however, from the presumption that the hearing officers...are unbiased." This presumption that officers of the court are unbiased is critical in its application to the instant case in which Appellants assert that the Rule to Show Cause will deprive them of due process via bias. Appellants set forth no fact that is an indication that Judge Hayes would be a biased fact-finder. The knowledge he has gained has been through evidence during the course of this litigation, which was highly contested by the Defendant and members of Cardamone Counsel who stayed in the action. Respondents submit that any fair reading of Judge Hayes' numerous orders in this matter displays a careful jurist who has unflaggingly exercised judicial restraint in his approach to multiple instances of apparent misconduct, including being down right lied to about the representation of William and Allison DeLoache which has been undeniably refuted.

State v. Langford, on the other hand, is cited misleadingly because it is, in fact, a criminal case. The court there states that "[a] criminal defendant has a due process right to have his case heard by a fair and impartial judge." Langford's holding addresses a different

area of jurisprudence, a criminal defendant's right to a jury trial, and is therefore not controlling on this equitable matter.

Appellants cite another criminal matter, State v. Duncan, 269 S.C. 510 (1977), to support their assertion of a right to due process. However, the quotation from the case that appears in the brief has ellipses. The ellipsis leaves out the most crucial distinction from the case. There is only one word left out by the ellipsis and that word is "criminal." The quotation in the brief, without ellipses, is as follows: "Due process requires a criminal defendant be given a fair trial before an impartial judge and unprejudiced jury in an atmosphere of judicial calm." State v. Duncan only asserts that a criminal defendant is entitled to due process and therefore an impartial judge and jury. Once again, the Appellants in the instant case are involved in a civil matter, not a criminal matter, making the case irrelevant.

CONCLUSION

This appeal of Judge Hayes' Order is not only procedurally unwarranted, it will cause a delay that will be injurious to the integrity of the legal profession. The absent class members and public intuitively recognize the possibility of conflict between a lawyer's responsibility to his clients, the legal system and his own interest in earning a satisfactory living. In this matter, the plaintiffs' attorneys and their individual clients obtained large cash benefits for themselves from the defendant and others based on an undisclosed agreement that made no such provision for absent class members. Those absent class members and the public deserve an explanation of how that occurred. Rule 23 of the South Carolina Rules of Civil Procedure requires the trial court to make such inquiry and such inquiries are routinely conducted by trial judges in all jurisdictions who have adopted Rule 23 of the Federal Rules of Civil Procedure. When the existence of the undisclosed individual settlements and attorney's fees were reported to Judge

Hayes, he instructed undersigned counsel to focus the litigation on Defendant Dryvit's conduct and deferred an inquiry into the conduct of the Original Class Representatives and Cardamone Counsel until after the underlying case against Dryvit was resolved. Rule 23 jurisprudence and South Carolina law permit such a course of action and support the trial judge's conclusion that the rules and the law "compel" him to complete this inquiry. It is the Plaintiffs' prayer that this appeal be dismissed so that the trial judge may fulfill his fiduciary duty to the absent class members and conduct the inquiry contemplated by the Order.

Prior to the filing of this appeal, Judge Hayes scheduled his inquiry for the week of September 9, 2013. In recognition of the difficulty in finding such a large block of time in a busy judicial schedule, the undersigned respectively make this Court aware of this availability if it is inclined to return the matter to the trial judge.

July 24, 2014

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No.: 2002-CP-07-1377
Appellate Case No.: 2013-001367

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 Scearce;
and Steven Christian individually and on behalf of other similarly
Situated in the State of South Carolina .....Respondents

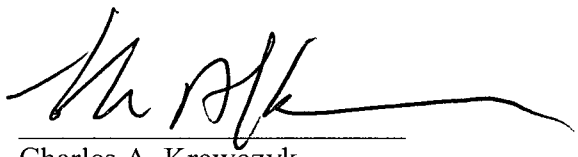
v.

Dryvit Systems, Inc.....Defendant

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b) SCACR.

July _____, 2014



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I certify that this 28th day of July, 2014, I have served the foregoing Respondents' Final Brief via

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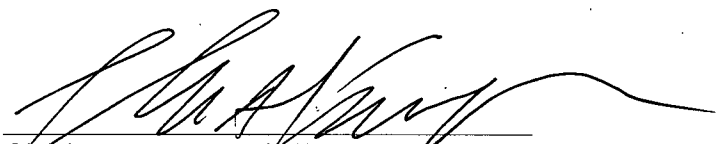

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