

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

Lower Court 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, Jane Treon, and P. Jennings Scarce
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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STATEMENT OF ISSUES ON APPEAL

- I. The Rule to Show Cause is Immediately Appealable Because It Violates Appellants' Constitutional Right to a Jury Trial on the Legal Claims in the *Treon/Tucker* Action
- II. Judge Hayes Lacked the Power to Issue a Rule to Show Cause against Former Class Counsel.
- III. The Rule to Show Cause Will Deprive Appellants of Due Process.

STATEMENT OF THE CASE

This appeal involves three related civil actions, two of which have now been consolidated. The first is a class action that was filed in 2002 against Dryvit Systems, Inc. ("Dryvit"), regarding alleged defects in Dryvit's synthetic stucco product. This action was originally captioned *Cardamone, et al. v. Dryvit Systems, Inc.*, Case No. 2002-CP-07-1377 (referred to herein as the *Cardamone* action). Appellants, who served as class counsel from 2002 to January 2006, have had no involvement in the case since January 19, 2006, when they were relieved as counsel and their clients were relieved as class representatives. (R. Vol. I, p. 113) After Appellants and the former class representatives were relieved, the *Cardamone* action continued, with new class representatives and new class counsel. On June 10, 2010, the parties in *Cardamone* reached a settlement, which was approved by Judge Hayes, and the action against Dryvit was dismissed with prejudice. (R. Vol. I, p. 153)

In the second action, which was filed in 2008, new class representatives in the *Cardamone* action sued the former class representatives and Dryvit, alleging claims for civil conspiracy, breach of fiduciary duty, and fraudulent concealment. This putative class action was originally captioned *Treon, et al. v. Dryvit Systems, Inc. and*

Cardamone, et al., Case No. 2008-CP-07-774 (hereinafter referred to as “the *Treon* action”). Appellants were not parties to this action. (R. Vol. II, p. 488-502)

The third action, also brought by the new class representatives in the *Cardamone* action and also filed in 2008, alleged the same claims, against the same defendants as the *Treon* action, but also added claims for professional negligence and breach of fiduciary duty against Appellants and other attorneys who were class counsel in the *Cardamone* action from 2002 to 2006.¹ That putative class action was captioned *Tucker, et al. v. Leath Bouch & Crawford, LLP, et al.*, Case No. 08-CP-07-3145. (R. Vol. I, p. 192-210) In both *Treon* and *Tucker*, the plaintiffs demanded a jury trial. The *Treon* action and the *Tucker* action were consolidated (hereinafter referred to as the “*Treon/Tucker* action”).

The *Cardamone* action and the *Treon/Tucker* action are integrally related: the plaintiffs in the *Treon/Tucker* action are members of the *Cardamone* class, and the same named class representatives purport to represent the class in *Cardamone* and the putative class in the *Treon/Tucker* action; the attorney defendants in the *Treon/Tucker* action are some of the attorneys who represented the original class representatives in the *Cardamone* action; and the claims in the *Treon/Tucker* action relate exclusively to the *Treon/Tucker* defendants’ conduct as class counsel in the *Cardamone* action. Additionally, the Honorable J. Mark Hayes, II presided over both cases until his recent—and possibly temporary—self-recusal from the *Treon/Tucker* action. (R. Vol. I, p. 49-58)

On April 27, 2012, Judge Hayes stayed the *Treon/Tucker* action so that he could issue a Rule to Show Cause in the *Cardamone* action; the Rule to Show Cause was issued a month later, on June 1, 2012. (R. Vol. I, p. 34-48; p. 1-11) The Rule to Show Cause

¹ Two of the attorney defendants in *Treon/Tucker*, Frank E. Grimball and Mullen Wylie, LLC, have settled with the plaintiffs and are no longer parties to that action.

names both the original class representatives and original class counsel; it requires an accounting of all benefits received by the class representatives and all attorneys' fees received by class counsel; requires the original class representative and original class counsel "to show why the court should not require that all fees and/or benefits, if any, be paid into the court to be held in a constructive trust for the class." (R. Vol. I, p. 11) The Order announced the Rule to Show Cause would be heard on October 1, 2012. (R. Vol. I, p. 11)

Former class counsel and former class representatives all filed returns to the Rule to Show Cause, seeking to have the Order dismissed. (R. Vol. I, p. 156-258)) Former class counsel and class representatives argued the trial court lacked the power to rule them in, and they also argued that the Rule to Show Cause deprived them of a jury trial and other fundamental due process rights. A hearing on the motions to dismiss the Rule was held in July 2012.

On September 28, 2012, Judge Hayes issued a written order denying the motions to dismiss the Rule to Show Cause. (R. Vol. I, p. 12-17) On October 9, 2012, Appellants moved for reconsideration of the written order pursuant to Rule 59(e). (R. Vol. I, p. 259-321) Judge Hayes denied the motions for reconsideration on May 31, 2013, and Appellants noticed this appeal on June 14, 2013. (R. Vol. I, p. 29-33; Vol. II, p. 484-487) Respondents filed a motion to dismiss the appeal, which Judge Cureton denied, though he invited the parties to address appealability in their appellate briefs. (R. Vol. I, p. 62-63)

FACTS

The present appeal challenges Judge Hayes's issuance of a Rule to Show Cause in the *Cardamone* class action. Through a strange set of rulings, the trial court has thrust

Appellants into an action to which they are not parties; halted the *Treon/Tucker* action, to which Appellants are parties and in which the very same issues are at stake; and if allowed to continue, will deprive Appellants of their fundamental due process rights, including their right to a trial by jury. To understand how Appellants have fallen into this bizarre legal rabbit hole requires a detailed recitation of facts, which spans over ten years. While the procedural history of this case is tortured and confusing, it accurately reflects how the *Cardamone* and *Treon/Tucker* actions have become much like the chimera of Greek mythology – a monster made up of incongruous parts against which Appellants are forced to defend themselves.

I. The *Cardamone* Products Liability Class Action

During the 1990s, numerous homeowners across the nation filed legal actions against Dryvit, alleging defects in Dryvit's synthetic stucco product. In April 2002, in a case known as the *Posey* action,² a Tennessee court certified a nationwide settlement class and gave preliminary approval to a proposed class-wide settlement. Anyone wishing to opt-out of the settlement had to do so by September 3, 2002.

Prior to September 3, 2002, several individual actions against Dryvit were already pending in South Carolina. Among these were lawsuits filed by Appellant Seekings and his firm on behalf of John and Sally Cardamone in Beaufort County on August 10, 1999, and on behalf of Ramona Gianni in Horry County on October 10, 2001. Additionally, Appellants W. Jefferson Leath, Timothy W. Bouch, and William M. Bowen, and their

² *Bobby R. and Sabrina Posey, et al. vs. Dryvit Systems, Inc., et al.*, Civil Action No. 17,715-IV (Circuit Court, Jefferson County, Tennessee). The Honorable O. Duane Slone ("Judge Slone") presided over the *Posey* action.

respective law firms, had filed suit on behalf of Benjamin and Diane Clark in Beaufort County on May 24, 2002.

Appellants' individual clients each filed a notice prior to September 3, 2002, opting out of the *Posey* settlement, which Appellants viewed as wholly inadequate. Hoping to ensure that other homeowners in South Carolina were not bound by the *Posey* settlement, Appellants filed the *Cardamone* class action in August 2002 in Beaufort County. The purpose of the class was to opt out all persons in South Carolina who might have claims against Dryvit, thereby preventing those persons from being bound by the *Posey* settlement and permitting them to pursue their own individual actions against Dryvit in South Carolina. The designated class representatives were the Cardamones, the Clarks, and Ms. Gianni. An Order granting the plaintiffs' motion for class certification of an "opt-out class action" was entered on September 3, 2002, the very deadline for opting out of the *Posey* settlement in Tennessee. (R. Vol. I, p. 80-86)

After filing the *Cardamone* class action, three attorneys who represented that class, not knowing whether the order opting out that class would be honored by the Tennessee court,³ traveled to Tennessee to oppose the proposed settlement in *Posey*. Over Dryvit's objection, Judge O. Duane Slone permitted Frank Grimbball, one of the lawyers then representing the class in the *Cardamone* class action, to make a presentation detailing the inadequacies of the proposed settlement. Judge Slone thereafter refused to approve the proposed settlement, but instead allowed the parties in *Posey* to engage in additional settlement negotiations. (R. Vol. I, p. 91; p. 299)

³ In fact, at least one federal appellate court had already held, in 1998, that such group opt-outs were not permitted under federal class action rules. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998).

The ensuing negotiations substantially improved the terms of the *Posey* settlement. According to the Order and Judgment Granting Final Approval of Settlement, entered by Judge Slone on January 14, 2003, the revised settlement included “an enhancement of the rights and options of Class Members and a substantial increase in the value of the benefits made available to persons who make claims under the Settlement.” (R. Vol. I, p. 91) Judge Slone specifically noted the contributions of counsel from South Carolina in improving the *Posey* settlement. (R. Vol. I, p. 91; p. 299-300) In his order approving the revised settlement, Judge Slone awarded \$11.6 million in attorneys’ fees and specifically authorized lead class counsel in *Posey*, in its sole discretion, to “allocate and distribute this award of attorneys’ fees and expenses among counsel for the Class.” (R. Vol. I, p. 96)

After the *Posey* settlement was approved in Tennessee, the Cardamones, Clarks, Ms. Gianni, and all of Appellants’ other clients who had filed individual lawsuits prior to the filing of the *Cardamone* class action, settled and dismissed their individual South Carolina lawsuits. (R. Vol. I, p. 109) The *Cardamone* class action, however, remained pending.

Because the class representatives had all settled their individual claims, several new attorneys moved to intervene as class counsel in the *Cardamone* class action and to substitute new class representatives. At the same time, original class counsel—whose clients had resolved their individual claims against Dryvit—moved to be relieved as counsel. (R. Vol. I, p. 109) Prior to being relieved as counsel, Appellant Dixon Robertson sent a letter to new class counsel and copied Judge Hayes, disclosing that

former class counsel were to receive attorneys' fees based on their participation in the *Posey* case. Specifically Appellant Robertson wrote:

Because of the contributions South Carolina made in the *Posey* case, class counsel agree to pay a portion of their attorney fees to us, in recognition of the work we did as counsel for objectors in *Posey*. To avoid even the appearance of impropriety, I wanted to make sure you knew about them. (R. Vol. I, p. 268-269)

New class counsel responded to Appellant Robertson's letter, asking him to clarify the reason original class counsel were receiving attorneys' fees. He also copied Judge Hayes. (R. Vol. I, p. 271-273) Robertson provided this clarification in a letter dated January 3, 2006, which again was copied on all attorneys and Judge Hayes, stating "any fees we may receive are in recognition of work done in *Posey*, not in this case. I am aware of no agreement with Dryvit affecting the vitality of the *Cardamone* action." (R. Vol. I, p. 275)

Judge Hayes, who by then had been appointed by the Supreme Court to preside over the *Cardamone* class action and who was copied on the correspondence regarding attorneys' fees, granted the motion to intervene, substituting Timothy and Jane Treon and P. Jennings Scarce as the class representatives, and appointing Gregory M. Alford, Thomas J. Finn, Thomas E. Williams, Robert B. Phillips, Richard Gleissner, and Donald E. Jonas (collectively, "the Alford group") as new class counsel. (R. Vol. I, p. 108-112) By consent order dated January 19, 2006, Judge Hayes also granted the motion for some of the original class counsel, including Appellants, to be relieved. (R. Vol. I, p. 108-112) For the next seven years, Appellants, had no involvement in the *Cardamone* class action.

A. Rule to Show Cause

On January 12, 2010, the Alford group filed a “Motion for an Accounting and Deposit into Court of All Attorneys’ Fees Collected by All Class Counsel or in the alternative for a Rule to Show Cause Why Counsel Should Not Be Held in Contempt.” (R. Vol. I, p. 322) The motion alleged that original class counsel, including Appellants, failed to adequately represent the absent members of the *Cardamone* class and received fees for their representation of the *Cardamone* class without notice to the class or Court approval. (R. Vol. I, p. 322-334) Judge Hayes held a hearing on the motion on March 31, 2010, and orally announced his intention to grant the motion. (R. Vol. II, p. 848, ll. 13-14) However, this ruling was never reduced to writing or filed prior to the *Cardamone* action being settled in June 2010.

B. Settlement and Dismissal with Prejudice

In June 2010, the parties to the *Cardamone* class action brought a settlement agreement to Judge Hayes, which he approved. In the order granting final approval of the settlement, Judge Hayes dismissed with prejudice “[the *Cardamone*] Action and all claims, rulings and motions against the Settling Defendant . . . , but the Court [retained] exclusive and continuing jurisdiction of the Action, all Parties, and Settlement Class Members, to interpret and enforce the terms, conditions and obligations of this Settlement Agreement consistent herewith.” (R. Vol. I, p. 153)

II. The Treon/Tucker Action

In 2008—two years before the *Cardamone* class action settled—the Alford group filed a putative class action against the former class representatives (the Cardamones, the

Clarks, and Gianni) and Dryvit.⁴ The named plaintiffs and putative class representative were Timothy Treon and Jennings Scarce, both of whom were still serving as class representatives in the *Cardamone* action. The *Treon* action asserted causes of action for civil conspiracy, breach of fiduciary duty, and fraudulent concealment. (R. Vol. II, p. 488-502) These claims were based on factual allegations that the former class representatives had reached “lucrative individual settlements which Dryvit conditioned on the dismissal of the *Cardamone* Action” without informing the court. (R. Vol. II, p. 496) Dryvit was also named as a defendant in this action, and Dryvit removed the *Treon* action to federal court. The *Treon* plaintiffs then moved to remand the case back to state court.

While the motion to remand was pending, the Alford group filed yet another lawsuit against the former class representatives and, for the first time, against former class counsel.⁵ The *Tucker* action included all of the causes of action in *Treon* (civil conspiracy, breach of fiduciary duty, and fraudulent concealment) and a professional negligence cause of action directed to the original class counsel only. (R. Vol. I, p. 192-210) The crux of the allegations against class counsel (including Appellants) is that they failed to adequately represent the absent members of the *Cardamone* class and received fees for their representation of the *Cardamone* class without notice to the class or Court approval. In the *Tucker* action, the plaintiffs originally sought, among other things, disgorgement of all attorneys’ fees and settlement proceeds as well as special, compensatory, and punitive damages. (R. Vol. I, p. 209)

⁴ *Treon, et al. v. Dryvit Sys., Inc., et al.*, Case No. 2008-07-774.

⁵ *Tucker, et al. v. Leath, Bouche, & Crawford, LLP, et. al.*, Case No. 2008-CP-07-3145.

After the *Treon* case was remanded back to state court, it was consolidated with the *Tucker* action and is referred to herein as the “*Treon/Tucker* action.” In both *Treon* and *Tucker*, the plaintiffs demanded a jury trial, a mode of trial to which the defendants in those actions, including Appellants, have a constitutional right. (R. Vol. II, p. 488; Vol. I, p. 192)

A. Disqualification of the Alford group from the *Treon/Tucker* Action

In the summer of 2009, counsel for the Cardamones realized that one of the attorneys in the Alford group, Thomas J. Finn, had formerly been an attorney at the Mullen Wylie law firm, which had represented the Cardamones in their individual action against Dryvit. (R. Vol. I, p. 116) While working for Mullen Wylie, Finn had participated in the Cardamones’ individual lawsuit by signing pleadings, attending at least one deposition, and receiving correspondence on the Cardamones’ behalf. (R. Vol. I, p. 116) In other words, the Cardamones’ former attorney from their lawsuit against Dryvit was now pursuing a lawsuit based on their actions while that attorney represented them. The Honorable Marvin H. Dukes, III, issued an order finding that this conflict of interest disqualified Finn, and all other attorneys in the Alford group, from representing the plaintiffs in the *Treon/Tucker* action. (R. Vol. I, p. 118-128) Thomas J. Pendarvis, I. Gregory Hodges, Timothy D. Roberts, and Williams J. Hunter (the Pendarvis group) now represent the *Treon/Tucker* plaintiffs.

Although disqualified as counsel in the *Treon/Tucker* action, the Alford group attorneys continued to represent the class in the *Cardamone* action through its settlement. Judge Dukes’s disqualification order prohibited the Alford group “from conferring or sharing any information with [the Pendarvis group], lest the conflict be imputed to them.” (r. Vol. I, p. 128) Judge Dukes subsequently clarified this by order to allow the Alford

group attorneys to return the file to their client and to provide the Pendarvis group with non-confidential information regarding the status of the case. (R. Vol. I, p. 130-131) Judge Dukes also allowed the Pendarvis group to file a motion with the Court if counsel believed additional information was needed to protect the clients' interests. (R. Vol. I, p. 131)

B. Judge Hayes's Appointment to the *Treon/Tucker* Action

In August 2010, two months after the *Cardamone* class action had settled and was dismissed with prejudice, the chief administrative judge in Beaufort County appointed Judge Hayes to handle the *Treon/Tucker* case. In July 2011, Judge Hayes heard arguments on the motion for certification of the *Treon/Tucker* class. During this hearing, it became clear that Judge Hayes had been exposed to years of *ex parte* communications, which convinced him – without ever having heard from Appellants – that Appellants had “failed to do their job” as class counsel. (R. Vol. II, p. 673, ll. 24-25)

For instance, after Kent Stair, on behalf of the *Treon/Tucker* defendants, concluded his arguments as to why the plaintiffs had not carried their various burdens in relation to class certification, Judge Hayes admitted that he “[did] not want to grant this class certification,” but went on to explain:

[W]hat I'm having a difficulty separating from, sir [Mr. Stair], is the fact that there was a class action litigation in place, that the lawyers that this side of the courtroom is representing in all indications failed to do their job and sit – let this South Carolina case sit for an extremely long period of time, let that fruit rot on the vine and did not send out any notice. ... *I have seen documents, I have seen letters, I have seen emails that highly suggest that there was a deal contemplated between Dryvit lawyers and class counsels and included these members of – that were the – these class representatives*, a secret deal to make the South Carolina case rot on the vine while *Posey* went, while

Posey up in Tennessee went through all the hurdles it went through to be ripened. If you have those types of allegations arising from a class action lawsuit and factual basis of the class action, a subsequent class action lawsuit that's the failure of the lawyers and class representatives to be able to do their job under Rule, under Rule 23 that I am obligated that gives me duties as well, I have to see that there is going to be a class. I might agree with you that plaintiffs' counsel is not making it easy for me to apply these rules that need to be applied but give me some help, don't – I – ***your credibility in your argument is lost with me when the facts that I have heard for years are so clear, they're so documented.*** I've not come to any final conclusions on those facts, if I did my judicial obligations would be different. I have not heard from the defense and I want to hear from the defense but we are talking about the first stage class certification and there are certain facts that are screaming at me that we need to have a class certification as much as I do not want to do it. (emphasis added) (R. Vol. II, p. 673, l. 21 to p. 675, l. 4)

Later in that same hearing, Judge Hayes went on to say:

Facts have been alleged *in the other case* related to alleged misconduct of these defendants in the other case that are the same types of facts that are related, that I believe will be related and are some contained in the complaint that are in this case we're here today on, the same defendants, the same facts. There is just an inexcuse – ***there's no way I don't think anybody can argue there is not the overlap of facts*** [sic] and these defendants in the other case they're in this case, I mean, that's just clear as clear can be that they're the same, I and I have knowledge of that. (emphasis added) (R. Vol. II, p. 728, ll. 7-17)

During the *Treon/Tucker* class certification hearing, Judge Hayes suggested Appellants review the transcripts from the *Cardamone* case to familiarize themselves with those “years” of facts and documents. (R. Vol. II, p. 657, ll. 1-2) Appellants have done so, and the transcripts reveal that Judge Hayes had been exposed to seven years of a one-sided presentation attacking their motives and integrity. For instance, in March 2010, while considering whether to issue the Rule to Show Cause against Appellants, at the urging of

plaintiffs' counsel in *Cardamone*, Judge Hayes acknowledged the "mountains and volumes of evidence" that he had heard against Appellants, in their absence, that "scream" and "yell" that they did not protect the interest of the class:

Why did we, as a society in our country, even bother with the processes of trying Timothy McVeigh? We all knew he was guilty. It was on the television every day. He killed innocent children. He blew up the federal courthouse. They had him dead to right. Why even care about the process when you knew that he was guilty to begin with? There are certain things about this litigation that has [sic] come before me that has [sic] been challenging because there has been some clarity of some things that have happened. Many of them to my surprise. And I continue to be surprised.

...

I am struggling at this point with this motion [for Rule to Show Cause] because there's some obvious things that tell me why not just go ahead and have this hearing? Why not just go ahead and have everybody come in and explain to me further what went on *when I have already heard for how many years and how much mountains and volumes of evidence that I've already received as to I feel like I know what went on?*"

...

And it's so clear that the South Carolina case did not proceed in what I would determine and call a reasonable fashion in protecting the interest of that class because the people who are driving that car that was pulling that South Carolina class had decided, we got what we wanted in Tennessee, and so we're not going to do anything in South Carolina. And we're going to let the South Carolina fruit on that tree die. And then we won't have any problems.

Those things are obvious to me. And I will welcome, if we, I mean, if those issues, if I have to decide those issue one day, I will welcome the receipt of any factual information anybody wants to give me to try to change my opinion of those. *But those are opinions that the facts have been presented in to me are just screaming and yelling.* (emphasis added) (R. Vol. II, p. 824, l. 16 to 825, l. 20; p. 828, ll. 10-25)

Numerous other examples illustrating the negative arguments made against Appellants, and Judge Hayes's unquestioning acceptance of those arguments, were outlined in the Memorandum in Support of Defendants' Motion to Recuse in the *Treon/Tucker* action. (R. Vol. I, p. 391-402).⁶

Judge Hayes denied the motion to recuse on May 2, 2012. Additionally, Judge Hayes stayed the *Treon/Tucker* action so that an accounting for the attorneys' fees and settlements received could be accomplished via a Rule to Show Cause in the *Cardamone* class action. Specifically, Judge Hayes stated, "[a]fter extensive research on the issue of recusal and this Court's obligations under Rule 23, the better approach at this time is for the [*Treon/Tucker* case] 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 [in the *Cardamone* class action]." (R. Vol. I, p. 47).

III. Issuance of Rule to Show Cause in the *Cardamone* Class Action

On June 1, 2012, Judge Hayes issued a Rule to Show Cause and Order for Accounting in the *Cardamone* class action, which had been settled and dismissed with prejudice for nearly two years. (R. Vol. I, p. 1-11) The Rule to Show Cause names both the original class representatives and original class counsel; it requires an accounting of all benefits received by the class representatives and all attorneys' fees received by class counsel; requires the original class representative and original class counsel "to show

⁶ The defendants in the *Treon/Tucker* action also pointed out the inherent conflict created by the fact that the Treons and Mr. Scarce were class representatives in both the *Cardamone* action and in the *Treon/Tucker* action, and in both cases sought the same "pot of money" for the same alleged conduct in both lawsuits. Counsel for the *Treon/Tucker* plaintiffs attempted to cure this intractable problem by filing a Conditional Stipulation for Consent Order in the *Treon/Tucker* action that withdrew the Treons and Mr. Scarce as class representatives in that lawsuit and abandoned the claim for disgorgement of all attorneys' fees paid to original class counsel. (R. Vol. I, p. 380-382).

why the court should not require that all fees and/or benefits, if any, be paid into the court to be held in a constructive trust for the class.” (R. Vol. I, p. 11) The Order announced the Rule to Show Cause would be heard four months later, on October 1, 2012. (R. Vol. I, p. 11)

Denying the court’s jurisdiction over them, Appellants and the former class representatives all filed returns to the Rule to Show Cause, seeking to have the Order dismissed. (R. Vol. I, p. 156-258) Appellants and the class representatives argued that the Rule to Show Cause would deprive them of a jury trial and other important rights of due process. They also argued the trial court did not have the power to issue a Rule to Show Cause against them. Judge Hayes denied the motion to dismiss and subsequent Rule 59(e) motions. (R. Vol. I, p. 12-33)

IV. Judge Hayes’s *Sua Sponte* Recusal from the *Treon/Tucker* Action

On September 7, 2012, the plaintiffs in the *Treon/Tucker* action asked Judge Hayes to temporarily lift the stay of that case and to hold a hearing on plaintiffs’ pending motion to compel. (R. Vol. II, p. 467-480) This motion demonstrates the blurred lines between the Rule to Show Cause and the *Treon/Tucker* action. As the motion explained, “Plaintiffs intend to provide” any documents produced in the *Treon/Tucker* action to the Alford group attorneys – who had been *disqualified* as counsel in the *Treon/Tucker* action – “so that those documents could be used in the Rule [to] Show Cause hearing” in the *Cardamone* action. (R. Vol. II, p. 469) Plaintiffs went so far as to state that they “have no objections whatsoever if this Motion to Compel is argued by counsel in the Underlying #1377 Case [the *Cardamone* action].” (R. Vol. II, p. 479) Stated another way, the Pendarvis group attorneys, as class counsel in the *Treon/Tucker* action, asked Judge Hayes to allow the Alford group attorneys to argue a motion to compel in the

Treon/Tucker action for the purpose of obtaining documents to use in the Rule to Show Cause, a motion that had been filed in a completely different case, the *Cardamone* action.

By order of March 29, 2013, acknowledging that the plaintiffs in the *Treon/Tucker* case were asking for the stay to be lifted in hopes of obtaining documents “for use in the prosecution of the [*Cardamone* class action] Rule to Show [Cause] hearing,” Judge Hayes granted the motion and lifted the stay in the *Treon/Tucker* action. (R. Vol. I, p. 50)

Judge Hayes also recused himself from the *Treon/Tucker* case until the completion of the Rule to Show Cause in the *Cardamone* class action. (R. Vol. I, p. 55-58) Recognizing the extreme overlap between the two cases, Judge Hayes explained the specific reason for the recusal as follows:

In the [*Cardamone* Class Action] Rule to Show Cause, the court is acting as the final fact finder. In ruling on the [*Treon/Tucker*] motion [to compel documents claimed to be privileged], the undersigned may review evidence highly probative of issues relevant to the Rule to Show Cause but yet which may be properly protected from disclosure. Thus, potentially compromising his role as fact finder and unnecessarily frustrating or clouding the objectives of the undersigned’s duties related to the Rule to Show Cause if he rules on the present [*Treon/Tucker*] motion [to compel]. (R. Vol. I, p. 57, n. 14)

Judge Hayes further explained that “[t]he undersigned continues to believe the integrity of the adjudicatory process is preserved by the undersigned refraining from ruling on any [*Treon/Tucker*] matter until after the [*Cardamone* Class Action] Rule to Show [Cause] is concluded.” (R. Vol. I, p. 55)

After Judge Hayes recused himself, the South Carolina Supreme Court assigned the *Treon/Tucker* case to the Honorable Clifton Newman. (R. Vol. I, p. 59) The Rule to Show Cause in the now-dismissed *Cardamone* action remains before Judge Hayes.

Because of the preclusive effect the factual findings in the Rule to Show Cause will have on the *Treon/Tucker* action, Judge Hayes is in fact ruling on the *Treon/Tucker* action despite his recusal to preserve the “integrity of the adjudicatory process.” (R. Vol. I, p. 55) Appellants have filed this immediate appeal to protect their right to a jury trial.

ARGUMENTS

I. The Rule to Show Cause is Immediately Appealable Because It Violates Appellants’ Constitutional Right to a Jury Trial on the Legal Claims in the *Treon/Tucker* Action

South Carolina law entitles a litigant to immediately appeal an interlocutory order that affects substantial rights. *See* S.C. CODE ANN. § 14-3-330(2) (1991). Moreover, an interlocutory order that affects a mode of trial *must* be appealed immediately, or the issue is waived. *Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008); *see Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). When a litigant is entitled to a jury trial as a matter of right, any order that has the effect of denying that right affects the mode of trial, and therefore must be appealed immediately. *See id.* (citing cases); *see also Creed v. Stokes*, 285 S.C. 542, 542, 331 S.E.2d 351, 352 (1985) (holding that appellant waived right to appeal order of reference to a master-in-equity by not appealing the reference immediately).

The South Carolina Constitution provides that “[t]he right of trial by jury shall be preserved inviolate.” S.C. Const. art. I, § 14; *see Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005) (“The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868.”). This right is confirmed in Rule 38(a) of the South Carolina Rules of Civil Procedure, which provides that “[t]he right of trial by jury

as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate.”

Appellants are the defendants in the *Treon/Tucker* action, and they are entitled to a jury trial on the claims against them in that litigation. “Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions.” *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 494, 730 S.E.2d 328, 332 (Ct. App. 2012). All of the causes of action pleaded in the *Treon/Tucker* case—breach of fiduciary duty, civil conspiracy, fraudulent concealment, and professional negligence—are legal. In addition, the *Treon/Tucker* plaintiffs seek compensatory damages—a legal remedy.⁷ Accordingly, Appellants have a constitutional entitlement to a jury trial in the *Treon/Tucker* action. See Rule 38(a), SCRPC (“Issues of fact in an action for the recovery of money only . . . *must be tried by a jury*, unless a jury trial be waived.” (emphasis added)). In contrast, Appellants have no right to a jury trial in the Rule to Show Cause, which is an equitable proceeding.⁸

Because there is no right to trial by jury in equitable actions, it has long been recognized that the constitutional entitlement to trial by jury mandates that “[i]f there are factual issues common to both the legal and equitable claims, the legal claim, absent the most imperative circumstances, must be tried . . . first.” *Gardner v. Travis*, 316 S.C. 315, 318, 450 S.E.2d 54, 56 (Ct. App. 1994) (internal quotation marks omitted); see also *C&S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 302, 350 S.E.2d 191, 193 (1986)

⁷ The complaint in the *Treon/Tucker* action also seeks disgorgement of fees, but counsel for the *Treon/Tucker* plaintiffs withdrew the claim for disgorgement, without notice to the putative class, during the class certification hearing.

⁸ As discussed *infra*, Appellants dispute that Judge Hayes had any authority to issue the Rule to Show Cause.

(citing *Beacon Theatres v. Westover*, 359 U.S. 500 (1959)). This is so because any findings of fact made in the first action to be tried will have preclusive effect in the second. See, e.g., *Beall v. Doe*, 281 S.C. 363, 367-68, 315 S.E.2d 186, 188-89 (Ct. App. 1984) (recognizing that facts determined in one proceeding may not be re-litigated in subsequent proceeding).

Both the *Treon/Tucker* action and the Rule to Show Cause involve the same underlying allegations of fact. This commonality of facts is clearly illustrated in the *Tucker* Complaint: paragraphs 46 through 53 are labeled “Common Deficiencies Relating to Defendants’ Conduct.” Among those “common deficiencies” are allegations that Appellants received \$825,000 in attorneys’ fees “that would be fully payable ‘after the final dismissal of the’ [*Cardamone* class action].” (R. Vol. I, p. 203 ¶ 50) Similarly, the Rule to Show Cause revolves around the “attorney fees allegedly received by certain Class Counsels . . . which were never disclosed to or approved by this Court.” (R. Vol. I, p. 1) As Judge Hayes said in relation to these two actions, “there’s no way I don’t think anybody can argue there is not the overlap of facts . . . I mean, that’s just clear as clear can be that they’re the same.” (R. Vol. II, p. 728, ll. 13-16)

In the Rule to Show Cause, Judge Hayes will make factual findings regarding the very same allegations that form the basis of the *Treon/Tucker* action. If he rules against Appellants, the plaintiffs will argue that Judge Hayes’s factual findings are entitled to preclusive effect in the *Treon/Tucker* action under established rules of collateral estoppel. Moreover, Judge Hayes is considering granting relief in the form of “recovery of money.” Because “issues of fact in an action for the recovery of money only . . . *must be*

tried by a jury,” the Rule to Show Cause affects the mode of trial and is immediately appealable.

In similar circumstances, this Court has recognized that the legal action must be resolved before the equitable one. *See Gardner v. Travis*, 316 S.C. 315, 450 S.E.2d 54 (Ct. App. 1994), *cert. dismissed*, 320 S.C. 60, 463 S.E.2d 94 (1995). *Gardner* was a foreclosure action in which the defendant homeowner pleaded legal counterclaims alleging that the notes and mortgages secured were void because they secured gambling debts. The circuit court recognized that Travis’s claims were both legal and compulsory, *i.e.*, that he was entitled to a jury trial. The court severed the counterclaims from the foreclosure action and referred the latter to a master-in-equity. Without waiting for resolution of the counterclaims, the master proceeded with the foreclosure action. Based on his factual finding that the notes and mortgages did not secure gambling debts, the master ordered foreclosure to proceed.

On appeal, this Court reversed. The Court recognized that Travis was entitled to trial by jury on his counterclaims and held that the master-in-equity had violated Travis’s right to a jury trial by proceeding with the foreclosure action. *See id.* at 317-18, 450 S.E.2d at 56. The court vacated the master’s order and remanded with explicit instructions that “all legal issues raised by Travis’s compulsory counterclaims” must be resolved before the foreclosure action could proceed.

Likewise, here, Appellants are entitled to have a jury decide the legal claims against them in the *Treon/Tucker* action before Judge Hayes makes preclusive factual findings in the Rule to Show Cause that will unfairly set the mold for the *Treon/Tucker* action. Judge Hayes’s order setting the Rule to Show Cause puts the cart before the horse

and, if allowed to stand, will deny Appellants the right to a jury trial on the claims against them in the *Treon/Tucker* action.

Appellants raised their concerns regarding a jury trial in their motions to dismiss. Judge Hayes denied relief because he had “received no request to conduct a jury trial as part of this [Rule to Show Cause].” (R. Vol. I, p. 25) This ruling, as Appellants pointed out in their Rule 59(e) motions, failed to address their argument that the Rule to Show Cause deprived them of their right to jury trial in the *Treon/Tucker* action. Moreover, Appellants have no standing to assert pleadings (and demand a jury trial) in the *Cardamone* action because they are not now nor have they ever been parties to that action.

II. Judge Hayes Lacked the Power to Issue a Rule to Show Cause Against Former Class Counsel

Judge Hayes issued this Rule to Show Cause approximately seven years after he relieved Appellants as class counsel in the *Cardamone* action. Appellants have never been parties in that case, and prior to being relieved as counsel, they informed Judge Hayes of the attorney’s fees they were to receive for improving the settlement in the *Posey* action. (R. Vol. I, p. 268-273) Because Appellants have long been relieved as counsel and are not parties to the action, the trial court lacks the power to issue a Rule to Show Cause against them.

A. The sources of authority cited by Judge Hayes do not support the issuance of the Rule to Show Cause

First, Judge Hayes reasoned that because Appellants are attorneys, and therefore officers of the court, their appearance at the Rule to Show Cause is required pursuant to

State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983). The holding in *State v. Brantley* is not so broad.

In *Brantley*, the trial judge was presiding over a guilty plea in Hampton County, and during the plea, the trial judge learned that the defendant's records were in Jasper County. *Id.* at 216, 305 S.E.2d at 235. The trial judge asked the solicitor's office to notify the Sheriff of Jasper County that he was to appear in court with the defendant's records that afternoon. *Id.* Rather than appearing himself, the sheriff sent a deputy with the records. *Id.* Unsatisfied, the trial judge instructed the deputy to "pass the word along to Sheriff Brantley that I want him in court tomorrow morning by 9:30 without fail." *Id.* The next morning, the sheriff did not appear, and the trial judge found him in contempt for failing to obey a court order. *Id.*

The issue on appeal in *Brantley* was whether the sheriff could be held in contempt of court for not obeying the trial court's order to appear in court when that order was orally delivered to an authorized agent of the sheriff. The sheriff argued he was not in contempt because he had never been subpoenaed to appear. The Supreme Court rejected this argument, holding:

[W]hen the subpoena serves no purpose other than as a notice to appear and the appellant admits he received the notice to appear on three occasions, he was in contempt of court in failing to comply. The court's order was valid, was directed to appellant in his official capacity as an officer of the court, and his wilful failure to comply constituted a constructive contempt of court, which tended to obstruct and embarrass or prevent the due administration of justice.

Id. at 217, 305 S.E.2d at 235 (internal quotations and citations omitted).

Here, the issue is not whether the trial court can hold a witness in contempt of court for disobeying an oral order of the court; rather, the issue is whether the trial court

has the power to rule in former class counsel, not as witnesses but ostensibly as parties, to prove why they should not have to return the attorneys' fees they earned earlier for their work in a different case. *State v. Brantley* is irrelevant to the issue in this case.

Second, Judge Hayes found that he had the power to issue the Rule to Show Cause based on the language of Rule 23(d) of the South Carolina Rules of Civil Procedure. That Rule states, in pertinent part:

In the conduct of [class] actions to which this rule applies, the court may make appropriate orders: (2) The 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. It may order that notice be given in such a manner as it may direct of the pendency of the action by the party seeking to maintain the action on behalf of the class. It may order that notice be given in such manner as it may direct of a proposed settlement, of entry of judgment, or any other proceedings in the action including notice to the absent persons that they may come in and present claims and defenses if they so desire. (3) Whenever the representation appears to the court inadequate fairly to protect the interests of absent persons who may be bound by the judgment, the court may at any time impose additional conditions on the representative parties, or order an amendment of the pleadings, eliminating therefrom all reference to the representation of the absent persons, and in that event the court shall order entry of the judgment in such form as to affect only the parties to the action and those adequately represented.

While this Rule does empower the trial court to protect the interests of absent class members, our Supreme Court has recognized limitations to that power. *See Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) (“The power to issue an order which the court, in its discretion, believes is necessary to curtail the opportunities for abuse of the judicial system in class actions is not without bounds.”). Namely, “[t]he specific grants of power in Rule 23(d), SCRCP are directed towards

notifying the absent parties of the pending litigation.” *Id.*; see also *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 597 (Smith, J., dissenting) (explaining that a trial court’s Rule 23 duties do not expand the boundaries of jurisdiction).

That a trial judge’s duty to protect the interests of absent class members is not without bounds makes sense. If the duty were unlimited, class action defendants would face a trial in which the arbiter of the dispute acted as an advocate for and made strategic decisions on behalf of the plaintiffs, thereby depriving the defendants of their fundamental right to have a neutral preside over the litigation. As the rule stands, the trial court’s primary duty is to ensure absent class members receive proper notice; the rule is not so broad that the trial judge can remove a legal malpractice action from the hands of a jury so that he can resolve the very issue raised in that action via a Rule to Show Cause.

Third, Judge Hayes cited *Premium Investment Corp. v. Green*, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984), for his authority to issue the Rule to Show Cause. This reliance is misplaced.

In *Premium Investment*, a subdivision property owner commenced a class action against individuals who had served as a class representative in a prior action, seeking to recover proceeds of an allegedly improper settlement in the previous action. This Court held that the prior action was a proper class action, and affirmed the trial court’s finding that the defendants had violated their fiduciary duties to the class they had represented by settling and dismissing the lawsuit without notice to the class. *Id.*

There are at least two critical distinctions between this case and *Premium Investment*. First, the *Premium Investment* case was initiated as a separate lawsuit filed by an aggrieved party, not via a Rule to Show Cause issued by the trial court in the

underlying class action. Accordingly, the authority of a trial judge to issue a Rule to Show Cause based on Rule 23, SCRCP, was not an issue in *Premium Investment*.⁹ Second, in *Premium Investment*, the class representative settled and dismissed the class action itself (there was no individual suit), obtaining for himself a benefit that should have been shared by the entire class (and which, for that reason, was rightly disgorged). Here, Appellants' clients settled their individual claims at various points in 2003. The settlement of those individual claims plainly did not compromise the class claims in the *Cardamone* action, which continued for several more years until the new class representatives and Dryvit reached a class-wide settlement that Judge Hayes expressly approved.

B. The South Carolina Rules of Civil Procedure prohibit Judge Hayes's issuance of the Rule to Show Cause.

Rule 3(a), SCRCP, requires a summons and complaint to commence a civil action, and although our supreme court has previously excused the use of the Rule to Show Cause to obtain jurisdiction, the cases allowing this procedure were decided prior to the adoption of the Rules of Civil Procedure. *See, e.g., Citizens and S. Nat. Bank of South Carolina v. First Palmetto State Bank and Trust Co., Inc.*, 279 S.C. 252, 254, 305 S.E.2d 80, 80-81 (1983) (acknowledging two cases in the past, *H.S. Chisholm, Inc. v. Klinger, et al.*, 229 S.C. 8, 91 S.E.2d 538 (1956) and *Beard-Laney, Inc., et al. v. Darby, et al.*, 208 S.C. 313, 38 S.E.2d 1 (1946), wherein the Court excused the use of the Rule to

⁹ To the extent *Premium Investment* is relevant at all, that case supports Appellants' contention that the allegations against them are properly resolved in the *Treon/Tucker* action.

Show Cause to obtain jurisdiction when it contained the essential elements of a valid summons).¹⁰

“The adoption of the SCRCP in 1985 heralded a new era in South Carolina's civil practice, modernizing and streamlining our system.” *McLain v. Ingram*, 314 S.C. 359, 360, 444 S.E.2d 512, 512-13 (1994). “Among the changes made by these rules was a new procedure for commencing a civil action.” *Id.* Pursuant to Rule 3(a), SCRCP, the only way to commence a civil action is “by the filing and service of a summons and complaint.” *See also* Notes to Rule 65, SCRCP (“To conform to the ‘one form of action’ requirement of Rule 2, a summons and verified complaint must be filed and served with the notice and motion for temporary injunction An action may no longer be commenced by the service of an order or ‘rule to show cause’ only.”). There is no cause of action recognized in this State that allows one party to a piece of litigation that has been dismissed with prejudice to have someone who has never been a party to that proceeding ordered to appear, without any summons or complaint, in a county without any basis for venue,¹¹ to carry the burden of showing a judge why he should not take their money and give it to the people who were the former plaintiffs (or their new attorneys) in that now dismissed lawsuit. Accordingly, this Rule to Show Cause should be dismissed

¹⁰ Since 1985, cases have permitted the use of a Rule to Show Cause, but only to the extent it is treated like a summons and complaint. *E.g., Moore v. Simpson*, 322 S.C. 518 (Ct. App. 1996).

¹¹ The Rule to Show Cause requires Appellants to appear in Spartanburg County to defend themselves against claims for the forfeiture of their property. Section 15-7-30 of the South Carolina Code requires that civil actions be brought in (a) the county where a defendant resides or (b) where the most substantial portion of the alleged act or omission giving rise to the cause of action occurred. None of the Appellants lives or has a place of business in Spartanburg County, and the *Cardamone* matter was filed in Beaufort County. The only connection between this case and Spartanburg County is that Judge Hayes resides there.

pursuant to Rules 12(b)(1) (lack of subject matter jurisdiction), 12(b)(2) (lack of personal jurisdiction), and 12(b)(3) (lack of venue).

Additionally, this Rule to Show Cause was issued two years after the *Treon/Tucker* action was filed, which involves the same claims against Appellants. Pursuant to Rule 12(b)(8), SCRCF, the Rule to Show Cause should have been dismissed because another action is pending between the same parties for the same claim.

III. The Rule to Show Cause Will Deprive Appellants of Due Process

Because the Rule to Show Cause threatens to deprive Appellants of their property, they are entitled to the due process rights guaranteed under the fourteenth amendment. U.S. Const., art. XIV, § 1. The United States Supreme Court and our state supreme court have repeatedly recognized that “due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.” *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *State v. Langford*, 400 S.C. 421, 437, 735 S.E.2d 471, 479 (2012); *cf. State v. Duncan*, 269 S.C. 510, 517, 238 S.E.2d 205, 208 (1977) (“Due process requires a . . . defendant be given a fair trial before an impartial judge . . . in an atmosphere of judicial calm.”). Additionally, “[w]here important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses,” and any evidence used against the defendants must be disclosed so they have the opportunity to show that evidence is untrue. *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990).

If the Rule to Show Cause is allowed to proceed, Appellants will not only be deprived of their right to a jury trial (as argued above), but they will also be deprived of their due process rights to know what evidence was being used against them and to have

the matter decided by “an impartial judge . . . in an atmosphere of judicial calm.” *Duncan*, 269 S.C. at 517, 238 S.E.2d at 208. As it is, the Rule to Show Cause was issued in a charged atmosphere and in reaction to Appellants’ motion to recuse Judge Hayes from the *Treon/Tucker* action. The evidence against Appellants is based on approximately seven years of hearings in the *Cardamone* action, to which Appellants were not parties and in which they did not participate. Judge Hayes admitted as much when he stated: “I have seen documents, I have seen letters, I have seen emails that highly suggest that there was a deal contemplated between Dryvit lawyers and class counsels [Appellants’] credibility in [their] argument is lost with me when the facts that I have heard for years are so clear, they’re so documented.” (R. Vol. II, p. 674, ll. 5-22) And, when Judge Hayes stated: “I never thought that people on that side of the room would ever bring me the information that they brought me concerning the activities of lawyers, and settlements, and bonus payments and, you know, potential of violations of ethical rules. I never would have thought I would have heard any of that stuff. And all of that, I’ve heard for a long time.” (R. Vol. II, p. 786, l. 19 to p. 787, l. 1) Judge Hayes’s predisposition was further betrayed by his comments at the hearing on the motion for a Rule to Show Cause, where he mused that having a hearing for Appellants was as pointless as conducting a trial for Timothy McVeigh, when “[w]e all knew he was guilty.” (R. Vol. II, p. 824, ll. 16-18) During that same hearing, Judge Hayes also acknowledged that he had heard for “years” and had seen “mountains and volumes of evidence” that Appellants did not protect the interest of the class. (R. Vol. II, p. 825, ll. 17-20)

Appellants vehemently dispute Judge Hayes's characterizations of their conduct, yet they face the virtually impossible task of changing his mind during a single Rule to Show Cause hearing after he has listened for seven years to a one-sided presentation against them and after he has already declared that their "credibility is lost" with him. It is fundamentally unfair, and a violation of due process, for Appellants to have to defend themselves after Respondents have been given a seven-year head-start to present Judge Hayes with "mountains and volumes of evidence" while Appellants were not a party to the action.

CONCLUSION

This appeal is admittedly unusual, in that to understand it requires knowledge of three interrelated class actions that have been ongoing for over fifteen years combined. As explained above, the issue in both actions has become identical: whether Appellants compromised the class by receiving attorneys' fees in the Tennessee class action without disclosing them to or having them approved by the trial court. This issue was initially raised in the *Treon/Tucker* case in which Appellants have a right to a jury trial. Two years after that case was initiated (by the same attorneys who represent the class in the *Cardamone* class action), Respondents moved for an accounting and Rule to Show Cause in the *Cardamone* action. Judge Hayes did not issue a written order on that motion, and a settlement agreement between the parties in that matter was thereafter reached and approved by Judge Hayes.

Meanwhile, the Respondents pursued the *Treon/Tucker* action against Appellants and former class representatives. Judge Hayes presided over that matter, and in response to Appellants' filing a motion to recuse him, he stayed that case for the admitted purpose of issuing a Rule to Show Cause in the *Cardamone* class action. Judge Hayes did not

have the power to issue this Rule to Show Cause, and if allowed to proceed, the Rule would deprive Appellants of important due process rights including the right to a jury trial, the right to an impartial judge in an atmosphere of judicial calm, and the right to defend themselves against the evidence being used against them. Appellants urge this Court to close this legal rabbit hole, dismiss the Rule to Show Cause, and allow the issues raised in it to be litigated in the *Treon/Tucker* action where Appellants' right to a jury trial and their fundamental rights of due process are protected.

Respectfully submitted,


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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

Lower Court 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.

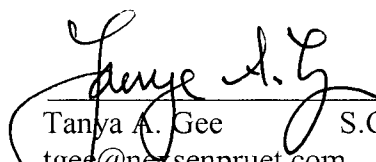
Timothy J. Treon and his wife, Jane Treon, and P. Jennings Searce
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v.

Dryvit Systems, Inc.,Defendant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellants Complies with
Rule 211(b), SCACR.



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SC Court of Appeals

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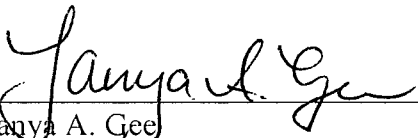
I certify that this 2nd day of June 2014, I have served the foregoing Final Brief of
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