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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

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SC Court of Appeals

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

vs.

Dryvit Systems, Inc., ... Defendant

RECORD ON APPEAL – VOLUME 1

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) FOURTEENTH JUDICIAL CIRCUIT
)
TIMOTHY TREON and his wife, JANE TREON, P. JENNINGS SCEARCE and STEVEN CHRISTAIN individually and on behalf of others similarly situated in the State of South Carolina,) Civil Action No.: 2002-CP-07-1377

Plaintiffs,

V.

DRYVIT SYSTEMS, INC.,

Defendant.

RULE TO SHOW CAUSE
and
ORDER FOR ACCOUNTING

2012 JUN -5 PM 1:42
JEAN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter is before the Court on Plaintiffs' Motion for an Accounting of attorney fees allegedly received by certain Class Counsels and for benefits paid to prior Class Representatives which were never disclosed to or approved by this Court. A hearing on the motion was conducted on March 31, 2010 and the Court's initial decision to grant the Plaintiffs' motion was announced at that time. After being appointed as the judge assigned with the responsibility of cases 2008-CP-07-3145 and 0774,[1] the Court delayed further action in this matter so that a global resolution of all three cases could be explored. No global resolution has occurred and this Court's present belief is that at this time proceeding with this Rule to Show Cause is proper.

The Plaintiffs seek an accounting of any attorneys' fees paid to or otherwise received by Original Class Counsel because of their status as Class Counsel in the present matter. Plaintiffs also seek an accounting of any benefits paid to or otherwise received by

[1] These two cases involve claims of professional malpractice and breach of fiduciaries arising from the present litigation.

Original Class Representatives because of their status as Class Representatives. The Plaintiffs also seek to have any fees and/or benefits received by Original Class Counsel and Original Class Representatives placed in a constructive trust for the benefit of the class.

The record of this case is substantial in its size. The vast majority of the record in this case, however, does not relate to the substantive product liability claim asserted in this lawsuit against the Defendant. But rather, the vast majority of the record relates to the use of a South Carolina Circuit Court judge's order granting class certification as a sword against a sister state's attempt to finalize a nationwide class action settlement and the subsequent conduct of Original Class Counsel and Original Class Representatives.

Based on the record of this case, this Court believes a sufficient showing has been made for it to invoke its powers under SCRCP Rule 23 and its inherent judicial powers to issue this Rule to Show Cause and Order for Accounting.

Background[2]

This class action lawsuit was commenced with the filing of a summons and complaint on August 12, 2002. It was originally captioned John and Sally Cardamone, et al. v. Dryvit Systems, Inc., et al. Attorneys Timothy W. Bouch; William M. Bowen; Francis E. Grimball; W. Jefferson Leath, Jr.; George E. Mullen; W. Dixon Robertson, III; Michael S. Seekings; and Robert L. Wylie, IV originally served as class counsel in this matter (hereinafter they will be collectively and individually referred to as "Original Class Counsel"). Original Class Counsel and Original Class Representatives moved for an order from the Honorable Thomas Kemmerlin, Jr. certifying a class in this action. As defined by

[2] The factual basis of this order includes and is hereby incorporated by reference, the facts found in this Court's prior order dated January 7, 2009.

the complaint, the Cardamone Class consisted of current and former owners of certain residential property in South Carolina clad with an Exterior Insulation and Finish System[3] manufactured by Defendant Dryvit Systems, Inc. who were also "members" of a purported nationwide class action settlement in a Tennessee action known as Posey, et al. v. Dryvit Systems, Inc., Tennessee Case No. 17,715.

After hearing the certification motion, Judge Kemmerlin certified the Cardamone class and specifically opted it out of the Posey action in Tennessee by Order dated September 3, 2002. (the "September 2003 Order"). This Court's opinion is that Judge Kimmerlin's Order placed Original Class Counsel and the Original Class Representatives in a representative capacity for absent class members and imposed upon them the fiduciary duties and Rule 23 obligations. Also, the September 2003 Order expressly required that a notice plan be submitted within 30 days. No notice plan was ever submitted by Original Class Counsel or Original Class Representatives.

Even though no notice plan was ever pursued by Original Class Counsel, on October 1, 2002, members of Original Class Counsel attended a hearing the Posey court conducted to consider the fairness of the purported nationwide settlement.[4] The Tennessee Court (The Posey Court) was made aware of the South Carolina's court decision to certify South Carolina class action when the Original Class Counsel spoke in opposition to the proposed settlement during the fairness hearing.[5] After participating in

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[3] Exterior Insulation Finish Systems are commonly known as "synthetic stucco" or by their acronym EIFS. EIFS is a relatively new building product that looks very similar to traditional concrete-based stucco, but incorporates an insulation lawyer that traditional stucco does not have.

[4] Posey's purported nationwide settlement sought jurisdiction over EIFS homeowners in every state except for North Carolina due to a state-wide class action settlement Dryvit had entered into earlier.

[5] Frank Grimball, Robert Wylie, and Dixon Robertson - attended that Hearing in Tennessee. Although ostensibly appearing on behalf of two individual objectors, William and Allson DeLoache, Frank Grimball argued against the Posey Settlement on a variety of grounds and he explained that "the entire state of South Carolina at this point, Your Honor, has opted out [of the Posey Settlement]." Posey Hr'g Tr. dated October 1,

certain negotiations with the lawyers in Tennessee, members of the Original Class Counsel attended a second fairness hearing on December 18, 2002, where their support for the final approval of the national settlement was reported to the Posey court. See Dryvit Systems, Inc.'s Evidence in Support of Motion to Dismiss at Tab 4. The Posey Court was also told that with the modifications to the settlement, the Cardamone class was withdrawing its objections to Posey settlement. Hr'g Trans. Dated 12/18/2002 at p. 28, lines 8-18.[6]

The Posey Court issued an order granting final approval to the Posey settlement on January 14, 2003. In that Order, the judge specifically noted the contribution of the South Carolina class counsel in reaching a settlement:

> [Posey] Class Counsel, together with counsel for certain objectors, including those representing a proposed litigation class in South Carolina, have been engaged in numerous substantial discussions and negotiations since the Fairness hearing with Counsel for the Settling Defendant.[7]

The Tennessee Order specifically approved an attorney fee and expense award of $11,600,000.00 to be distributed "among counsel for the Class." January 14th Order at p. 10. That "counsel" included the Order's earlier reference to "counsel ... representing a proposed litigation class in South Carolina." Id. at pp. 8,10. The Order also specifically prohibited class members from participating in other class actions, such as the Cardamone action. Id. at pp. 6, 9.

2002 at p.16, lines 15-17; p.17, lines 6-10. He also argued that "opt-outs are really objectors, but they just had sense enough to go ahead and remove themselves from this situation, avoid this class so that they could effect a full recovery." Id. at p.115, lines 7-11.

[6] Attorney Robert Phillips, who represented the South Carolina objectors Harry and Trudy Creasy was also present at the Second Fairness Hearing. He responded to the claim that the Cardamone class no longer sought to opt-out of the Settlement by informing Judge Slone that his clients were

> intervening in the South Carolina class action. We filed that motion approximately a month ago, and it is not our position that the changes cure the fundamental legal defects that keep this class from being certified, much less a settlement. So I just wanted to correct that representation.

[7] Posey Order dated January 14, 2003 at p.5, ¶15.

Following the issuance of the January 14th Order, Original Class Counsel presented the proposition of the attempted compromise of the Cardamone action to Judge Kemmerlin. During a hearing on February 5, 2003, Michael Seekings of the Mullen, Wylie and Seekings firm, informed the court that:

> [Original Class Counsel] came – we opted out after we came to your Honor and asked for certification of a class in South Carolina. We then went to Tennessee and opted our class out. Participated in additional negotiations with both Dryvit and counsel for the plaintiffs at the direction of the court. The settlement changed. We as our certified class then went to a hearing and told the judge we thought now it is fair. ... Now this class de facto doesn't exist anymore. The Cardamone case underlined has been settled. The Dryvit settlement [In Tennessee] has been changed to the satisfaction of all involved.

In the present litigation, Dryvit was ordered to produce numerous documents including e-mails, letters, settlement agreements and other documents. The Court has reviewed these materials and is satisfied that they are authentic and reflect the ongoing dialogue between Original Class Counsel, Posey Class Counsel and Dryvit Counsel. The Court has also reviewed transcripts of the hearings in Posey and a hearing in front of the Honorable Thomas Kemmerlin, Jr., on February 26, 2003. After such review, it appears to this Court that following the Posey fairness hearing, Original Class Counsel and Dryvit's attorneys and Posey Class Counsel agreed to settle the individual lawsuits of certain Cardamone class members who were represented by Original Class Counsel and pay Original Class Counsel a significant attorneys' fee. See Dryvit Documents Numbers Card 092-094, Dry 0970, CARD 00088, CARD 00072-73; Dry 0277, 0379, 0103, CARD 06727-29, 06739.

After the agreement to settle the Class Representatives' cases and to pay the attorneys' fees to Original Class Counsel, it appears that the present case was allowed to

lie dormant until December 2005. During the nearly three (3) intervening years, Dryvit and Original Class Counsel finalized individual settlements with each of Cardamone's named class representatives.[8]

In an email dated September 29, 2005, Dryvit's counsel reaffirmed the agreement to pay Original Class Counsel a total of $825,000 as an attorneys' fee upon the ultimate dismissal of the Cardamone action. Shortly thereafter, Dryvit moved to Dismiss and Decertify the Cardamone action in South Carolina. Dryvit Documents Number CARD 0128-0129. One of the Original Class Counsel also referenced an agreement between Cardamone and Posey counsel in an email dated April 22, 2004:

> "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 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." Dry0970.

After learning that 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.

[8] In correspondence dated February 5, 2003, Dryvit's counsel confirmed the individual settlement it had reached with class representatives John and Sally Cardamone and acknowledged that the amount "Dryvit has agreed to pay [the Cardamones] 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."

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"). Although most members of Original Class Counsel chose to voluntarily withdraw from this action at that time, attorneys George Mullen and Frank Grimball remained in the action.

By order dated January 18, 2006, this Court allowed Intervening Class Counsel and Misters Mullen and Grimball to act as Class Counsel. (the "January 18, 2006 Order").

The existence of the agreement referenced above regarding the terms of the settlements and the attorneys' fees to be paid to Original Class Counsel were not disclosed to the Court by Original Class Counsel at the February 26, 2003 or December 2005 hearing. However, after Dryvit produced documents, the record reflects that Original Class Counsel have received the $600,000.00 payment promised by the April 22nd email.[9]

Plaintiffs' have asked the court for an accounting of the attorneys' fees promised and/or paid to Original Class Counsel while they were representing the Cardamone class along with the fees related to individual settlements they negotiated for certain class members. At this time, this Court is not requiring disclosure of fees related to individual cases of Class members who were not also named Class Representatives. Nevertheless, this Court is compelled to ascertain why fees of $825,000 were promised to Original Class Counsel which the e-mails and other documents in the record say are conditioned upon the dismissal of this case.

[9] The following checks were provided to the Court: Check issued by Doffermyre, Shields, Canfield, Knowles, & Devine, LLC ("Doffermyre, LLC") to Leath, Bouch & Crawford, LLP ("Leath Bouch") and Mullen Wylie & Seekings on 11/15/2005 for $310,345.00 with notation "Leath and Seekings share of attorney fees"; check issued by Doffermyre, LLC to Leath Bouch on 6/21/2006 for $93,103.00; check issued by Doffermyre, LLC to Leath Bouch for $196,552.00 on 9/18/2006 with notation "Attorneys Fees for Objectors."

Again, none of the payments or arrangements were disclosed to the Court. Further, the different reasons or justifications given by different members of Original Class Counsel made in statements and testimony before this Court compels the Court to inquire further. One theory proffered by Original Class Counsel is that the monies were paid solely for the representation of Posey Objectors William and Allison Deloach.[10] Another theory is that it was for work done for the Posey class.[11] However, from the documents in the record in this case, one can reasonably conclude that the payments were based on Original Class Counsel's status as being named "Class Counsel" and the agreement to compromise and ultimately dismiss this case; again, the substance of which was never presented to Court in accordance with SCRCP Rule 23(c) and (d).

Law/Analysis

This Court finds it has jurisdiction over the Original Class Counsel and the Original Class Representatives sufficient to require them to appear before me to answer the questions raised by the documents produced by Dryvit and the monies they received while they had fiduciary obligations to this Court and the Class. This Court's belief is that the present Order is needed, if for no other reason than to clarify for the record of this case that the South Carolina class action rules have been complied with, so that the integrity of the class action process is maintained.

In this matter, there is evidence that Original Class Counsel participated in the Posey action while representing this Class to which they owed a fiduciary duty. See Premium Investment Corp, 282 S.C. 464, 324 S.E.2d 72. It appears that Original Class

[10] Mrs. Deloach has testified in her deposition that she and her husband had no attorney- client relationship with any of Original Class Counsel.
[11] The final Order in Posey, does not designate any of Original Class Counsel as "Class Counsel" in Posey.

Counsel may have negotiated attorneys' fees for themselves based on a willingness to compromise the prosecution of this action. Original Class Counsel did not disclose to nor have they sought approval by the Court for the payment of any attorneys' fees or for approval of the settlement of the claims of the Original Class Representatives.

The Court therefore finds it necessary to require each member of Original Class 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. Original Class Representatives and Original Class Counsel invoked the jurisdiction of this Court to make themselves the fiduciaries of this Court and the Class under Rule 23 SCRCP and therefore this Court feels it appropriate to exercise its jurisdiction over them.

Furthermore, as officers of the court, Original Class Counsel have an obligation to appear before a circuit court judge seeking their testimony on a pending matter for which their input is required. See State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983) (holding trial court could order sheriff from adjoining county, as an officer of the court, to appear without issuing a subpoena), cf. Rule 3.4(c), RPC, Rule 407, SCACR (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Rule 1.15(d), RPC, Rule 407, SCACR (a lawyer shall promptly render a full accounting regarding contested property). The exercise of this power is enhanced by the operation of Rule 23, SCRCP which grants each trial court broad powers to oversee the conduct of a class action lawsuit and protect the interests of unnamed class members.

Accordingly, this Court finds the issuance and service of an Order and/or Rule to Show Cause appropriate in order to allow the Class to properly account for the benefits, if any, promised and/or paid to Original Class Counsel and the Original Class

Representatives. Additionally, the appearance of Original Class Counsel in this matter allows this court to examine and, if necessary, to correct conduct that is calculated to obstruct, degrade, and undermine the administration of justice. Brandt v. Gooding, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006).

From the information provided to the Court, there appears to be no dispute that Original Class Counsel aided in the settlement of the individual cases of the Original Class Representatives. Those settlements create an appearance of being in violation of South Carolina law.[12] The U.S. Supreme Court has stated: due process requires adequate representation "at all times." *Shutts*, 472 U.S. at 812 (1985):

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 Rules of Civil Procedure "specifically permits the trial court to maintain continual control over class action proceedings." Salmonsen v. CGD, Inc., 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). This allows the trial court, "at any time, [to] impose such terms as shall fairly and adequately protect the interest of the person on whose behalf the action is brought." Rule 23(d)(2), SCRCP. A trial court has a specific responsibility to account for the benefits derived by Class Representatives and Class Counsel in this action in accordance with Rule 23, SCRCP. See Premium Investment Corp. v. Green, 282 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 imposing a constructive trust on any benefits obtained as a

[12] Class representatives may not enter into settlements of their individual claims because of their fiduciary duty to the class. [*Prem. Investment Corp. v. Green*, 324 S.E.2d at 77; *See In re Green*, 354 S.E.2d 557 (S.C. 1987); *Rogers v. U.S. Steel Corp.*, 70 F.R.D. 639 (1976)]

result of a breach of that duty). These obligations are merely specific applications of, and possibly enhancements to, a court's inherent power to protect the legal process in all matters that come before it.

It is therefore Ordered that Original Class Counsel and Original Class Representatives appear before this Court on October 1, 2012 at the Spartanburg County Court House at 9:30 am in Courtroom West-B to be examined and account to this Court for all fees and benefits, if any, received and or promised in connection with this action, specifically as follows:

1) An accounting for the $825,000 referenced herein;

2) An Accounting of all fees received from the settlement of the individual cases of the Original Class Representatives;

3) An accounting of all benefits received by the Original Class Representatives;

4) 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.

This Order is to be served upon the Original Class Counsel and the Original Class Representatives in accordance with Rule 4 of the SCRCP.

AND IT IS SO ORDERED.

J. Mark Hayes, II
Presiding Judge

This 1st day of June 2012

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT Timothy J. Treon and his wife, Jane Treon, P. Jennings Scearce, and Stephen Christian, individually, and on behalf of others similarly situated in the State of South Carolina, Plaintiffs, vs. Dryvit Systems, Inc., Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action No.: 2002-CP-07-1377 **Order Denying Respondents' Motion to Dismiss SCRCP Rule 23 Rule to Show Cause and Accounting Proceeding**

2012 SEP 28 PM 12:26
ROSEMEAU
COUNTY, S.C.
OF COURT

This matter is before the Court on the motions of Respondents W. Jefferson Leath, Jr.; Timothy W. Bouch; Michael S. Seekings; William Dixon Robertson; William M. Bowen; John and Sally Cardamone; Benjamin T. and Diane M. Clark; and Ramona Gianni to dismiss and/or quash this Court's Order for a Rule to Show Cause & Accounting filed on June 5, 2012 (hereinafter "June 5th Order"). Additionally, certain Respondents have claimed their participation in this proceeding is by "special appearance." The June 5th Order requires the Respondents to appear on October 1, 2012 to be examined and account for all fees and benefits, if any, received and or promised in connection with this action (hereinafter the aforementioned proceeding will be referred to as the "RTSC").

As for specific objections to the RTSC proceeding, Respondents John and Sally Cardamone, Benjamin T. and Diane M. Clark, and Ramona Gianni (hereinafter individually and collectively referred to as "Cardamone Representatives") seek to dismiss or quash the RTSC on the grounds:

1) This Court lacks personal & subject matter jurisdiction over Respondents,

2) Process was improper or improperly served upon the Respondents,

3) Plaintiffs' counsel are not qualified to prosecute the instant action due to limitations placed on them by order of another court,

4) The form and substance of the relief demand by Plaintiffs is violative of the respondents' rights to equity and a jury trial,

5) The claims advanced by the Plaintiffs are barred by the applicable statute of limitations, and

6) The allegations against the Cardamone Representatives lack merit because there is no evidence they took an "antagonistic" action against the instant Class.[1]

Respondents W. Jefferson Leath, Jr.; Timothy W. Bouch; and Michael S. Seekings (hereinafter individually and collectively referred to as "Leath Bouch") seek the dismissal or quashing of the RTSC pursuant to Rules 12(b)(1) - (8), SCRCP. Their arguments raise issues 1) through 5) above along with:

7) The venue of the RTSC is improper,

8) Defendant Dryvit Systems Inc. is an indispensible party to the RTSC, and

9) The June 5th Order fails to state facts sufficient to constitute a cause of action upon which relief may be granted.[1]

Respondent William Dixon Robertson (hereinafter "Mr. Robertson") also seeks to dismiss the RTSC based on grounds 1) through 4) above. Additionally, Mr. Robertson argues:

10) The RTSC proceeding lacks sufficient procedural safeguards to ensure Respondent's due process rights are safeguarded, and

11) The June 5th Order demonstrates the presiding judge has already decided a question of fact before the Court.

Finally, Respondent William M. Bowen (hereinafter "Mr. Bowen") seeks the dismissal and withdrawal of the RTSC based on grounds 1) through 4) and 11) above.

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[1] The Cardamone Representatives and Leath Bouch claim they are making a "special appearance" in this matter. It is generally recognized that special appearances were abolished with the adoption of the South Carolina Rules of Civil Procedure in 1985. Smalls v. Weed, 291 S.C. 258, 261, 353 S.E.2d 154, 156 (Ct. App. 1987) ("We recognize that under the South Carolina Rules of Civil Procedure effective July 1, 1985, the special appearance has been eliminated."). Moreover, were it to still exist, its protections are waived by a party when seeking a dismissal on grounds that impliedly acknowledge the jurisdiction of the Court, adopting the substantive arguments of other parties, and otherwise participating in the action. Id. at 260, 353 S.E.2d at 156.

All pending motions were heard on two (2) days, July 18-19, 2012. After a full and careful review of the memoranda, exhibits, documents, Clerk's file, and arguments of counsel, the Court DENIES Respondents' motions for the reasons set forth below.

Background[2]

This class action lawsuit was commenced in August of 2002[3] by John & Sally Cardamone, Benjamin T. & Diane M. Clark, Nathan W. & Jill C. Gordon, and Ramona Gianni. They brought the action "on behalf [sic] themselves and all other similarly situated persons in the State of South Carolina" pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. Named parties in a Rule 23 class action are known as class representatives; accordingly, the aforementioned persons will be collectively referred to hereinafter as the "Cardamone Representatives." In their class action complaints, the Cardamone Representatives pledged to "fully and adequately protect the interests of Class members" and declared that they, and their counsel, had "the necessary financial resources to adequately and vigorously litigate this class action." The Cardamone Representatives acknowledged they were "aware of their fiduciary responsibilities to the Class[4]" and claimed to be "determined to diligently discharge those duties, and [to] have no interests which are adverse to or in conflict with other members of the Class."[5] At the time of this declaration, the Cardamone Representatives were actively pursuing individual

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[2] This Court has recounted the factual and procedural background of this matter in several prior orders including orders filed on January 7, 2009 and June 5, 2012. The factual basis of this order includes, and hereby specifically incorporates by reference, the facts found in those prior orders.

[3] Initial complaint was filed on August 12th while an amended complaint was filed on August 29th.

[4] This is a reference to the fiduciary duty owed by named class representatives and their counsel to the unnamed members of a Rule 23 class action. See e.g., Premium Inv. 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.").

[5] No person may serve as either a class representative or class counsel if possessed of an economic interest that is not shared by the unnamed class members. See Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990) ("The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named [class] representative has a claim which conflicts with the economic interests of the class."); see also Hospitality Mgmt. Associates, Inc. v. Shell Oil Co., 356 S.C. 644, 664, 591 S.E.2d 611, 622 (2004) (recognizing that neither the class representative nor class counsel may have an interest that conflicts with the interests of the class.).

lawsuits against the same defendant, Dryvit Systems, Inc., regarding the same synthetic stucco[6] building product that is the subject of this action.

In this class action lawsuit, the Cardamone Representatives sought money damages from Defendant Dryvit Systems, Inc. for moisture damage to class members' homes caused by alleged defects with Dryvit's synthetic stucco product. Additionally, this action challenged a purported nationwide settlement Dryvit reached in another class action known as Posey v. Dryvit Systems, Inc. (C/A No. 17,715-IV) in the Circuit Court for Jefferson County, Tennessee at Dandridge. Specifically, the Cardamone Representatives sought an "opt out" from the Posey settlement for themselves and the unnamed members of the South Carolina class they represented.

Attorneys Timothy W. Bouch; William M. Bowen; Francis E. Grimball, W. Jefferson Leath, Jr.; George E. Mullen; W. Dixon Robertson, III; Michael S. Seekings; and Robert L Wylie, IV represented the Cardamone Representatives in this action. Hereinafter, these lawyers will be referred to collectively as "Cardamone Counsel." While serving as class counsel, certain members of Cardamone Counsel represented the Cardamone Representatives in their individual lawsuits against Dryvit Systems, Inc. Each member of Cardamone Counsel, or his law firm, represented other unnamed plaintiffs from the South Carolina class in individual actions against Dryvit while also serving as class counsel in this matter.

While serving as Cardamone Counsel, attorneys Francis E. Grimball; Michael S. Seekings; Robert L. Wylie, IV; and George E. Mullen[7] appeared *pro hac vice* in the Posey action on behalf of William and Allison DeLoache[8]. Additionally, Cardamone Counsel attorneys Frank Grimball; William Dixon Robertson, III; Robert L. Wylie, IV; and W. Jefferson Leath, Jr.

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[6] Synthetic stucco is also known as "Exterior Insulation and Finish System" and is commonly referred to in many construction defect by the acronym "EIFS."

[7] In an earlier hearing in this matter, George Mullen testified an affidavit bearing his name and signature that was filed in support of the DeLoache appearance in Posey contained a forgery of his signature.

[8] In February of 2009, Allison DeLoache testified neither she nor her husband William were acquainted with any member of Cardamone Counsel, were ever represented by them in any matter, and were unaware that their identities had been used in the Posey proceeding.

appeared on behalf the South Carolina class at a hearing in Posey on December 18, 2002 that approved the national settlement.[9]

Although the South Carolina class action was filed in opposition to Posey's national settlement in August of 2002, Cardamone Counsel supported the Posey settlement at a hearing on December 18, 2002 before the Posey court in Tennessee. Thereafter, each Cardamone Representatives reached an individual cash settlement with Dryvit beginning with John and Sally Cardamone on February 5, 2003 and ending with Benjamin and Diane Clark in August of 2003. Documentation obtained through discovery has been presented to this Court which indicates Cardamone Counsel memorialized an agreement with Posey class counsel and Dryvit's counsel on April 22, 2004 wherein Counsel was to receive a total of $825,000.00 in attorneys fees for the "SC Class" upon the dismissal of the Cardamone action in South Carolina.

On September 23, 2005, Defendant Dryvit System Inc. moved to have the Cardamone class action dismissed and decertified. Additionally, the Current Class Representatives and Current Class Counsel moved to intervene into this action. Both motions were heard on December 5, 2005. At the December 5th hearing, attorneys William M. Bowen; W. Jefferson Leath, Jr.; Timothy W. Bouch; Michael A. Seekings; and William Dixon Robertson, III moved to be relieved as Cardamone Counsel which was accomplished by order filed on January 19, 2006. The Cardamone Representatives were replaced by current representatives Timothy & Jane Treon and P. Jennings Scearce by order of substitution on or about November 26, 2006. In that Order, the Court reserved the option of revisiting any compensation paid to Cardamone Counsel in connection with this matter. The current Class Representatives and their Counsel eventually reached a class-wide settlement with Defendant Dryvit System, Inc.

After their intervention in 2006, Current Class Representatives engaged in discovery with

[9] During this second Posey fairness hearing, Cardamone Counsel was referred to alternatively as "South Carolina Counsel," "South Carolina objectors," or "lawyers who have a certified South Carolina class opting out their state in its entirety."

Dryvit and discovered the attorney fee agreement that Cardamone Counsel reached with Dryvit in April of 2004. Current Class Counsel then filed a Motion for an Accounting or Rule to Show Cause regarding the Posey fee agreement on January 14, 2010. In order to facilitate the litigation or settlement of the pending product defect allegations against Dryvit, this Court deferred ruling on the January 14th Motion and instructed the Current Representatives and their Counsel to exclusively pursue the product defect case against Dryvit until resolution before returning to the Motion for Accounting. This Court issued its ruling on the January 14th Motion on June 5, 2012.

Discussion

Although the history of this litigation leading to its settlement in 2010 is extensive, the involvement of the Cardamone Representatives and their Counsel is brief. After obtaining the certification of the South Carolina Class in August of 2002, the Representatives and their Counsel filed a class-wide "opt-out" form to the Posey settlement with the Tennessee court in September of 2002. Thereafter, certain members of Cardamone Counsel conducted negotiations with counsel for Dryvit and the Posey class in Tennessee which culminated in Counsel's support of the Posey Settlement at a hearing in Tennessee on December 18, 2002.[10] After the December 18th hearing, no action was taken to prosecute the South Carolina class' claims against Dryvit or provide any type of notice to the South Carolina Class.[11] However, documents from discovery reflect that the Cardamone Representatives and their Counsel remained engaged with Dryvit and finalized financial settlements between Dryvit and the Class Representatives at various times in 2003. Those individual settlements were not disclosed to this Court until 2006, well after the

[10] In a letter dated November 15, 2002, Cardamone Counsel Jeff Leath wrote to Dryvit proclaiming that the "South Carolina attorneys believe that these enhancements [to the Posey Settlement] are in the interest of all parties [and] would appear to answer many, if not most of, the substantive objections which have been filed to the Posey settlement." Cardamone Counsel Frank Grimball echoed this statement at the December 18, 2002 hearing to approve the Posey settlement: "I think [the changes in the Settlement] cures a lot of the problems that are being raised by the objectors ... I think that we have done that through some intense negotiations with South Carolina counsel and Jeff Weak (phonetically)."

[11] In February of 2003, Cardamone Counsel opposed an attempt by Harry and Trudy Creasy to intervene into this action as class representatives.

Representatives' claims against Dryvit were mooted.[12]

When deciding a motion to dismiss, well pled facts are presumed to be true and the plaintiff's pleadings should be construed so that substantial justice is done between the parties. Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010). The exercise of personal jurisdiction over a person must comport with due process which requires a defendant to "purposefully avail itself of the privilege of conducting activities within the forum state." Coggeshall v. Reproductive Endocrine Assocs., 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). Motions brought pursuant to Rule 12(b)(6) should not be granted when the facts alleged would entitle the plaintiff to relief on any theory. Cricket Cove, 390 S.C. at 321, 701 S.E.2d at 44. With regard to motions brought pursuant to Rule 12(b)(8), an action should be dismissed if another action is pending between the same parties that involve claims that are "*precisely or substantially the same in both proceedings* in order for the drastic remedy of dismissal to be appropriate." Id. 390 S.C. at 323, 701 S.E.2d at 45 citing Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 105-06, 674 S.E.2d 524, 531-32 (Ct. App. 2009)(emphasis in original).

This Court's jurisdiction and authority over the Cardamone Representatives and their Counsel is so widely recognized in Rule 23 jurisprudence that a cursory review of precedent will suffice to dispose of the Respondents' jurisdictional objections. "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 Inv. Corp. v. Green, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct. App. 1984). The class representative and/or class counsel breach that obligation by using the class action they filed to obtain a benefit for themselves, even

[12] Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 566, 564 S.E.2d 94, 98 (2002) ("Where the named plaintiffs' claims become moot after class certification by death or other means, the class claims become moot unless intervenors can be substituted as named plaintiffs.").

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 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 counsel's individual gain.

The prohibition against a class counsel or class representative pursuing his or her own self-interest while representing unnamed members of a Rule 23 Class is well grounded in South Carolina and Federal law. Our Supreme Court recognized this fundamental principle as early as 1916 with the observation that it only required "[a] moment's reflection without the citation of authority" to understand that "one cannot represent a class when his interest and that of the class are antagonistic." Sartor v. Newberry Land & Security Co., 104 S.C. 184, 88 S.E. 467, 468 (1916). This principle is universally recognized in modern class action litigation and is equally applicable to class counsel and class representatives. For example, all major treatises on the Federal Rules of Civil Procedure note that any conflict of interest or antagonism between unnamed class members and their representatives is sufficient grounds to disqualify the class representatives.[13] Of all the different types of conflicts that can develop, the most fundamental is when a representative uses the prosecution of a class action to advance his or her own economic self-interest. "A class representative should never use a class action as leverage to procure a more favorable settlement of non-class claims." Moore's Federal Practice Explicit Condition: Representative Parties Must Fairly and Adequately Represent Class § 23.25 [2][b][vii].

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

[13] E.g., Wright & Miller 7A Fed. Prac. & Proc. Civ. The Representatives Will Protect the Interests of the Class – Antagonistic or Conflicting Interests § 1768 (3d ed.) ("It is axiomatic that a putative representative cannot adequately protect the class if the representative's interests are antagonistic to or in conflict with the objectives of those being represented."); 1 Newberg on Class Actions Adequacy of Class Representative – Conflicts of Interest § 3:58 (5th ed.) ("All that is required—as the phrase "absence of conflict" suggests—is sufficient similarity of interest such that there is no affirmative antagonism between the representative and the class.").

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 well recognized when South Carolina adopted its modern rules Rule of Civil Procedure in July of 1985. Rule 23 included a specific 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" posed by the self-interest of class representatives and their counsel to unnamed class members in the negotiation of a class action settlement.

> [C]lass representatives have their own incentives to advance their interests at the expense of the class." Also, class counsel has their own "incentives ... 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.

327 F.3d 938, 959-60 (9th Cir. 2003). Although the Ninth Circuit's generally defers to the trial court's judgment as to whether a proposed class action settlement is **fair** to unnamed class members, the Court routinely determines 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.").

From the documentation obtained through discovery which has been presented to this Court, this Court has concluded there has been a sufficient factual showing for it to invoke its Rule 23 powers and to require the respondents to appear before it. The Court rejects the position that because this Court has found that a sufficient factual basis exists for issuing the RTSC, the

Court must now dismiss the RTSC because it has already decided a question of fact. As indicated by the RTSC, the documentation received by this Court is not *de minimis* and relates directly to the Court's Rule 23 duties. This Court's opinion is that it would be a dereliction of its Rule 23 duties to not issue the RTSC based on the factual information before it.

The fact that the Court's managerial decision to conclude the underlying lawsuit before conducting this inquiry into the alleged settlements Dryvit reached with the Cardamone Representatives and their Counsel was deferred until now, provides no support for the Respondent's jurisdictional arguments. 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) (emphasis added) 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 common-place 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 earlier class action settlement). 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 candidly inform the presiding judge of information relevant to a possible conflict of interest between counsel and the class. In re: Eastern Sugar Antitrust Litig., 697 F.2d 524, 533 (3rd Cir. 1982). In Eastern Sugar, certain members of class counsel and defense counsel discussed the possibility of merging their two firms during the pendency of class action litigation. No notice of the merger was given to

anyone during the pendency of the antitrust litigation. The Third Circuit approved the disgorgement of **all** fees earned during the class action litigation, even fees earned for work performed before the merger talks began, in order "to deter future misconduct of a similar type." 697 F.2d at 533. In each matter discussed above, the trial court's inquiry into possible conflicts of interest occurred well after the settlement of the class action litigation. Such delay can not act as a bar to an equitable inquiry, in South Carolina or elsewhere, because "the statute of limitations does not apply to actions in equity." Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005). Also, the settlement reached in this matter with Defendant Dryvit Systems, Inc. does not bar the Court's inquiry into the conduct of the Class Representatives or their counsel. The Order entered on June 10, 2010 that granted final approval to the settlement of the action against Dryvit, it made no specific findings regarding the performance of the Cardamone Representatives or Cardamone Counsel and specifically reserved those issues for a later determination.

Similarly, the collateral lawsuits now pending against the Respondents do not require the dismissal of the RTSC. In order to dismiss a related action, the moving party must demonstrate that the claims are "*precisely or substantially the same in both proceedings.*" Cricket Cove, 390 S.C. at 323, 701 S.E.2d at 45 (emphasis in original). The collateral lawsuits are civil actions wherein the unnamed plaintiffs in this action seek a jury trial against the Respondents for damages they sustained based on allegations of breach of fiduciary duty, legal malpractice, etc. The RTSC involves an inquiry by this Court into the conduct of parties and lawyers appearing before it. Although the RTSC proceeding has some relationship to the collateral actions, the RTSC inquiry is based on Court's Rule 23 obligations which are fundamentally and structurally different than the issues raised by the plaintiffs in the collateral proceedings. Accordingly, the

RTSC does not meet the "narrow" dismissal standard of Rule 12(b)(8). Capital City Ins., 382 S.C. at 106, 674 S.E.2d at 532.

This Court has personal jurisdiction over the Class Representative and their Counsel based on the service of the Rule to Show Cause Order and the inherent contempt power of a South Carolina circuit court.[14] A Rule to Show Cause stands in place of a summons to establish jurisdiction over a party and hale that party into court. "[O]ur Supreme Court has previously excused the use of the Rule to Show Cause in place of a summons to obtain jurisdiction when it contained the essential elements of a valid Summons." Ex parte South Carolina Dept. of Revenue, 350 S.C. 404, 407-08, 566 S.E.2d 196, 198 (Ct. App. 2002) quoting Citizens & S. Nat'l Bank of S.C. v. First Palmetto State Bank & Trust Co., 279 S.C. 252, 254, 305 S.E.2d 80 (1983) (internal punctuation omitted). In the instant matter, the Court's Rule to Show Cause Order complies with the applicable requirements of a summons as set forth in Rule 4(b), SCRCP.

There is no grounds for the disqualification of current class counsel with regards to the RTSC proceeding. The notion that current class counsel must withdraw from this action based on an Order issued by Judge Marvin Dukes in an associated legal malpractice action (*Treon v. Dryvit Systems, Inc.* (2008-CP-07-0774)) is misplaced in both fact and law. Judge Dukes' Order contains no basis for forcing the removal of the undersigned from this matter.[15] In fact, the opposite is true. Judge Duke specifically noted that "[i]t would be inequitable to allow the asserted conflict [in the malpractice action] to impair the access of the class and class representatives in case #1377 to the counsel who have represented them since December of

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[14] As officers of the court, Cardamone Counsel's appearance at the RTSC is required by State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983). Leath Bouch's challenge to Brantley misstates its facts and holding. In their motion, Leath argues the "Court of Appeals" did not rule upon the jurisdictional issue because Sheriff Brantley "specifically admitted to having already waived jurisdiction." In fact, Brantley was decided by our Supreme Court which specifically noted that "[a]ppellant contends the trial court lacked jurisdiction" for several specific reasons. Rather than conceding jurisdiction, the Brantley court held the Sheriff waived his jurisdictional challenge by sending a deputy to court in his place. Nevertheless, the Court went on to hold that the Sheriff's failure to comply with the trial court's "notice to appear" "constituted a constructive contempt of court."

[15] One of the undersigned attorneys, Robert Phillips, did not participate in the action giving rise to Judge Dukes' order and is consequently not subject to its provisions. The following discussion only pertains to those lawyers who did participate in both actions.

2005." In fact, Judge Dukes lacked the power to make the ruling the Cardamone Representatives falsely claim he did. Salmonsen v. CGD, Inc., 377 S.C. 442, 545, 661 S.E.2d 81, 88 (2008) (noting that one circuit court judge does not have the authority to override another circuit court judge). Although the Court rejects the argument that current counsel is disqualified, it order the examination of the Cardamone Representatives be performed by attorney Robert B. (Sam) Phillips, a lawyer who currently represents the Class, but made no appearance in the proceeding that produced Judge Dukes' order.

The June 5th Order comports with the requirements of due process in that it requires an accounting from the Cardamone Representatives and their Counsel for all financial gain they were promised and/or realized while serving as a fiduciary for the South Carolina Class. Plaintiffs also seek to impose a constructive trust on that gain pursuant to Premium Investment Corp. v. Green, 283 S.C. 464, 472, 324 S.E.2d 72, 77 (Ct. App. 1984) and related authority. An action to perform an accounting or impose a constructive trust sound in equity, not law; accordingly, the Representatives and their Counsel are not entitled to a jury trial on these matters. Chief Justice Jean Hoefer Toal, et al., Appellate Practice in South Carolina 185 (2nd ed. 2002) (noting actions to perform accountings and impose constructive trusts both sound in equity). Additionally, this Court has received no request to conduct a jury trial as part of this RTSC.

Respondents argue there is insufficient evidence in the record to pursue RTSC. The material entered in support of Plaintiffs' Motion for Accounting or RTSC suggest otherwise. The purpose of the class created by Judge Kemmerlin was to opt South Carolina homeowners out of the Posey Settlement in Tennessee.[16] At a minimum, the pursuit of that goal required the

[16] By August 25, 2003, all of the South Carolina Class Representatives had settled non-class claims with Dryvit and Original Class Counsel had entered into other arrangements with Dryvit to settle certain individual cases and to receive a sizeable attorney fee. All of this was undertaken without any notice to, or input from, this Court even though Rule 23(e), SCRCP specifically requires any attempt to settle or compromise a class action to be approved by a court after appropriate notice and a fairness hearing.

Cardamone Representatives and their Counsel to keep the South Carolina class informed of the status of the two competing class actions and the positions took by Cardamone Counsel in the Posey proceedings. It is axiomatic that "absent class plaintiffs must receive notice plus an opportunity to be heard and participate in [class action] litigation, whether in person or through counsel" in order to satisfy the requirements of minimal due process in a class action lawsuit. Salmonsen v. CGD, Inc., 377 S.C. 442, 457, 661 S.E.2d 81, 89 (2008). Said notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Salmonsen, 377 S.C. at 457, 661 S.E.2d at 89 quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). Timely notice was particularly necessary to the unnamed members of this Class who were subject to the Posey action, had already received notice of its purported nationwide settlement and were being asked to submit to the exclusive jurisdiction of the Tennessee court. Timely notice from the Cardamone Representatives and their Counsel were crucial for informing South Carolinians of their competing litigation options. Indeed, the class certification order filed on September 3, 2002, required such notice to the South Carolina class, yet Cardamone Representatives and their Counsel took no action to fulfill this important due process requirement despite the clear need, and court instruction, to do so.

Inaction is not the only matter that warrants examination. Prior to the intervention of the current representations and their counsel, documentation has been present which suggests Dryvit coordinated its motion practice with the Cardamone Representatives and their Counsel to de-certify this action without any mention of the Cardamone Representative's individual settlements or the agreement their Counsel reached to receive an attorney fee after this action was dismissed. Respondents' motions impermissibly seeks to impair this Court's authority to investigate those actions and is clearly violative of Rule 23 SCRCP which provides "[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 individual benefits derived by class representatives and/or their counsel in accordance with Rule 23, SCRCP. Premium Investment Corp. v. Green, 282 S.C. 464, 324 S.E. 2d 72 (Ct.App. 1984) (reviewing the discharge of fiduciary obligations by class representatives and their counsel.).

The Court has been asked to dismiss the RTSC upon the assertion that venue is in Charleston County. The underlying product liability action was commenced with the filing of a summons and complaint in Beaufort County (Fourteenth Judicial Circuit). Subsequent to the lawsuit being certified as a class action, the undersigned was vested with exclusive jurisdiction to hear all matters related to the case regardless of where he may be assigned to hold court. Pursuant to the assignment, the undersigned was vested with all powers and duties of a circuit judge of the Fourteenth Judicial. The RTSC hearing is brought pursuant to Rule 23 and relates to the underlying litigation. The assertion that the RTSC should be denied because Venue is in Charleston County is without merit. *See,* Cardamone v. Dryvit Sys. Inc., S.C. Sup. Ct. Order dated Aug. 31, 2006.

Lastly, the Court rejects that the RTSC must be dismissed upon the assertion that Defendant Dryvit Systems, Inc. is an indispensible party to the RTSC pursuant to Rule 12(b)(8), SCRCP. Rule 12(b)(8) is not a mechanism whereby a defendant may compel the dismissal of an action against it based on the plaintiff's earlier settlement with a joint-tortfeasor. Rather, the Rule operates to join an indispensable party whose presence is required in order to render complete relief to the Plaintiff. See Chester v. South Carolina Dept. of Pub. Safety, 388 S.C. 343, 698 S.E.2d 559 (2010). In this matter, Dryvit is not such a party as demonstrated by the

fulfillment of the settlement it reached with the South Carolina Class. Nevertheless, the Court's denial of the motion is based upon a Rule 12(b) standard. Since the Respondent suggests the possibility that no "agreement" with Dryvit ever existed, Dryvit has not been dismissed from the underlying litigation.

Accordingly, the Respondents' motions are DENIED.

J. Mark Hayes, II
Circuit Court Judge
Fourteenth Judicial Circuit

Date: September 27, 2012

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TIMOTHY TREON and his wife, JANE TREON, and P. JENNINGS SCEARCE, and STEPHEN CHRISTIAN individually and on behalf of others similarly situated in the State of South Carolina,

Plaintiffs,

v.

DRYVIT SYSTEMS, INC., ESTATE BUILDERS, INC., and AMERICAN WAY APPLICATORS OF SOUTH CAROLINA, INC.,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No. 2002-CP-07-1377

13 JUN -5 PM 12:17
JERRI ANNE DOSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Order Denying Motions Under Rule 59 (e)

This matter came before the court pursuant to SCRCP Rule 59(e) on motions of William Dixon Robertson III, & William M. Bowen (hereinafter "Robertson Motion") and Timothy W. Bouch, W. Jefferson Leath Jr., & Michael S. Seekings (hereinafter "Bouch Motion"), both filed on or about October 9, 2012 to alter or amend this court's prior order denying motions to dismiss and/or quash. In accordance with SCRCP Rule 59(f), this court exercises its discretion to determine the motions on the briefs filed by the parties without oral arguments. After reviewing in detail, the Motions to Alter or Amend its prior order and the Memorandum in Opposition to the Motion and Plaintiffs Notice of Motion and Motion for Sanctions, I deny the motions.

Although service of the Motions to Alter or Amend filed by Counsel for Leath, Bouch and Seekings, was not accomplished in accordance with the rules of civil procedure, I considered those arguments in my deliberations as if the Motions had been properly served. Notwithstanding this procedural concern over service, I find that those arguments are not persuasive and do not affect my denial of the Rule 59 motions on all issues presented.

In addition, Counsel for Movants, Leath, Bouch and Seekings, claims to have made an appearance for only a limited purpose. To the extent that doctrine still exists, those attorneys moved beyond the "limited" jurisdictional arguments and advanced factual arguments and attempted to present factual information which related to some of the core factual issues to be determined at the Rule To Show Cause (RTSC). In addition, in their briefs filed the night before their appearance before this Court, they adopted "all" of the factual and legal arguments of the other Movants. Although this issue is not one that gives this Court pause in exercising its jurisdiction over Messrs. Leath Bouch and Seekings, this Court finds that their appearance was not limited. Further, the Court notes that the factual material placed in the record by Movants is entirely contradicted by the existing record of this case, and therefore underscores the need for the Rule to Show Cause Hearing to go forward.

In denying Plaintiffs' motion for sanctions, the Court stresses that it retains all the inherent powers and if what Plaintiffs have termed "a fraud" has taken place against this Court and the class action processes in South Carolina, this Court will be exercising both its inherent powers and Rule 23 supervisory authority over class action litigation to address that conduct.

Contrary to the arguments raised in the Bouch and Robertson Motions,[1] this Court has the inherent authority, and the express duty required by Rule 23, SCRCP to require the appearance of Movants and the power to compel their answers to its questions regarding Movants' conduct as class counsel.[2] This Court's power and authority to address the issues in the RTSC is not

1 Specifically, arguments 1, 2, 3, and 7 of the Bouch Motion and arguments 3, 6, and 7 of the Robertson Motion are based on the misrepresentation that this Court lacks jurisdiction to conduct the RTSC.

2 The Court notes that prior class representatives have not objected to cooperating with the Court's investigation.

limited by its Rule 23 obligations. Neither this Court, nor any court, is divested of its inherent or contempt power when affirmative duties are codified in a rule of procedure or statutory law.[3]

Furthermore, should the facts found at the RTSC require it, the Court may be required to exercise its power to punish which is inherent in all courts at all times. The "inherent" power's existence is essential to the preservation of order in judicial proceedings and consequently to the due administration of justice. *Cheap-O's Truck Stop v. Cloyd*, 350 S.C. 596, 567 S.E.2d 514 (Ct. App. 2002).

Rule 23 powers may be employed when the court believes it is necessary to curtail the opportunities for abuse of the judicial system in class actions. See, *Eldridge v. Greenwood*, 308 S.C. 125, 417 S.E.2d 532 (1992). This RTSC hearing's objective is to address alleged abuses to the administration of justice. If required to do so, the Court will avail itself of any available and proper remedies. *Brandt v. Gooding 368 S.C. 618, 630 SE2d 259 (2006).*

In their Motions, Movants focus a great deal of their attention on the $825,000.00 attorney's fee amount. Because the dollar amount of the fee is significant, Movants reason they are entitled to a jury trial. Significantly, Movants cite no case law that suggests a dispute over an attorney fee in a Rule 23 class action should be decided by a jury rather than by the presiding trial judge in the matter. As no party contends that a South Carolina judge ever approved the $825,000 fee, the Movants' arguments are without merit. Unless this matter transforms itself into a criminal proceeding and thus addresses a wrong committed against the state, a jury trial seeking private damages is not the proper avenue to address whether Rule 23 has been violated

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3 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 control the adjudicative power to hear and decide cases in order "to safeguard the rights of litigants," enforce orders and judgments, 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." This is an "implied and necessary power" that is required to ensure the "due administration of justice" and 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).

and a civil jury should not determine the appropriate sanction for the wrong. Thus this court cannot find a constitutional right to a jury trial that is being denied the movants by conducting the RTSC. Also no challenge has been made to the provisions of Chief Justice's Order assigning this case the undersigned judge.

Generally, the constitutional right to a jury trial is reserved to matters historically arising from common law and cases where a person's liberty is at stake. The Court further finds that in South Carolina, proceedings to investigate and punish instances of fraud upon a court are equitable in nature and do not entitle the allege perpetrators of a fraud on the court to a jury trial. *See e.g. Mr. T v. Ms. T*, 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct. App. 2008) (noting that Rule 60(b), SCRCP merely follows the equitable analysis associated with a fraud upon the court and quoting from 11 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* §2868 (2d ed. 1995)). Because the Court's inquiry in the RTSC proceeding is equitable in nature, Movants' claims[4] of a right to a jury trial are without merit.

In its earlier Order, this court referenced its order of January 9, 2009, denying Dryvit's Motion for Summary Judgment as a means for further placing everyone on notice of what had been presented to the court that causes the court great concern. Additionally, based on the submissions made by the Movants and the years that this and other litigation has been on going,[5] this Court has confidence that the Movants have proper notice and are aware of the issues and concerns of the Court which need to be addressed in the RTSC.

The assertion of a statute of limitation defense provides no basis to prevent the RTSC from proceeding. The statute of limitations is an affirmative defense not a jurisdictional issue. If the statute of limitations argument is advanced later it would require a showing of prejudice

4 Arguments 8 and 17-19 in Bouch Motion and 2, 9 & 10-12 in Robertson Motion.
5 See also: 2008-CP-07-0774; 2008-CP-07-3145

(assuming an unreasonable delay). No prejudice argument has been presented upon which this court can even speculate as to the factual basis to support a prejudice argument. The exercise of the Court's inherent power cannot be restricted or affected by legislative action; therefore, Movant's arguments regarding venue, statute of limitations and Rule 12(b)(8) SCRCP[6] are without merit. *Williams v. Bordon's Inc.*, 274 S.C. 275, 279-80, 262 S.E.2d 881, 883-84 (1980).

The Court finds that no due process rights of the Movants are being violated by conducting RTSC. The Movants have not made a request to conduct discovery. Further, the Movants have been provided volumes of documentation by present class counsel which relate to the issues in the RTSC and the Movants have presented documents which relate to the facts of the RTSC. The Court has great confidence that all of the parties have been placed on adequate notice of the Courts reasons for conducting the RTSC. The Court is not opposed to the parties doing discovery. The Court is aware that depositions were previously scheduled which were canceled when an appeal of an earlier email was filed. Even though the Court recalls that prior to the filing of RTSC discovery was presented to all or some of the present movants and no response information was received in response, and even though no request to conduct discovery as part of the RTSC has been made, the Court will assist in scheduling reasonable discovery upon the request by the parties.

The RTSC will go forward on September 9th, 2013 and will continue until completed.

J. Mark Hayes, II
Presiding Judge

Spartanburg, South Carolina
May 31, 2013

6 Arguments 6, 11 & 12 in Bouch Motion and 1 in Robertson Motion.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)
) FOURTEENTH JUDICIAL CIRCUIT
2008-CP-07-0774)

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

Plaintiffs,

v.

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

Defendants.

2008-CP-07-3145

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

Plaintiffs,

vs.

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

Defendants.

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

12 MAY -2 PM 12:07
JEANNETTE A. ROBINSON
BEAUFORT CO., S.C.
CLERK OF COURT

ORDER
DENYING MOTIONS TO RECUSE
AND
TEMPORARILY STAYING MATTERS

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

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

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

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

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

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

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

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

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

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

After several years of litigation and numerous hearings, the underlying class action resolved itself through a court approved settlement in June of 2010. However, prior to this Court approving the settlement, the conduct of prior class counsel and prior class representatives came before the Court. These allegations first appeared before the Court in addressing a Motion to Dismiss and a Motion for Summary Judgment in the underlying litigation based upon the assertion that a Tennessee nationwice class action barred the prosecution of the South Carolina class action under the theories of collateral estoppel, res judicata, and the Full Faith and Credit Clause of the U.S. Constitution.

To defend against the presumptive validity (See, *Hospitality Management Associates, Inc. v. Shell Oil Co.*, 356 S.C. 664, 591 S.E.2d 611, 2004) of the Tennessee class action, it was asserted, in part, that the Defendant should be estopped from maintaining the preclusive effect of the Tennessee Class Action because of irregularities and improper conduct by the Defendant which included the settlements it reached with former class representatives outside of the parameters of SCRCP 23. It was also asserted that the Defendant had paid former class counsel hundreds of thousands of dollars in attorney's fees for the purpose of stalling the prosecution of the South Carolina class action so that the Tennessee class action could become final in Tennessee in order that its finality could be used to dismiss the South Carolina case. To support the position, numerous documents were presented, including but not limited to, emails purportedly reflecting conversations between the Defendant's

lawyers and some former class counsel. The conversations in these documents indicate, among other things, a pre-summary judgment agreement between Defendant's attorneys and certain members of prior class counsel to stage the summary judgment argument.

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

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

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

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

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

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

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

The Present Motions

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

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

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

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

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

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

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

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

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

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

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

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

Decisional Authorities[5]

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

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

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

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

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

Duty to Hear the Case

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

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

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

Exercise of Discretion

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

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

[6] *See infra* Note 8.

Clearly the canons seek to preserve the public confidence in the judiciary serving as the bedrock of justice by requiring recusal of a judge whose impartiality reasonably may be questioned due to a bias or prejudice stemming from an extra-judicial source (ie., judge was previously a lawyer in the matter before him; or the judge's family has potential economic interest in the controversy or subject matter before him; the judge or a family member is a personal friend or is related within the third degree to a party or lawyer appearing before him; the judge is a trustee or officer in an organization before him as a party; or that the judge's judgment may otherwise be affected by a family, political, social, or other type of relationship)[7]. The Canons do not suggest, and no decisional authority was presented to the Court that suggests, recusal is mandatory when a judge's impartiality is being questioned due to information he gained in his prior service as a judge in a related case[8].

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

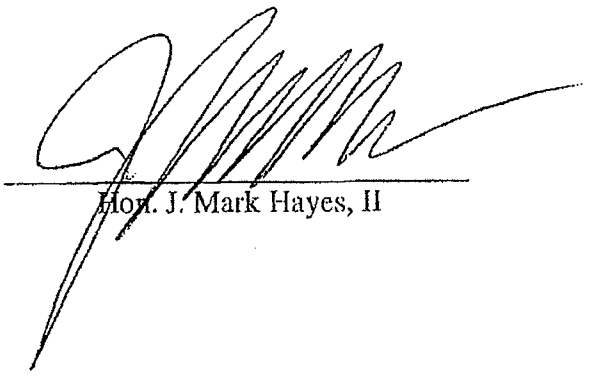
Based on the procedural history of the two present cases prior to this Court's appointment which includes, among other things, removal to federal court, various motions to dismiss and for summary judgment, motions to disqualify and relieve prior counsel, and motions to disqualify and relieve present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

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

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

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

IT IS SO ORDERED.



Hon. J. Mark Hayes, II

Date: 4/27/12
Spartanburg, SC

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)
) FOURTEENTH JUDICIAL CIRCUIT
2008-CP-07-0774)

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

Plaintiffs,

v.

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

Defendants.

2008-CP-07-3145

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

Plaintiffs,

vs.

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

Defendants.

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

13 APR -4 PM 3:32
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

ORDER
LIFTING TEMPORARY STAY
AND
RECUSAL

THE PRESENT MOTION

These cases[1] are presently before the court on the Plaintiff's Motion for Limited Relief from Order Staying Case to Argue Motion to Compel[2]. As part of their motion, the plaintiffs seek to have this Court partially lift a temporary stay of the prosecution of the Treon II cases. The stay of Treon II was issued in an effort to preserve the integrity of the adjudicatory process of Treon I and Treon II by creating an objective barrier between the undersigned's work in the cases. The stay was to have been only for a short duration. It was set to be ended once the undersigned issued a decision in the Treon I Rule to Show Cause.

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

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

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

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

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

After careful review and consideration, the court is of the opinion that an inescapable conflict has arisen between the duties he must perform in Treon I and those he is being presently asked to perform in Treon II. After considering the limited possible means of remediation[5], the court's most difficult opinion is that the best interest of the present Treon II litigants and its potential class, and in the best interest of the Treon I litigants and its class, is

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

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

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

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

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

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

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

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

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

PROCEDURAL BACKGROUND

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

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

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

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

By Order dated August 10, 2010, the Chief Administrative Judge of the Fourteenth Judicial Circuit assigned the Treon II cases to the undersigned. At the request of Treon II defense counsel, discovery was limited to the issue of class certification. Memorandums and briefs from all parties were submitted on the issue of class certification and arguments were presented. On the second day of argument, defense counsel made an oral motion for the undersigned to recuse himself based upon some comments made by the undersigned during the prior day's arguments. It was asserted that these comments reflected a bias or prejudice arising from the undersigned's service in Treon I that wrongfully compromised the undersigned's ability to serve impartially in Treon II. After denying the oral motion, the court allowed the parties to submit briefs on the issue of recusal. After receiving the briefs and researching the issue, an order formally denying the recusal motion was issued on May 2, 2012.[7]

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

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

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

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

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

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

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

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

THE CONFLICT

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

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

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

resolved without unnecessary cost or delay. A judge should also monitor and supervise a case so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary cost.[10] These are general duties owed by a judge to any case assigned to him or her. These are duties which are being unfulfilled in Treon II by the decision that the Treon I Rule to Show Cause must be decided prior to making further decisions in Treon II.

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

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

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

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

[12] *Id.* Pg. 2.

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

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

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

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

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

---

[14] *See Infra.* footnote 8. Also, even though the undersigned would be, in ruling on the present motion, receiving in his judicial capacity and in the typical setting not a concern, in this unique and rare setting it is of high concern. In the Treon I Rule to Show Cause, the court is acting as the final fact finder. In ruling on the Treon II motion, the undersigned may review evidence highly probative of issues relevant to the Rule to Show Cause but yet which may be properly protected from disclosure. Thus, potentially compromising his role as fact finder and unnecessarily frustrating or clouding the objectives of the undersigned's duties related to the Rule to Show Cause if he rules on the present Treon II motion.

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

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

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

IT IS SO ORDERED

J. Mark Hayes, II
Circuit Court Judge

Date: March 29, 2013
Beaufort, South Carolina

The Supreme Court of South Carolina

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

v.

Dryvit Systems, Inc., et al. Defendants.

Beaufort County
2008-CP-07-00774

and

Steven Tucker, et al Plaintiffs,

v.

Leath, Bouche & Crawford, LLP, et al. Defendants.

Beaufort County
2008-CP-07-03145

ORDER

IT IS ORDERED that the Honorable Clifton Newman be vested with exclusive jurisdiction to hear and dispose of the above cases. Judge Newman shall decide all matters pertaining to these cases, and pursuant to this assignment shall retain jurisdiction over these cases regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard as to whether there is a term of court scheduled.

Jean Hoefer Toal
Chief Justice

May 30, 2013
Columbia, South Carolina

The South Carolina Court of Appeals

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

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

v.

Dryvit Systems, Inc., Defendant.

Appellate Case No. 2012-213083

RECEIVED
[illegible] 2012
NEXSEN PRUET, LLC

ORDER

Respondents have filed a motion to dismiss and Appellants have filed a motion to hold this appeal in abeyance pending the lower court's ruling on a timely post-trial motion. After careful consideration, this appeal is dismissed without prejudice. *See Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986) ("[I]n the event timely post-trial motions are filed under Rule 59, simultaneously with or subsequent to the filing of a Notice of Appeal, the appellant shall notify the Clerk of . . . Court in writing. Upon receipt of such notice, the appeal shall be dismissed without prejudice. Any party can appeal within ten (10) days after the order disposing of the post-trial motions. A second filing fee will not be collected from a party who previously appealed.").

FOR THE COURT

FILED
12/3/12 AS

Columbia, South Carolina

cc:
Tanya Amber Gee
James L. Bruner
Kent Taylor Stair
Thomas Justin Finn
Gregory Milam Alford
Robert B. Sam Phillips
Susan Pedrick McWilliams
Daniel C. Leonardi
Kenneth C. Anthony, Jr.
Thomas E. Williams

The South Carolina Court of Appeals

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

Timothy J. Treon and his wife, Jane Treon, and 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.

Appellate Case No. 2013-001367

RECEIVED
OCT 15 2013
NEXSEN PRUET, LLC

ORDER

Respondents have filed a motion to dismiss this appeal. After careful review and consideration, the motion is denied at this time. However, nothing in this order shall be construed to prevent the parties from addressing the issue of appealability in their briefs.

FOR THE COURT

Columbia, South Carolina

FILED
10/11/13

cc:
Tanya Amber Gee
Susan Pedrick McWilliams
Daniel C. Leonardi
Kirsten Elena Small
James L. Bruner
Kent Taylor Stair
Kenneth C. Anthony, Jr.
Gregory Milam Alford
Thomas Justin Finn
Robert B. Sam Phillips

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE CIRCUIT COURT

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

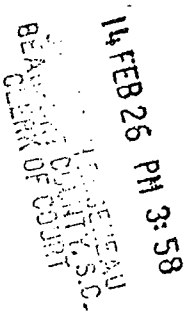
Plaintiffs,

vs.

Leath, Bouche & Crawford, LLP, W. Jefferson Leath, Jr., William Dixon Robertson III, Michael S. Seekings, William M. Bowen, John Cardamone, Sally Cardamone, Benjamin T. Clark, Diane M. Clark, Ramona Gianni, and Nathan W. Gordon,

Defendants.

Case No. 2008-CP-07-3145



Steven Tucker, Jeaneen Tucker, Charles H. Davis, Stephanie H. Davis, individually and on behalf of others similarly situated in the State of South Carolina,

Plaintiffs,

vs.

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

Defendants.

Case No. 2008-CP-07-0774

ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This matter is before the Court on the plaintiffs' motion for class certification. This Court entertained arguments on this motion on October 8, 2013, in Beaufort County Circuit Court, where all parties were represented by their respective counsel. After thorough

consideration of the pleadings, memoranda of law, and arguments, the Court finds that the plaintiffs have failed to satisfy the requirements of Rule 23 of the South Carolina Rules of Civil Procedure. Accordingly, the plaintiffs' motion for class certification is denied.

PROCEDURAL BACKGROUND

I. Underlying Class Action

On August 12, 2002, a group of attorneys – the lawyer defendants in this action and their respective law firms[1] –filed a class action complaint in the Circuit Court of Beaufort County, for the purpose of opting South Carolina residents out of a national class action against Dryvit, Inc., which was then pending in Jefferson County, Tennessee, styled *Bobby R. and Sabrina Posey, et al. vs. Dryvit Systems, Inc., et al.*, Case No. 17,715-IV (hereinafter "*Posey*"). The South Carolina action alleged that Dryvit's synthetic stucco product was defective, and the case was styled "*John Cardamone and his wife, Sally Cardamone, and Benjamin T. Clark and his wife, Diane M. Clark, individually and on behalf of others similarly situated in the state of South Carolina vs. Dryvit Systems, Inc., et al.*" Civil Action No. 2002-CP-07-1377 (hereinafter "*Cardamone*" or "the *Cardamone* action"). John and Sally Cardamone, Benjamin T. and Diane M. Clark, Ramona Gianni, and Nathan Gordon (collectively hereinafter "the Former Class Representatives") were designated the named class representatives in *Cardamone*.[2]

After the nationwide settlement was approved in *Posey*, the Cardamones, Clarks, and Ms. Gianni settled and dismissed their individual South Carolina lawsuits. The *Cardamone* class action, however, remained pending.

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[1] W. Jefferson Leath, Jr., William Dixon Robertson III, Michael S. Seekings, William M. Bowen, are the lawyer defendants in this action, and the law firm Leath, Bouche & Crawford, LLP, is also a defendant. Frank E. Grimball and his firm, Mullen & Wylie, previously reached a settlement with the plaintiffs in this action, which was approved by then-presiding Judge J. Mark Hayes, II.

[2] The Cardamones and the Clarks are the four non-lawyer defendants named in this action. Ms. Gianni was part of the Mullen Wylie settlement, and Nathan Gordon was never served, so he is effectively not part of this matter.

Because the class representatives had all settled their individual claims, several new attorneys moved to intervene as class counsel and to substitute new class representatives. At the same time, original class counsel (lawyer defendants)—whose clients had resolved their individual claims against Dryvit—moved to be relieved as counsel. The Honorable J. Mark Hayes, II, granted the motion to intervene, substituting Timothy and Jane Treon and P. Jennings Scearce 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. By consent order dated January 19, 2006, Judge Hayes also granted the motion for former class counsel (lawyer defendants) to be relieved.[3]

II. Current Action against Former Class Representatives and Class Counsel

A. The *Treon* Action

On March 7, 2008, the Alford group filed a putative class action against the former class representatives (the Cardamones, the Clarks, and Gianni) and Dryvit. The named plaintiffs and putative class representative were Timothy Treon and Jennings Scearce, both of whom were still serving as class representatives in the *Cardamone* action. The action was styled as "*Timothy J. Treon and P. Jennings Scearce, Individually and on behalf of Others similarly situated in the State of South Carolina vs. Dryvit Systems, Inc., John Cardamone and his wife, Sally Cardamone, Benjamin T. Clark and his wife, Diane M. Clark, Ramona Gianni, Nathan W. Gordon and John Doe and Mary Roe*," Civil Action No. 08-CP-07-00774 (hereinafter "Treon" or "the *Treon action*").

The *Treon* action asserted causes of action for civil conspiracy, breach of fiduciary duty, and fraudulent concealment. These claims were based on factual allegations that the former class representatives had reached "lucrative individual settlements which Dryvit conditioned on

[3] The *Cardamone* class action continued, and a settlement agreement was approved by Judge Hayes in June of 2010.

the dismissal of the *Cardamone* Action." 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.

B. The *Tucker* Action

On August 26, 2008, while the motion to remand was pending, the Alford group filed another lawsuit against the former class representatives and, for the first time, against former class counsel (lawyer defendants). This putative class action was styled as "*Steven and Jeaneen Tucker, Charles and Stephanie Davis, Timothy and Janie P. Treon and P. Jennings Scearce, and John Doe and Jane Doe, Individually and on behalf of Others similarly situated in the State of South Carolina vs. Leath, Bouch & Crawford, LLP, W. Jefferson Leath, Jr., Williams Dixon Robertson III, Michael S. Seekings, Frank E. Grimball & Mullen Wylie, LLC formally Mullen, Wylie & Seekings, LLC, John Cardamone and his wife, Sally Cardamone, Benjamin T. Clark and his wife, Diane M. Clark, Ramona Gianni, Nathan W. Gordon,*" Civil Action No. 08-CP-07-3145 (hereinafter "*Tucker*" or "the Tucker action").

The *Tucker* plaintiffs alleged 1) civil conspiracy; 2) breach of fiduciary duty; 3) inducing, aiding, and abetting a breach of fiduciary duty; 4) fraudulent concealment; and 5) negligence of original class counsel. The complaints in the *Treon* and *Tucker* actions were nearly identical, save for the addition of Dryvit as a defendant in *Treon*[4] and the negligence claim directed against the original class counsel in *Tucker*.[5] 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.

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[4] Dryvit settled out of *Treon* as part of its settlement of the *Cardamone* action in 2010.

[5] On October 13, 2008, the plaintiffs filed a First Amended Class Action Complaint in *Tucker* containing the same claims, but adding William M. Bowen as a defendant.

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C. New Class Counsel Appointed to this Matter

In February of 2010, Judge Marvin H. Dukes, III, who was then presiding over this action, disqualified the Alford group from representing the putative class due to a conflict of interest. Thomas A. Pendarvis, I. Gregory Hodges, Timothy D. Roberts, and Williams J. Hunter now represent the plaintiffs in this matter.

III. Motion for Class Certification

A. Hearing before Judge Hayes

On October 15, 2010, the plaintiffs served a Motion for Class Certification (hereinafter "Plaintiffs' Motion") upon all defendants in this case. The plaintiffs sought to consolidate the *Treon* and *Tucker* cases, and their motion treated the cases as consolidated. In response, the defendants timely filed memoranda in opposition to Plaintiffs' Motion for Class Certification, to which Plaintiffs filed a Reply.

On July 21 and 22, 2011, Judge Hayes, who had by then been assigned to preside over this matter, held a hearing on Plaintiffs' Motion. Nearly six months later, on December 5, 2011, the plaintiffs served a Supplemental Memorandum in Support of Motion for Class Certification. On February 12, 2012, Judge Hayes issued a Form 4 Order indicating an intention to grant Plaintiffs' Motion, but further indicating that a more formal Order would follow. However, before issuing a final Order, Judge Hayes recused himself from this case on March 29, 2013.

B. Hearing before the Undersigned

Two months after Judge Hayes's recusal, the undersigned was assigned to preside over these proceedings. This Court held a new hearing on Plaintiffs' Motion on October 8, 2013. Prior to that hearing, counsel for defendants Leath Bouch & Crawford, LLP, W. Jefferson Leath, Jr., and Michael S. Seekings (hereinafter "the LBC defendants") filed a Supplemental

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Memorandum in Opposition to Plaintiffs' Motion for Class Certification, and during the October 8th hearing, made extensive use of PowerPoint materials (submitted as "Evidentiary Documents for Argument in Opposition to Class Certification"), a hard copy of which was then filed with the Court. Approximately three weeks after the October 8, 2013 hearing, the plaintiffs submitted a Supplemental Memorandum in Support of Motion for Class Certification. On October 10, 2013, defendant W. Dixon Robertson III filed a Supplemental Memorandum in Opposition to the Plaintiffs' Motion, and on November 14, 2013, the LBC defendants filed a Memorandum in Response to Plaintiffs' Supplemental Memorandum in Support of Motion for Class Certification. The Court has now considered all of the submissions by the parties on this motion, as well as the arguments of counsel. For the following reasons, the Court denies Plaintiffs' Motion.

LEGAL STANDARD

Parties seeking class certification bear the burden of proving five prerequisites set forth in Rule 23(a) of the South Carolina Rules of Civil Procedure: 1) the class must be "so numerous that joinder of all members is impracticable;" 2) there must be "questions of law or fact common to the class;" 3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;" 4) "the representative parties [must] fairly and adequately protect the interests of the class;" and 5) "the amount in controversy [must exceed] one hundred dollars for each member of the class." In deciding whether class certification is proper, this Court must rigorously analyze whether each prerequisite is satisfied, and it may not speculate as to the presence of an element necessary for class certification. *Gardner v. Dept. of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003); *Waller*, 300 S.C. at 467, 388 S.E.2d at 801; *Ferguson v. Charleston Lincoln-Mercury, Inc.*, 344 S.C. 502, S.E.2d 285 (Ct. App. 2001). As part of this

rigorous analysis, it is appropriate for this Court to look beyond the pleadings and probe the relevant facts. *Walmart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (U.S. 2011).

The burden of proving the five prerequisites under South Carolina law rests entirely on the plaintiffs. *Waller*, 300 S.C. at 467, 388 S.E.2d at 801. "The failure of the proponents to satisfy any one of the prerequisites is fatal to class certification." *Gardner v. S.C. Dept. Rev.*, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003). A trial judge's ruling on whether an action is properly maintainable as a class action is within his or her discretion. *Waller*, 300 S.C. at 468, 388 S.E.2d at 801.[6]

DISCUSSION

The plaintiffs' purported class action complaint has asserted various claims against two distinct groups: the first group is comprised of four individuals who acted as original class representatives in the underlying products liability class action; the second group is comprised of six attorneys (and two of their law firms) who filed the underlying products liability class action. Though not dispositive of the issue of class certification, the Court notes at the outset that the existence of lawyer defendants as part of the purported class action requires an examination of the requirements of Rule 23, SCRCP, within the context of the very unique and special relationship that exists between clients and their attorneys. Just as legal malpractice claims cannot be assigned because of the unique and personal nature of attorney-client relationships, I

[6] This Order is made with the Court's review and understanding of the lengthy debate that has taken place, and various respective arguments that have been made, over the appropriateness of the certification of a purported class in this action. This Court acknowledges that Judge Hayes had previously heard arguments on Plaintiffs' Motion regarding the issue of class certification and subsequently issued a Form 4 Order indicating an intention to grant the motion. However, in that Order, Judge Hayes anticipated filing a more formal order. Furthermore, both parties concede that Judge Hayes indicated in an e-mail that he did not consider his Form 4 Order to be a Final Order and that, in fact, he did not know whether he would ultimately certify a class in this action. *See* July 18 and 19, 2012 Transcript of Record at pgs. 36, 244, and 277. Additionally, through the Defendants' presentations and arguments made on and after October 8, 2013, it appears that new facts and circumstances further support this Court's consideration of Plaintiffs' Motion and the issue of class certification. *See Smith v. Breedlove*, 377 S.C. 415, 661 S.E.2d 67 (2008). Finally, as noted at the October 8, 2013 hearing, this Court could, if it chose, decertify a class previously certified. For these various reasons, and because it is now the responsibility of this Court to determine whether this case should proceed as a class action, this Court can and will exercise its own judgment on these issues.

find that in this case, the unique and special relationship between each class member and the lawyer defendants supports my decision to deny class certification. *See, e.g.*, *Brown v. Partipilo*, C.A. No. 1:10CV110, 2010 WL 3979802 (N.D.W.Va. Oct. 8, 2010) (holding that legal malpractice claims could not be assigned under the compelling public policy reason premised on the "unique personal nature of the relationship between an attorney and his client").

Moreover, the plaintiffs, who have the burden of proving each prerequisite of Rule 23(a) before a class can be certified, have essentially argued throughout this litigation that they are members of the *Cardamone* class and that all members of that class have suffered the same pain; ergo, they have filed a new class action, and their motion for class certification must be granted because they are already a class. This logic is flawed, and as explained in detail below, I find that the plaintiffs have not carried their burden as to four of the five prerequisites of Rule 23(a), SCRCP: commonality, typicality, adequacy of class representative, or amount in controversy.[7] Each one of these reasons independently supports my denial of class certification.

I. Common Questions of Law or Fact

To establish a class action, Rule 23(a) requires the plaintiffs to demonstrate that there are "questions of law or fact common to the class." "In practical terms this means the party must articulate the existence of significant common, legal, or factual issues which bind the proposed class together. *Gardner v. S.C. Dept. of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003) (internal quotations omitted). The plaintiffs generally argue that "[c]ommon issues predominate Plaintiffs' legal malpractice, breach of fiduciary duty, and related claims against Defendants." In their Reply memorandum in favor of class certification, the plaintiffs primarily argue that the

[7] The Court finds that Rule 23's requirement of numerosity is most likely met here, based on the representation by plaintiffs' counsel at oral argument that some 52 individuals filed claims as to the settlement with Mullen Wylie, thereby evidencing that number of likely potential class members.

common issue in this case is the defendants' failure to notify potential *Cardamone* class members of their right to opt out of the nationwide *Posey* settlement.

The plaintiffs seek to define the class as "[a]ll members of the Class created by the *Cardamone* Action, including those members who without formal notice, settled their claims against Dryvit for reduced compensation based on the assertion that the [nationwide] *Posey* settlement ended their right to make claims against Dryvit." In its final form, the *Cardamone* Class, certified by Judge Hayes, included "all Persons who, as of the Notice Date [January 18, 2010], own or owned a Structure [in South Carolina] on which Dryvit EIFS was installed during the Class Period [between January 1, 1989 and September 3, 2002]."

I find that all members of the plaintiffs' putative class here do not share the purported "common issue" of failure to receive notice. It is not disputed that least some class members in *Cardamone*, such as the individual clients of the lawyer defendants, settled their claims against Dryvit even while knowing they were not bound by the nationwide settlement. Additionally, the plaintiffs have acknowledged in their Answers to Interrogatories that some people who presumably would fall within the proposed class retained attorneys to represent them in their individual claims against Dryvit *after* September 3, 2002, and those people were able to settle their claims without any reduction in compensation.

Furthermore, I reject the plaintiffs' sweeping statement that the breach of fiduciary duty and malpractice allegations are common to the class. Allegations against the lawyer defendants sounding in malpractice and breach of fiduciary duty require the plaintiffs to prove: 1) the existence of an attorney-client relationship (or fiduciary relationship); 2) breach of duty by the attorney (or fiduciary); 3) damage to the client; and 4) proximate causation of client's damage by the breach. *RFT Management Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335-36, 732 S.E.2d

166, 173 (2012); *Holy Loch Dist., Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000). Based on the definition of this putative class, it would be impossible for some class members to have even an arguable attorney-client or fiduciary relationship with the defendants. For instance, class members who sold their EIFS-clad home prior to September 3, 2002, had no relationship with any of the defendants at all. Additionally, the defendants had no relationship with, nor did they owe any legal or fiduciary duty to, any person who bought an EIFS-clad home after January 18, 2006, when they withdrew as class counsel and class representatives. Moreover, every plaintiff in a legal malpractice case is going to have an individual, unique claim based on the strength of their case against Dryvit, which will depend upon legal issues (such as statute of limitations defenses) and construction issues (such as the extent to which their home deteriorated).

The defendants have presented a myriad of other examples that demonstrate the "uncommon" factual or legal issues among the members of the plaintiffs' purported class, and the plaintiffs have made no attempt to redefine the class in such a way that the members would have "significant common, legal, or factual issues." *Gardner*, 353 at 21, 577 S.E.2d at 200. Instead, the plaintiffs have forged ahead using the definition of the *Cardamone* class under the flawed assumption that "once a class, always a class." In doing so, they have failed to carry their burden of proving the commonalities among the members in their causes of action against these defendants, and that failure alone, requires the Court to deny the plaintiffs' motion for class certification.

II. Typicality

The plaintiffs have also failed to carry their burden of proving that the claims of the representative parties are typical of the claims of the class. *See* Rule 23(a), SCRCP (requiring a showing of typicality). Courts have held the typicality requirement is met "if the class

representatives occupy essentially the same position as the other members of the class." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 824 (W.D. Pa. 1995). "The proper inquiry is whether other members of the class have the same or similar injury, whether the action is based on conduct not special or unique to the [class representatives], and whether other class members have been injured by the same course of conduct." *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 99 (S.D.N.Y. 1981).

The plaintiffs' counsel articulated three sub-classes in the proposed class: 1) those who still had Dryvit on their houses, and their houses had not yet been repaired; 2) those who had initially had Dryvit on their houses, but whose houses had been repaired: and 3) "*Posey*-ites," those who had Dryvit on their houses, did not opt out of *Posey*, and recovered through that settlement class in an amount less than those who recovered in the South Carolina class action (*Cardamone).* The plaintiffs admit that none of the current class representatives fall within the third subclass, the "*Posey*-ites." Furthermore, as discussed above, the defendants owed no duty to some members of the class. Thus, class members were owed different duties, had different levels of reliance, and incurred different damages.

This case is not unlike *Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 4 S.W.3d 805 (Tex. Ct. App. 1999), where clients sued their former attorneys who had represented them in a prior class action. The Texas Court of Appeals affirmed the lower court's denial of class certification, finding the claims against the attorneys lacked commonality and typicality. The Texas court found that "even if the duties were the same as and to [the three subgroups of the class], whether the duties were breached and the proximate cause for any breach will most certainly differ between these three subgroups." *Id.* at 811. Because the levels of reliance and damages would differ among those groups, the court found a lack of typicality and affirmed the

trial court's denial of class certification. *Id.* at 812. Here, the three sub-groups of this proposed class similarly preclude a finding of typicality. Each sub-group has suffered different damages, if they have been damaged at all, and there are arguably causation differences among them as well.

Accordingly, just as I found that individual issues predominated over common issues among the plaintiffs, so too do I find that the named class representatives' claims are not "typical" of the class. Indeed, no "typical" claim exists. Thus, the plaintiffs failed to carry their burden of proving Rule 23's typicality requirement, and that failure alone supports my denial of class certification.

III. Inadequacy of Class Representatives

Determining the adequacy of the class representatives "is a question of fact which depends upon the circumstances of each case." *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990). This Court must consider two criteria when determining whether the class representatives are adequate: "(1) the representative[s] must have common interests with the unnamed members of the class;" and (2) it must appear that the representative[s] will vigorously prosecute the interests of the class through qualified counsel." *Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983). After exhaustively reviewing this extensive record, I find that the plaintiffs have failed to carry their burden of proving that "the representative parties will fairly and adequately protect the interests of the class." *See* Rule 23(a), SCRCP.

A. Class representatives' interests significantly conflict with those of unnamed class members.

To establish the first criteria, the class representatives must demonstrate that they have no "significant antagonistic or conflicting interests to the unnamed members of the class." *Runion*,

98 F.R.D. at 317. "The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim which conflicts with the economic interests of the class." *Waller*, 300 S.C. at 468, 388 S.E.2d at 801. The purpose of this inquiry to protect the due process rights of unnamed class members. *Sullivan v. Winn-Dixie Greenville, Inc.*, 62 F.R.D. 370, 375 (D.S.C.1974).

This class action had been championed by the Treons, the Tuckers, the Davises, and Mr. Scearce. In their complaints, the plaintiffs alleged that the defendants abandoned the *Cardamone* action through a scheme where original class attorneys were paid $600,000, with a promise of an additional $225,000 upon dismissal. The plaintiffs requested, among other relief, "[d]isgorgement of all fees and settlements paid as a result of the breach of fiduciary duty."

Over a year after filing this putative class action, named class representatives Timothy Treon, Janie Treon, and Jennings Scearce – who are also named class representatives in the *Cardamone* action – filed a motion for accounting in *Cardamone* seeking the very same $825,000. When the defendants pointed out the inherent conflict, the Treons and Scearce withdrew as class representatives in this action, and the remaining named class representatives withdrew their claim for disgorgement. In other words, in an effort to "undo" the conflict of interest, the unnamed class members in this action no longer have a claim for the $825,000, for the benefit of the class members in *Cardamone*. This highlights the torn loyalties of the class representatives caused by conflicting economic interests of the two classes.

The plaintiffs' settlement with the Mullen Wylie law firm further exposes the antagonism between class representatives and unnamed class members. The plaintiffs settled their claims against Mullen Wylie for $475,000. Yet, in their settlement agreement, they agree that the proceeds of the settlement could be disbursed to the *Cardamone* class, if Judge Hayes finds such

a disbursement to be required in the Rule to Show Cause hearing Judge Hayes seeks to hold. Although the plaintiffs argue that the *Cardamone* class and this class should be one and the same, as explained above, large swaths of the *Cardamone* class would not have causes of action against the defendants. The difference in size between this putative class and the *Cardamone* class is significant. According to the plaintiffs' counsel, there were approximately 250 members of the *Cardamone* class. However, after Judge Hayes recognized a settlement class for purposes of the Mullen Wylie settlement in *Tucker and Treon*, and even after what the plaintiffs' counsel described as comprehensive notice, a mere 52 individuals came forward to participate. Considering the difference in class size and the effect that has on an individual members' share of a settlement agreement, the rights of the unnamed members of this class would be compromised if a settlement in this class was disbursed among the members of the larger *Cardamone* class.

Finally, the plaintiffs face the problem that some class members may not be dissatisfied with the defendants' representation. This is especially true considering that the plaintiffs would have all been limited to the *Posey* settlement had it not been for the defendants' filing of the *Cardamone* action in the first place. *See, e.g., Huber v. Taylor*, 2011 WL 4553154 (W.D. Penn. Sept. 29, 2011) ("[I]t seems a rather dubious proposition that clients who believe counsel have breached fiduciary duties and should be made to, e.g., disgorge their fees, can properly represent presumptively satisfied clients." *Id.* at *4). A few members who have come forward believing that their attorneys committed malpractice cannot represent the entire class who may be comprised of potentially satisfied members who have not made a claim. This is especially true where, as here, the Court must consider the very unique relationship between attorneys and

clients. Therefore, I find the plaintiffs did not establish the requisite "adequacy of representation," and this failure alone supports my decision to deny class certification.

B. Class counsel's loyalties are divided.

To establish the second criteria for adequate representation, qualified counsel must vigorously prosecute the interests of the class. *Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983). Just as the class representatives had conflicting claims with regard to the $825,000, so too does current counsel, Mr. Pendarvis. Mr. Pendarvis, who represents the plaintiffs, also represents another couple, the DeLoaches, who have filed an individual suit against the lawyer defendants.[8] In the DeLoaches' action, they seek the very same $825,000 that the class in this case had requested in their prayer for relief. The claim for disgorgement has since been withdrawn from this action. As a result, the unnamed class members no longer have a claim for the $825,000, but Mr. Pendarvis's other clients, the DeLoaches, still do. The withdrawal of the disgorgement claim highlights the division of loyalties that might prevent Mr. Pendarvis from vigorously prosecuting the interests of the class. Accordingly, the plaintiffs have not carried their burden of proving that they would adequately represent the class, and that failure alone supports my denial of class certification.

IV. Amount in Controversy

I also find that the plaintiffs have failed to prove that the amount in controversy for each member of the class exceeds $100, as required by Rule 23(a), SCRCP. Damages in this case are very fact intensive and depend on a number of factors, such as the construction of the home (i.e. design, location, etc.); quality of the general contractor and installer; extent of application of

[8] The DeLoaches' suit, pending in Richland County Circuit Court, was filed against the defendants here, plus Francis Grimball, Mullen Wylie, and John Kassel. The Master in Equity, Judge Joseph Strickland, has issued orders granting the defendants' respective motion to dismiss. The DeLoaches have filed a motion to reconsider those orders.

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Dryvit to a particular residence; quality and experience of the plaintiffs' attorney; expert testimony; and so forth. Yet, the plaintiffs focus not on individual damages, but argue about the total amount of damages allegedly suffered by the *Cardamone* class as a whole. As explained above, the *Cardamone* class and this putative class are different in many important respects.

After carefully reviewing the record before me, the plaintiffs have failed to satisfy their burden of proving that each class member's individual claim will exceed $100. At least one class representative, Mr. Scearce, testified at his deposition that he has suffered no damage to his home. Furthermore, it is undisputed that, were it not for the defendants, many plaintiffs would have been bound to the *Posey* settlement, which was less lucrative than the settlement reached in *Cardamone*. Considering these factors, which indicate that individuals incurred only nominal damages, and in light of the plaintiffs' focus on the losses to the *Cardamone* class as a whole rather than on the losses incurred by individual members of ***this*** putative class, I find that the plaintiffs have not met their burden of proving that class members are individually damaged in an amount that exceeds $100. This finding alone supports my decision to deny class certification.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion to for Class Certification is hereby denied.

AND IT IS SO ORDERED.

C. Newman

Clifton Newman
Presiding Judge

February 19, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action No. 2002-CP-07-1377
JOHN CARDAMONE and his wife SALLY CARDAMONE, and BENJAMIN T. CLARK and his wife, DIANE M. CLARK, and RAMONA GIANNI, and NATHAN W. GORDON and his wife, JILL C. GORDON individually and on behalf of others similarly situated in the state of South Carolina, Plaintiffs, v. DRYVIT SYSTEMS, INC., ESTATE BUILDERS, INC., and AMERICAN WAY APPLICATORS OF SOUTH CAROLINA, INC., Defendants.	)	ORDER GRANTING CLASS CERTIFICATION

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BEAUFORT CO.
CLERK OF COURT
BEAUFORT, S.C.

This matter is before the Court on a Motion by the Plaintiffs for an Order Certifying a Class Action pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. This Motion was filed on August 19, 2002. The parties appeared and were represented by their respective counsel. Because the Plaintiffs can satisfy the requirements of Rule 23 SCRCP, the Plaintiff's Motion is GRANTED.

PROCEDURAL BACKGROUND

On August 12, 2002, the Plaintiffs filed suit in this Court to have themselves and all other similarly situated persons in South Carolina who have paid for, own, or have owned an exterior insulation and finish systems (EIFS systems). The class is restricted to property owners in South

Carolina. On August 19, 2002, the Plaintiffs filed a Motion to Certify a Class or, in the alternative, for an injunction.

Under South Carolina Rule of Civil Procedure 23(a), in order to certify a class action, it is necessary that the Court find: (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law and fact common to the class; (3) claims or defenses of the representative parties are typical of claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interest of the class; (5) the amount in controversy must exceed one hundred dollars ($100.00) for each member of the class. The Complaint so alleges.

CLASS CERTIFICATION

The Plaintiffs seek to certify an opt-out class action on behalf of themselves and all other persons similarly situated who have paid for, own, or have owned an exterior insulation and finish systems (EIFS systems). The class consists of

> [a]ll persons who own or have owned a one- or two-family residential dwelling, or townhouse (hereinafter "structure") in the State of South Carolina who would be a member of the Class purportedly created bin the action pending in Tennessee, Posey, et al. v. Dryvit Systems, Inc.,
>
> All persons who own or have owned a structure in the State of South Carolina on which an Exterior Insulation and Finish System ("EIF system") have been installed or any previous owner of such structures who incurred any costs or expenses to inspect, repair, or replace the EIF system or other property damages by the EIF system at any time from January 1, 1989, until the date Defendants' continuing conduct is terminated (the "Class Period").

(Plaintiffs' Complaint, pp. 6-7).

As the proponent of class certification, it is the Plaintiffs' burden to make a *prima facie* showing that the five requirements of class certification pursuant to Rule 23(a) SCRCP have been met. *Waller v. Seabrook Island Property Owners Association*, 300 S.C. 465, 388 S.E.2d

799, 801 (1990); *Littlefield v. S.C. Forestry Commission*, 370 S.C. 348, 523 S.E.2d 781 (1991). The Court finds that the Plaintiffs have met their burden as to each of these requirements.

NUMEROSITY

South Carolina Rule of Civil Procedure 23(a)(1) requires that the class be so numerous that joinder of all members of the potential class is impractical. Impracticability means difficulty or inconvenience of joinder, not impossibility. *In re Drexel Burnam Lambert Group, Inc*, 960 F.2d 285, 290 (2nd Cir. 1992). *Stemmermann v. Lilienthal* 54 S.C. 440, 32 S.E. 565(1889). That requirement can be satisfied by the sheer number of potential class members. *Stemmermann, id.* The Plaintiffs are not required to show the exact number in the class. *Evans v. US Pipe and Foundry Co.*, 696 F.2d 925 (11th Cir. 1983), or even that all members of the class can be readily identified. *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 154 (Ct.App. 1986). The law is clear that where the exact size of the class is unknown, but general knowledge or common sense suggests it is large, the Court may take judicial notice of the fact and assume that joinder is impractical. See Newberg, *Newberg on Class Actions*, p. 46 (2d ed. 1985)(citing *Evans v. US Pipe and Foundry Co.*, 696 F.2d 926 (11th Cir. 1983). The South Carolina Supreme Court has affirmed the certification of classes that are composed of a single family. *Caine v. Griffin*, 232 S.C. 562, 103 S.E.2d 37 (1958); *Faber v. Faber* 76 S.C. 156, 156 S.E. 677 (1907). The South Carolina Federal Court has affirmed class allegations of the property owners within a single residential subdivision, *Bates v. Tenco Services, Inc.*, 132 F.R.D. 160 (D.S.C. 1990). In this case, the potential class is composed of all persons in South Carolina who have paid for, own, or have owned the Defendants' EIFS systems. Numerosity cannot be an issue.

The Court finds that the sheer numbers of proposed class members who have paid for, own or have owned the Defendants' EIFS systems establishes that there are large numbers of

potential class members in this case. Based upon the sheer number of potential class members, joinder of all the class members would be impracticable. *South Carolina Public Service Authority v. C&S Bank*, 300 S.C. 42, 836 S.E.2d 775 (1989). *Stemmerman v. Lilienthal*, 54 S.C. 440, 32 S.E. 535 (1899).

COMMONALITY

South Carolina Rule of Civil Procedure 23(a)(2) requires that there be questions of law common to the class; a "common nucleus of operative fact" generally satisfies the commonality requirement of the Rule. Under Rule 23, a single common issue will suffice if it is important enough. It also follows that the mere existence of individual issues does not defeat class action status. *McGann v. Mungo*, 287 S.C. 561, 340 S.E.2d 157 (Ct. App. 1986); *Central Wesleyan College v. W.R. Grace and Company*, 143 F.R.D. 628, 636 (D.S.C. 1992); Flanagan, *South Carolina Civil Procedure*, p. 179 (2d ed. 1996). In defective products cases, the commonality requirement is easily satisfied. By their nature, defective product cases entail common legal and factual questions about the existence in fact of the alleged defect and defective product. *In re Playmobil Antitrust Litigation*, 35 F.2d 231, 240 (E.D.N.Y 1998).

The Court finds this defects product case satisfies the requirement of common quests of law or fact. The Court finds that the Plaintiffs have established that there are questions of both law and fact common to the class.

TYPICALITY

Rule 23(a)(3) requires the claims of representative parties to be "typical of the claims of the class". Judge Blatt recognized in the *Central Wesleyan* case " a claim is typical if it arises from the same course of conduct that gives rise to the claims of the class members and if the claims are based on the same legal theories." *Central Wesleyan, supra*, 143 F.R.D. at 637. The

test does not require that the representative have identical claims, but focuses instead on the similarity of legal and remedial theories of claims of the named and unnamed Plaintiffs. *Id*; *see also Bates v. Tenco Services*, 132 F.R.D. 160, 163 (D.S.C. 1990). Moreover, the typicality and commonality requirements tend to merge. *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982). Typicality is generally presumed when common questions exist. Newberg *Newberg on Class Actions*, 165 (2d ed. 1985).

ADEQUACY

Rule 23(a) requires that the named Plaintiffs adequately represent the class and that the named parties "will adequately and fairly represent the class." To be adequate, the Plaintiffs need only show that they have common interests with the unnamed members of the class and that they will vigorously prosecute the interest of the class. *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 S.C. (1990); *Runion v. US Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983). The kind of antagonism that will defeat certification is limited to that which relates to the subject matter in controversy. *Waller, id.* at 801. This antagonism exists when the main Plaintiff has a claim which conflicts with the economic interest of the class. *Id.* There is no question of antagonism in this case.

The adequacy requirement does not require that the Plaintiffs show they are likely to succeed on the merits. Requiring such a showing on the merits in determining whether a class should be certified is error. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). Adequacy does not require that the absent class members express prior satisfaction. *Id.* After notice, class members will have adequate opportunity to opt out of the class. *Central Wesleyan College, supra*, 6 F.3d at 188 (4th Cir. 1988).

The standard for determining the adequacy of class counsel is whether counsel is "qualified, experienced, and generally able to conduct the proposed litigation." *South Carolina National Bank v. Stone*, 139 F.R.D. 325 (D.S.C. 1991). Counsel for the Plaintiffs have established that they are adequate and qualified to act as class counsel.

Finally, the named class members, through their attorneys, are willing to undertake the cost of class notice.

AMOUNT IN CONTROVERSY

Rule 23(a) requires that each class member have at least one hundred ($100.00) dollars in controversy. The Complaint alleges as much. There can be no dispute that the potential class members either paid more than one hundred dollars for the installation of their EIFS system; suffered more than one hundred dollars in damages as a result of the failure of their EIFS system; or has made repairs to their buildings costing over one hundred dollars. The knowledge of the attorneys involved in litigation with Dryvit makes it clear that the repair and replacement costs for an EIFS system requires expenditures well over one hundred dollars.

The Court finds that each of the potential class members would meet the requirement of the amount in controversy.

CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion is **GRANTED**. The Plaintiffs shall provide this Court with a proposed Notice Plan within the next thirty (30) days of the date of this Order, and

IT IS SO ORDERED!

~~The Honorable~~ Thomas Kemmerlin
Master in Equity and Special Circuit Judge for
Beaufort County

Beaufort, South Carolina
Date: ~~Sep~~ August 30, 2002
Nunc pro tunc

IN THE CIRCUIT COURT
JEFFERSON COUNTY, TENNESSEE
AT DANDRIDGE

BOBBY R. POSEY, and wife, SABRINA POSEY and DALE TEAGUE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

DRYVIT SYSTEMS, INC.,

Defendants.

Case No. 1

CLASS ACTION

ORDER AND JUDGMENT GRANTING FINAL APPROVAL OF SETTLEMENT

THIS CAUSE coming on for hearing before the undersigned Superior Court Judge on October 1, 2002, pursuant to this Court's April 8, 2002 Order of Preliminary Approval of Settlement ("April 8 Order"), in order for this Court to conduct a final fairness hearing to determine whether the proposed Settlement with Settling Defendant Dryvit Systems, Inc. (hereafter "Settling Defendant") is fair, reasonable and adequate, and to address Class Counsel's application for an award of attorney's fees and costs; and the Settlement Class Members being represented by Class Counsel and Settling Defendant being represented by its attorneys;

AND THE COURT having read and fully considered the Settlement Agreement, the Notice Plan, and Memoranda submitted by Class Counsel, having received evidence at the hearing and post-hearing, having heard arguments from Class Counsel, the

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FILED 1/14 20 03
AT 9:30 O'CLOCK P.M.
KATHY B. CARPENTER, CLERK

Settling Defendant, and all submissions filed as objections and comments to the proposed Settlement, and being further advised in the premises, now makes the following:

FINDINGS OF FACT

1. This Order Approving Class Action Settlement incorporates the Stipulation of Settlement, with exhibits, filed with this Court on April 8, 2002.

2. This action was commenced on November 14, 2000, as a class action.

3. After more than two (2) years of intensive litigation in this action and other related actions, as a result of more than sixteen (16) months of intensive, arm's length negotiations between Class Counsel and Settling Defendant, the parties have reached accord with respect to a Settlement that provides substantial benefits to Settlement Class Members, in return for a release and dismissal of the claims at issue in this case against the Settling Defendant ("Settlement Agreement"). The resulting Settlement Agreement was preliminarily approved by the Court on April 8, 2002.

4. The law firms of Doffermyre, Shields, Canfield, Knowles & Devine and The Mason Law Firm, PC ("Co-Lead Counsel") and other counsel-of-record for Plaintiffs herein, and the Class representatives have fully and adequately represented the Class for purposes of entering into and implementing the settlement, and have satisfied the requirements of Tenn. R. Civ. P. 23.01(4).

5. As part of its April 8 Order, this Court approved a proposed Notice Plan and Class Notice, which provided Settlement Class Members notice of this proposed settlement with the Defendant. The Notice Plan provided an opportunity for class members to file objections to the Settlement.

6. As of the deadline for the filing of objections, only ten (10) timely "objections" were filed. Given the magnitude of this Settlement, and notice described above, this Court finds that the comparatively low number of objections is indicative of the fairness, reasonableness and adequacy of the Settlement with the Settling Defendant.

7. The settling Parties have filed with the Court declaration from Andrew Novak declaring that the mailing of the Court-approved notice, consistent with the Notice Plan, has been completed.

8. The Court finds that the distribution of the Class Notice and publication of the Legal Notice, in accordance with the terms of the Settlement Agreement and this Court's Preliminary Approval Order: (a) constituted the best practicable notice to Class Members under the circumstances of this action; (b) was reasonably calculated, under the circumstances, to apprise Class Members of the pendency of this class action, their right to exclude themselves from the Class and the proposed settlement, their right to object to any aspect of the proposed settlement, their right to appear at the Final Fairness Hearing – either on their own or through counsel hired at their own expense – if they did not exclude themselves from the Class, and the binding effect of the Orders and Judgment in this action, whether favorable or unfavorable, on all persons who do not request exclusion from the Class; (c) was reasonable and constituted due, adequate and sufficient notice to all persons entitled to be provided with notice; and (d) otherwise fully satisfied the requirements of the Federal Rules of Civil Procedure, the United States Constitution (with specific reference to the Due Process Clause), the Tennessee Constitution, the Tennessee Code as well as the state constitutions, statutes, regulatory and case law in all states where a cause of action arising under or related to the litigation may accrue, as described in, among other things, in the pleadings, in the Settlement Agreement, and

in the persuasive authorities presented to the Court by the parties in support of approval of the Settlement Agreement.

9. The Settling Defendant has paid the cost and expense of implementing the Notice Plan.

10. Any persons who wished to be excluded from this Action were provided an opportunity to individually "opt out," pursuant to the Notice and Paragraph 12 of the Court's April 8 Order. A list of all of the individuals who timely filed a valid exclusion is on file with the Court as an exhibit to the Affidavit of Matthew B. Potter. All such listed persons have no rights under the Settlement Agreement and shall not be bound by the Settlement Agreement or the final judgment herein.

11. Settlement Class Members (*i.e.*, members of the Settlement Class who did not timely file such valid individual "opt-out" requests) are bound by the Settlement, the Settlement Agreement and releases contained therein, and the Final Order and Judgment, and do not have any further opportunity to opt out of the Action, except as otherwise provided by Paragraph 6.7 of the Settlement Agreement (the "Post-Inspection Exclusion Request").

12. Any Settlement Class Member who did not timely file and serve an objection in writing to the Settlement Agreement, to the entry of Final Order and Judgment, or to Class Counsel's application for fees, costs, and expenses, in accordance with the procedure set forth in the Class Notice and mandated in the Order Granting Preliminary Approval of Settlement, is deemed to have forever waived any such objection by appeal, collateral attack, or otherwise.

13. The Court has fully considered all objections filed by Class Members and Non-Class Members (regardless whether they have standing to object) and finds that these objections lack merit and are without any basis of law or fact. Nonetheless, one objector has

expressed the opinion that Class Members should be notified of the possiblity that they or a subsequent purchaser of their home might not be able to obtain insurance so long as the house is clad with EIFS. Although Class Counsel and Dryvit do not agree with this proposition, they have agreed to supplement the notice to Claimants with notice regarding homeowners' insurance, substantially in the form attached as Exhibit A, hereto. The Court is satisfied that this notice fairly and adequately addresses this issue.

14. The Court has expressed its concern with the duration of the Claims Period and mold issues that may be encountered by Class members. The Court is satisfied that the amendments to the Settlement, together with the fact that the Settlement does not release personal injury claims, fairly and adequately address the mold issue in the context of this Settlement. As for the Notice, Dryvit has agreed to, and the Court shall so order, a six (6) month extension of the Claims Period.

15. This conclusion is particularly true in light of amendments to the Settlement Agreement and various related clarifications that have been made since the Fairness Hearing. Class Counsel, together with counsel for certain objectors, including those representing a proposed litigation class in South Carolina, have been engaged in numerous substantial discussions and negotiations since the Fairness Hearing with Counsel for the Settling Defendant and persons who will be responsible for overseeing inspection, repair, and warranties under the Settlement Agreement. These negotiations and discussions have resulted in 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.

16. On the basis of all of the issues in this litigation, and the provisions of the Settlement Agreement, the Court is of the opinion that the Settlement is a fair, reasonable and

adequate compromise of the claims against the Settling Defendant in this case, pursuant to Rule 23 of the Tennessee Rules of Civil Procedure. There are a number of factors which the Court has considered in affirming this Settlement, including:

a. The liability issues in this case have been vigorously contested.

b. The Court notes that for settlement purposes, this Settlement has the benefit of providing relief to homeowners now, without the further costs, delays, risks, and other burdens of litigation, under circumstances where the liability issues are still vigorously contested among the parties to this litigation and among the parties to the individual litigation.

c. This Settlement is clearly a byproduct of hard-fought litigation between the parties, and not a result of any collusion on the part of Class Counsel or Counsel for the Settling Defendant.

d. The Settlement Agreement does not impair, and indeed preserves, the rights of Class Members to pursue claims against non-settling parties such as homebuilders and applicators.

17. Class Counsel submitted to the Court and served on the Settling Defendant their application for reasonable attorneys' fees, costs, and expenses consistent with the terms of the Settlement Agreement. This Court has considered Class Counsel's request and hereby grants the request in full.

18. The claims procedure established under the Settlement Agreement is fair, a simplified process and workable. In any event, the Court will retain jurisdiction over the Settlement Agreement to work out any unanticipated problems.

NOW, THEREFORE, ON THE BASIS OF THE FOREGOING FINDINGS OF FACT AND THE COURT HEREBY MAKES THE FOLLOWING:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this proceeding.

2. Pursuant to Rule 23 of the Tennessee Rules of Civil Procedure, the following Settlement Class is certified for purposes of final settlement:

> All Persons who, as of June 5, 2002, in any State other than North Carolina, in whole or in part, with Dryvit EIFS installed after January 1, 1989, except persons who (1) prior to June 5, 2002, have settled with Dryvit, providing a release of claims relating to Dryvit EIFS; or (2) have not obtained a judgment against Settling Defendant for a Dryvit EIFS claim, or had a judgment entered against them on such a claim in Settling Defendant's favor; and (3) any employees of Dryvit.

3. The Court finds that, for the purpose of this Settlement, the requirements of Rule 23 of the Tennessee Rules of Civil Procedure are satisfied, and that a class action is an appropriate method for resolving the disputes in this litigation. In particular, the Court finds (a) that the numerosity, commonality, typicality, and adequacy requirements of Rule 23.01 are satisfied, and (b) that the "predominance" and "superiority" requirements of Rule 23.02 are likewise satisfied. As to the latter requirements, the Court notes that it need not consider the trial manageability problems that would exist if this action were not being settled and that a settlement class is a superior method for resolving the claims of Settlement Class Members.

4. Settlement Class Representatives are entitled to and are hereby awarded an additional payment of $10,000.00 over and above their claim under the Settlement Agreement, in recognition of the efforts they have undertaken and the risk they have incurred in connection with this Action.

5. The Court grants final approval of the Settlement Agreement – as amended – as being fair, reasonable and adequate, pursuant to Rule 23 of the Tennessee Rules of Civil Procedure. The Court notes in particular that the Second Amendment to Settlement Agreement Between Plaintiffs and Dryvit Systems, Inc. enhances and expands the rights and options of Class Members, among other things, by providing additional options for claimants with estimated repair costs in excess of $15,000.

6. The Courts finds that the request for attorneys' fees is reasonable. The Court has considered the requested fee and expenses from Class Counsel in light of the appropriate factors outlined by courts in this and other states and grants the request in full. Here, Class Counsel has achieved an excellent result for Class members and have devoted a substantial amount of time, energy, creativity and monetary resources in prosecuting and resolving this extremely complex case. In addition, given the nature of the settlement, Class Counsel will be obligated to devote additional time and energy and resources assisting Class Members in the Settlement program. Class counsel are some of the most experienced class action counsel in the country and have developed, over the years, an expertise in EIFS litigation. Accordingly, the Court finds the amount sought is reasonable.

NOW, THEREFORE, ON THE BASIS OF THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Motion for Final Approval of the Proposed Settlement is GRANTED.

2. The Claims Period shall be extend by an additional six (6) months.

3. The Parties shall provide notice by mail and by the settlement website to Claimants regarding homeowners' insurance, substantially in the form as Exhit A, hereto.

4. Settlement Class Representatives are entitled to and are hereby awarded an additional payment of $10,000.00 over and above their claims for damages, in recognition of the efforts they have undertaken and the risk they incurred in connection with this Action.

5. The Class Counsel's application for attorneys' fees and expenses is granted in the amount set forth in the Settlement Agreement.

6. All Class Members who have not validly excluded themselves from the Class in accordance with the April 8 Order are hereby permanently barred and enjoined from (i) filing, commencing, prosecuting, intervening in, participating in as Class members or otherwise, or receiving any benefits or other relief from, any other lawsuit, arbitration, or administrative, regulatory or other proceeding or order in any jurisdiction based on or relating to the claims and causes of action, or the facts and circumstances relating thereto, in this Action (as that term is defined in the Settlement Agreement) and (ii) organizing, or attempting to organize, such non-excluded Class Members into a separate class for purposes of pursuing as a purported class action (including by seeking to amend a pending complaint to include class allegations, or by seeking class certification in a pending action in any jurisdiction) any lawsuit based on or relating to the claims and causes of action, or the facts and circumstances relating thereto, in this Action. The Court finds that issuance of this permanent injunction is necessary and appropriate in aid of the Court's jurisdiction over the action and to protect and effectuate the Court's Final Judgment.

7. This Action and all claims against the Settling Defendant are hereby dismissed with prejudice, but the Court shall retain 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.

8. Co-Lead Counsel and Counsel for the Class, as set forth in the Settlement Agreement, are hereby awarded attorneys' fees and reimbursement of their disbursements and expenses in the amount of $11,600,000 to be paid by the Defendant to Co-Lead Counsel. Such fees and expenses are to be paid by the Defendant pursuant to the Settlement Agreement. Co-Lead Counsel, in it sole discretion, shall allocate and distribute this award of attorneys' fees and expenses among counsel for the Class.

9. The Motion to Intervene filed by Barton-Riley Company, LLC, Blazer Homes, Inc., James Edward Pee, Poly-M Contractors, Inc., Reeve Construction Company, Inc. and Thornton Construction Company, Inc. is DENIED as untimely and upon other grounds;

10. The Motion to Continue The Fairness Hearing And Request To Conduct Discovery Regarding The Adequacy Of The Proposed Settlement filed by Nancy Seats is DENIED.

11. The Motion to Continue the Fairness Hearing filed by Barton-Riley Company, et al is DENIED.

12. The Motion to Continue the Fairness Hearing filed by Tom and Maria Smith is DENIED.

This the 14 day of January _____, 2003.

Circuit Court Judge

Exhibit A

IMPORTANT NOTICE
REGARDING HOMEOWNERS' INSURANCE

SOME HOMEOWNERS' INSURANCE COMPANIES IN SOME PARTS OF THE COUNTRY HAVE APPARENTLY DECIDED TO STOP PROVIDING OR NOT TO RENEW EXISTING INSURANCE COVERAGE FOR HOMES THAT ARE CLAD WITH EXTERIOR INSULATION AND FINISH SYSTEMS (EIFS).

ALTHOUGH THIS APPEARS TO BE AN ISOLATED PHENOMEMON, THE ABILITY TO OBTAIN AND/OR MAINTAIN INSURANCE COVERAGE MAY AFFECT THE TERMS OF YOUR MORTGAGE AS WELL AS THE MARKETABILITY (ABILITY TO SELL) AND VALUE OF YOUR HOME.

THE ABILITY FOR EIFS HOMEOWNERS TO OBTAIN AND/OR MAINTAIN INSURANCE COVERAGE FOR THEIR HOMES WILL VARY FROM INSURANCE COMPANY TO INSURANCE COMPANY, AND FROM STATE TO STATE.

CLASS MEMBERS ARE STRONGLY ADVISED TO CHECK WITH THEIR HOMEOWNERS' INSURANCE COMPANY AND TO DETERMINE THEIR CURRENT STATUS AND ELIGIBILITY FOR CONTINUED INSURANCE COVERAGE BEFORE MAKING ANY DECISION CONCERNING A CHOICE OR SELECTION OF POSSIBLE REMEDIES UNDER THIS SETTLEMENT.

CLASS COUNSEL MAKE NO REPRESENTATIONS CONCERNING THE ABILITY OF A CLASS MEMBER TO OBTAIN AND/OR MAINTAIN INSURANCE COVERAGE.

IF YOU HAVE QUESTIONS CONCERNING THIS NOTICE OR ARE HAVING DIFFICULTY OBTAINING INSURANCE ON YOUR EIFS HOME, PLEASE CALL THE CLAIMS ADMINISTRATOR AT 800-XXX-XXXX AND ASK TO SPEAK TO AN ATTORNEY.

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing document has been served upon all counsel of record either by Federal Express, overnight delivery, to the following:

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EVALUATION REPORT

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ER-2728
Reissued October 1, 2000

Filing Category: EXTERIOR INSULATION AND FINISH SYSTEMS (EIFS) (062)

DRYVIT OUTSULATION® EXTERIOR INSULATION AND FINISH SYSTEM

DRYVIT SYSTEMS, INC.
ONE ENERGY WAY
POST OFFICE BOX 1014
WEST WARWICK, RHODE ISLAND 02893

1.0 SUBJECT

Dryvit Outsulation® Exterior Insulation and Finish System.

2.0 DESCRIPTION

2.1 General:

The Dryvit Outsulation Exterior Insulation and Finish System is applied to buildings having a construction other than framed walls of Type V construction, Group R, Division 1 and Division 3 occupancies. The Dryvit Outsulation system is a five-component system that may be applied to vertical substrates of masonry, concrete, exterior plaster, unpainted, exterior or Exposure 1 wood structural panels complying with UBC Standard 23-2 or 23-3 and water-resistant core gypsum sheathing complying with ASTM C 79-92. The five components consist of an adhesive, molded expanded polystyrene insulation board, a woven glass fiber fabric, a base coat, and a synthetic plaster finish. See Figure 1 for typical installation details.

2.2 Materials:

2.2.1 Dryvit Adhesives: The Dryvit adhesives consist of one of the following materials applied to the inside surface of the insulation board:

1. Dryvit ADEPS Adhesive: Dryvit ADEPS adhesive is a premixed, fully formulated, water-based acrylic copolymer. Shelf life of the product is one year when stored in a cool, dry location.
2. Dryvit Primus/adhesive: The Dryvit primus/adhesive is a copolymer dispersion with a quartz sand aggregate that is to be mixed with Type I portland cement. Shelf life of the product is one year when stored in a cool, dry location.
3. Dryvit Genesis Adhesive: The Dryvit Genesis adhesive is a fiber-reinforced, 100 percent acrylic-based product that is to be mixed with Type I portland cement complying with ASTM C 150-94. Shelf life of the product is one year when the product is stored at 40°F (4.5°C) or above in tightly sealed containers out of direct sunlight.

2.2.2 Insulation Board: The insulation board is a molded, rigid expanded polystyrene insulation board with a nominal density of 1 pound per cubic foot (16 kg/m^3), a flame-spread rating not exceeding 25 and a smoke-density rating not exceeding 450 when tested in accordance with UBC Standard 8-1. The board is available in thicknesses ranging from $^3/_4$ inch (19.1 mm) to 4 inches (102 mm), and with a maximum width of 24 inches (610 mm) and a maximum length of 4 feet (1219 mm). Sources include:

1. Dryvit Outsulation, a Type I product, complying with ASTM C 578-95.
2. Type WSG, by AFM Corporation (ICBO ES PFC-5680).
3. Type EWG, by Falcon Foam (ICBO ES ER-4059).

2.2.3 Dryvit Base Coat: The Dryvit base coat consists of one of the following base materials applied to the outside surface of the insulation board:

1. Primus/adhesive mixture, which consists of primus/adhesive mixed at a ratio of 1:1 by weight with Type I portland cement.
2. NCB base coat, which is a fully formulated water-based product applied without the addition of portland cement. Shelf life of the product is one year when stored in a cool, dry location.
3. Dryvit Genesis base coat applied after mixing with Type I or Type II portland cement complying with ASTM C 150-94 at a ratio of 1:1 by weight. Additional water may be added to achieve a workable consistency.

2.2.4 Dryvit Reinforcing Fabric: The Dryvit reinforcing fabric is a balanced open-weave glass fiber, made from twisted multiend strands and treated for compatibility with the other materials. The mesh weighs a minimum of 4.3 ounces per square yard (51 g/m^2), with a 12 by 6 thread count. Other reinforcing mesh types are available for use where supplementary impact resistance is required in accordance with the manufacturer's instructions.

2.2.5 Dryvit Finish: The Dryvit finish is composed of natural mineral aggregates and fillers, colored pigments and an acrylic latex emulsion. Shelf life of the product is two years when stored at 40°F (4.4°C).

2.3 Application:

2.3.1 General: All exposed edges of insulation board must be wrapped with the reinforcing mesh fully embedded in the base coat.

2.3.2 Substrates: The substrates are to be structurally sound, clean, dry and smooth, with all dust and deleterious materials removed. There are to be no planar irregularities exceeding $^1/_4$ inch (6.4 mm) in a 4-foot (1219 mm) radius.

2.3.3 Adhesives: The Dryvit ADEPS Adhesive is applied directly to the entire back surface of the insulation board as a continuous coating, using a U-notched trowel to produce a $^1/_4$-inch-wide-by-$^3/_8$-inch-deep (6.4 mm by 9.5 mm) notch every $1^1/_2$ inches (38 mm).

The Dryvit Primus/adhesive is mixed with Type I portland cement at a ratio of 1:1 by weight and is applied to the entire back surface of the insulation board, using a rounded

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AFFIDAVIT

PERSONALLY APPEARED BEFORE ME, David W. Bennett, who first being duly sworn, under oath, deposes and states that:

1. My name is David W. Bennett. I am a resident of Georgia. I am over the age of eighteen years.

2. I am a principal of Bennett & Bennett Construction Co., Inc., a licensed general contractor in the State of South Carolina (License #104292).

3. In December of 2002, I contacted Circle Supply, a distributor of EIFS products manufactured by Dryvit Systems, Inc. (hereinafter "Dryvit"), in Columbia, South Carolina on behalf of Bennett and Bennett Construction.

4. In December of 2002, I was informed by Circle Supply that it routinely supplies Dryvit's "PB" Barrier EIFS products for application on new residential construction.

5. Circle Supply also informed me that Gordon Plastering Company, Inc. and Champion Plastering, Inc. are both local Dryvit-trained EIFS applicators who will apply Dryvit's "PB" barrier EIFS systems to new residential construction in South Carolina.

FURTHER AFFIANT SAYETH NOT!

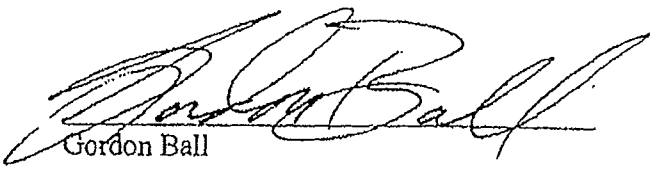
By: David W. Bennett

SWORN TO AND SUBSCRIBED before me on this 24th day February, 2003.

Patricia Pierson
NOTARY PUBLIC FOR SOUTH CAROLINA
My commission expires: 8/16/2011

M:\Lit\CLIENT\13597\Aff.Bennett.wpd

This 14th day of January, 2003.



Gordon Ball

ES REPORT™

ER-5032

Reissued July 1, 2002

ICBO Evaluation Service, Inc. • 5360 Workman Mill Road, Whittier, California 90601 • www.icboes.org

Filing Category: EXTERIOR COATINGS

DRYVIT FASTRAK SYSTEM 4000 DIRECT-APPLIED EXTERIOR FINISH SYSTEM

DRYVIT SYSTEMS, INC.
ONE ENERGY WAY
WEST WARWICK, RHODE ISLAND 02893

1.0 SUBJECT

Dryvit Fastrak System 4000 Direct-applied Exterior Finish System.

2.0 DESCRIPTION

2.1 General:

Fastrak System 4000 is a direct-applied exterior finish system consisting of four components to cover wood or steel framing. The four components are Dens-Glass™ Gold sheathing, base material, reinforcing mesh and finish coat. The finish has a flame-spread rating of less than 25 and a smoke-developed rating of 450 or less. The Dryvit Fastrak System 4000 is used in regions not exceeding 4,000 heating degree (°F) days. See Figure 2 for acceptable locations south of the 4,000 line.

2.2 Materials:

2.2.1 Sheathing: The sheathing is $^1/_2$-inch-thick (12.7 mm) or $^5/_8$-inch-thick (15.9 mm) Dens-Glass Gold gypsum board manufactured by Georgia-Pacific Corporation, Gypsum and Roofing Division, and recognized in the current ICBO ES evaluation report ER-4305.

2.2.2 Base Material: The NCB base material is a ready-mixed, noncementitious acrylic copolymer coating.

2.2.3 Reinforcing Mesh: The reinforcing mesh is a woven, treated glass-fiber fabric weighing a minimum of 4.3 ounces per square yard (145.93 g/m²). It has a minimum tensile strength of 150 pounds per inch width (2.681 kg/mm), and has 12 strands per inch (0.4724 strand per mm) in the warp direction and 6 strands per inch (0.2362 strand per mm) in the fill direction.

2.2.4 Synthetic Finish Coat: The Dryvit finish coat is composed of natural mineral aggregates and fillers, color pigments, and an acrylic latex emulsion. It is packaged in 70-pound (26.1 kg) plastic pails and has a shelf life of two years when protected from extended periods of freezing and extreme heat. Storage temperatures should generally range from 40°F to 120°F (4.4°C to 48.9°C).

2.3 Installation:

Framing consists of minimum 2-by-4 (51 by 102 mm) wood studs or No. 18 gage [0.0451 inch (1.15 mm)] steel studs. When sheathing is $^1/_2$-inch-thick (12.7 mm) Dens-Glass Gold, framing is spaced a maximum of 16 inches (406 mm) on center. When sheathing is $^5/_8$-inch-thick (15.9 mm) Dens-Glass Gold, framing is spaced a maximum of 24 inches (610 mm) on center. The framing system must be designed to resist all positive and negative transverse loads with a maximum allowable deflection of L/240 of the span. Prior to installing the Dens-Glass Gold sheathing, Grade D kraft waterproof building paper, complying with UBC Standard 14-1, must be attached to the framing in accordance with Section 1402.1 of the code. Dens-Glass Gold gypsum sheathing panels are applied with the long dimension parallel to framing and all edges backed by framing.

For steel framing, minimum $^1/_2$-inch-thick (12.7 mm) sheathing panels are fastened with 1-inch-long (25.4 mm), No. 6, Type S-12, bugle-head, corrosion-resistant, self-tapping drywall screws. Five-eighths-inch-thick (15.9 mm) sheathing panels are fastened with 1 $^1/_4$-inch-long (31.7 mm) screws. Fasteners are spaced 8 inches (203 mm) on center along all studs and around the perimeter. The sheathing must be flat to $^1/_8$ inch (3.2 mm) within any 4-foot-0-inch (1219 mm) radius.

All components must be applied over dry surfaces and out of direct sunlight. Temperature during application and curing must be 40° (4.4°) and above. Supplementary heat and moisture protection may be provided as needed. Surfaces must be sound, clean, dry, unpainted and free from any residue that may affect bond. Any surface contaminants such as dirt or dust must be removed without damaging the substrate surface.

The NCB base material is mixed to a smooth homogeneous consistency using a $^1/_2$-inch (12.7 mm) drill at 400 to 500 rpm. A small quantity of clear water may be added for workability. The base material is applied in a uniform thickness of approximately $^1/_{16}$ inch (1.6 mm) to the surface of the sheathing, using a flat stainless steel trowel. The reinforcing mesh is immediately placed against the wet NCB and embedded into the base material with the trowel. The NCB base coat must cure at least 24 hours.

The Dryvit finish material is mixed similarly to the NCB base material. The finish material is applied over the reinforced NCB base coat to the desired finish pattern and thickness. The finishes are applied using a clean, flat, stainless steel trowel, and are leveled to a uniform thickness. The texture is achieved by uniform hand motion and/or type of tool. The Freestyle finish is applied, using a clean, flat, stainless steel trowel, to an initial thickness of approximately $^1/_{16}$ inch (1.6 mm). The finish texture is either pulled out of this initial material to a maximum thickness of $^1/_4$ inch (6.4 mm), or the texture is achieved by adding more Freestyle to the base coat up to the maximum thickness of $^1/_4$ inch (6.4 mm).

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RPM International Inc.
Second-Quarter 2003 Earnings Conference Call
Friday, January 10, 2003, 10 a.m. EST

Operator:
Good day and welcome to this RPM conference call. Today's call is being recorded. This call is also being webcast live and can be accessed through the RPM website at www.rpminc.com. A taped telephone replay will be available from two hours after this call concludes until 8 p.m. Eastern Standard Time Tuesday, January 14 and can be accessed by dialing 719-457-0820 and entering confirmation number 392850. A webcast replay and written transcript will also be available through our website. The webcast replay will be available two hours after this call ends. And the written transcript will be available two to three business days after the call concludes.

Comments made on this call may include forward-looking statements based on current expectations that involve risks and uncertainties that could cause the results of RPM to differ materially from management's current expectations. For more information regarding these risks and uncertainties, please review RPM's quarterly earnings releases and periodic reports filed with the Securities and Exchange Commission.

The information in this conference call related to projections or other forward-looking statements may be relied upon subject to the previous Safe Harbor statements and may continue to be used while this call remains on the active portion of the RPM website. At this time, I'd like to turn the call over to RPM's president and chief executive officer, Mr. Frank Sullivan. Please go ahead, sir.

Frank Sullivan:
Thank you. Good morning to everyone and thank you for joining our conference call this morning. We're pleased to report a strong quarter results, with revenues up over 6 percent from the prior-year quarter, net earnings up 21 percent, and earnings per share up 8 percent.

Before I turn it over to Glenn Hasman to give you the details on the quarter, I'd like to give you some color on our business over the last three months. First of all, while revenue growth accelerated in the quarter from our first quarter and certainly from last year, I think it's important to realize that this is as much a reflection of the comparison to last fall rather than an indication of any improving industrial or manufacturing economy. Quite candidly, we're just not seeing that yet, in general. RPM Industrial companies are posting year-over-year positive growth and that's continuing, which we believe is coming from market share gains.

A couple of exceptions worth noting. On the negative side, our Dryvit subsidiary, which is a high-margin business for us, has had a difficult period this year, particularly in the fall, as much of their business is related to commercial new construction, which is down pretty dramatically. And while they're holding their own, their revenues are down and, given their profitability, that hurts.

On the positive side, our Tremco's WTI service business is booming. This is a service business related to roofing maintenance and some contracting work, mostly at institutions or, in a lot of cases, with government entities. A year ago we did $25 or $30 million in revenues. This year we will do $70 million or more, and it's really growing. That is a substantially lower gross margin business for us, although the operating income level is getting slowly to where we want it and from a capital perspective it's a great business because there's not much capital investment. It's all people expense. The combination of those two impacted our margins, and Glenn will provide you the details on that.

We also did have some extraordinary corporate expenses that we will detail for you and, excluding those, I think you'll see that we had an excellent quarter in terms of operating leverage in both our Industrial and our consumer businesses.

All in all, this is a good first quarter and first half for us. And with that, I would like to turn it over to Glenn Hasman, who will take you through the details of the quarter.

Glenn Hasman:
Thank you very much, Frank, and good morning, everyone. As Frank indicated, we had sales in the second quarter of $518 million. That's up 6.2 percent over the prior year by $30.1 million.

By segment, the Industrial sales reached $286.3 million in the second quarter. That represents 55 percent of the total sales for the company this quarter and that's ahead 5.8 percent quarter-over-quarter, most of which – over 5 percent of that is – in fact, organic growth as Frank had indicated.

Consumer sales were $231.7 million; that's the other 45 percent of our total. That's ahead 6.7 percent quarter-over-quarter and most of which, again, is organic. We had solid demand throughout the quarter on the consumer side of our business as well.

Gross profit itself, in dollars, improved by 5.5 percent to $234.1 million from last year's $222 million. That benefit really comes from the leverage from the higher sales volume and also some favorable year-over-year raw material costs.

Gross margin, on the other hand, did decline slightly to 45.2 percent this quarter from 45.5 percent during last year's second quarter.

By segment, Industrial margins were slightly lower at 45.5 percent from 46.4 percent. Again, as Frank had mentioned, a lot of this is mix with the services sales business. But there was to the good side of that as well; there was some product pull-through from those services at our more normal margins. There also were a number of favorable raw material costs in the Industrial segment.

Consumer gross margins, quarter-over-quarter, were ahead 50 basis points to 44.9 percent this year from 44.4 percent last year. Again – representing the positive volume effects. And they also had a number of favorable raw material costs in the Consumer segment as well.

SG&A expenses. These expenses were improved this year to 35 percent of sales from

of our industrial business segments, and we expect that to continue.

Silke Valdez:
Thank you very much.

Greg Halter, LJR Great Lakes Review:
Good morning, gentlemen.

Frank Sullivan:
Good morning, Greg.

Greg Halter:
You've talked about the asbestos. Do you have the number of cases that were paid or dismissed in the quarter, and also the number of new cases in the quarter?

Frank Sullivan:
You know, I don't have those handy. We will file our 10-Q next week.

Greg Halter:
OK.

Frank Sullivan:
And we will have all that detail in there.

Greg Halter:
OK. Can you give us an update on the EIFS litigation or settlement?

Frank Sullivan:
The EIFS situation is continuing to evolve positively. As we have disclosed earlier, we had a fairness hearing in front of a judge for a national class action settlement, and we expected that to be resolved in the fall. It was put off because the court asked a number of parties to clarify a few issues, and that has been done. And we expect a final approval of the judge, literally, any day now. It should happen in the next week or so. Once the court gives final approval, there is a mandatory 45-day waiting period for any further appeals, but we don't anticipate any given the actions of the court, after which it becomes final and official. And that continues to evolve positively for us. A national class action settlement will bring substantial closure to this. The settlement itself is a pay as you go, over a three-to-five-year period. It is substantially covered by insurance, and the cost to RPM will not be material over the period.

Greg Halter:
OK. Great. That's a good offset there. Regarding your debt-to-cap's 43 percent now, what kind of goal or sweet spot would you like that to be, given your strong cash flow and the amount that's been reduced already?

Frank Sullivan:
Traditionally we've been able to maintain kind of a middle investment grade rating, which is our goal, with a debt-cap ratio that's ranged from about 40 percent to 60 percent. It hit a high a couple years ago of about 62 percent. I think going forward, you'll see us manage that debt-cap ratio more between 40 percent and 50 or the low 50's, as a percent of our

12/5/05

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
JOHN CARDAMONE and his wife, SALLY CARDAMONE, and BENJAMIN T. CLARK and his wife, DIANE M. CLARK, and RAMONA GIANNI, and NATHAN W. GORDON individually and on behalf of others similarly situated in the State of South Carolina, Plaintiffs, v. DRYVIT SYSTEMS, INC., ESTATE BUILDERS, INC., and AMERICAN WAY APPLICATORS OF SOUTH CAROLINA, INC., Defendants.	Civil Action No.: 2002-CP-07-1377 **ORDER ON MOTION TO INTERVENE TO SUBSTITUTE CLASS REPRESENTATIVES AND SUBSTITUTE AS CLASS COUNSEL**

This matter is before the Court for a hearing on December 5, 2005, upon a Motion to Intervene, to be substituted as Class Representatives and to be substituted as Class Counsel. The intervenors are Timothy & Jane Treon and P. Jennings Scearce (the "Intervenors") and are represented by Finkel & Altman, L.L.C., Alford & Wilkins, P.C., the Finn Law Firm, and Cotty & Jonas (the "Intervenors Counsel"). Also present at the hearing were Dryvit Systems, Inc. ("Dryvit") through its counsel from the law firms of Womble, Carlyle, Sandridge and Rice, P.L.L.C. and Tupper, Grimsley & Dean, P.A. ("Defense Counsel"), and the current class representatives through their counsel from the law firms of Mullen, Wylie & Seekings, LLC, Leath, Bouch & Crawford, LLP, and William Dixon Robertson, Esquire ("Current Class

Counsel").

Under Rule 24 of the South Carolina Rules of Civil Procedure, the burden on the Intervenors is to show a (1) timely motion to intervene, (2) a personal stake in the outcome of the litigation and (3) their interests are not being adequately represented by the current representatives. None of the parties argued that the motion to intervene was not timely. Through affidavits, the Intervenors have established that they have a personal stake in the outcome of the litigation. Lastly, at the hearing, Current Class Counsel informed this Court that the current class representatives have resolved their claims against Dryvit. Therefore, the current class representatives do not have a personal stake in this litigation and do not adequately represent the interests of the Intervenors. Therefore, this Court finds that it is appropriate for the Court to Grant the Motion to Intervene and the request for the Intervenors to be substituted as named class representatives.

During the hearing, Current Class Counsel indicated that they currently represented several other individuals that did have a personal stake in the outcome of this litigation of whom one or more of them may be willing to serve as additional named class representatives. During the hearing, Current Class Counsel orally moved before the Court to allow them to include these other individuals as class representatives (the "Substituted Client") and to allow Current Class Counsel to continue to represent the Class. Under Rule 23(d)(2), SCRCP, 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." With this discretionary authority in mind, this Court will allow Current Class Counsel ten (10) days from the entry of this Order to file an

affidavit from a Substituted Client that indicates the Substituted Client's willingness to serve as a named class representative in this action. With the filing of this affidavit, the Court grants the oral motion of Current Class Counsel to allow for the Substituted Client to be included as additional named class representatives.

Lastly, this Court must address the issue of Intervenors Counsel and their request to be substituted for Current Class Counsel. The South Carolina Supreme Court has found that the right to an attorney of one's own choosing is a substantial right. *See Hagood v. Sommerville*, Op. No. 25915 (Shearhouse Advance Sheet, January 4, 2005). Thus, the Intervenors have the substantial right to have Intervenors Counsel represent them. Similarly, with the filing of the affidavit from one or more Substituted Clients, these clients have the substantial right to have Current Class Counsel represent them. Thus, this Court finds that both Intervenors Counsel and, upon the filing of the affidavit, Current Class Counsel shall proceed forward as joint class counsel in this case.

This Court provides for this joint representation and expressly holds that (1) ~~Intervenors Counsel shall not be imputed with responsibility for or liable for any action or inaction relating to this class action prior to the entry of this Order.~~ (1) Intervenors Counsel shall not be entitled to share in any compensation paid to any Current Class Counsel or to be paid to Current Class Counsel for the services that they rendered prior to the entry of this Order, and (2) this decision providing for joint representation may be revisited at any time if counsel is unable to work together in the best interests of the class members.

This Court is mindful that a trial court's power to manage a class action is fluid and

allows the court to redefine or subdivide the class as necessary. McCann v. Mungo, 287 S.C. 561, 570-71, 340 S.E.2d 154, 159 (1986). That power also allows the court to act whenever a person's interests are not being adequately represented by the existing parties. Berkeley Electric v. Town of Mount Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990).

It is therefore,

ORDERED, ADJUDGED AND DECREED,

(1) the motion to intervene is granted;

(2) the motion to substitute the Intervenors as named class representatives is granted;

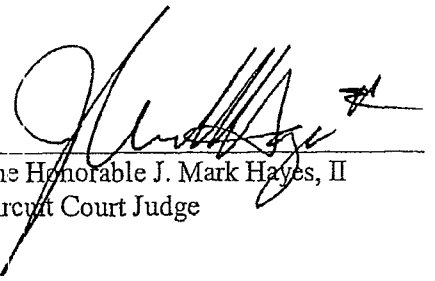
(3) the oral motion to allow for additional named class representatives with a personal stake in the outcome of this litigation is granted and Current Class Counsel has ten (10) days from the entry of this Order to submit an affidavit or affidavits from a Substituted Client or Clients evidencing their willingness to serve as named class representatives,

(4) the motion to allow Intervenors Counsel to serve as class counsel is granted;

(5) the motion to substitute Intervenors Counsel for Current Class Counsel is denied upon the condition that an affidavit from a Substituted Client of Current Class Counsel is filed within (10) days of the entry of this Order evidencing the their willingness to serve as named class representatives; and

(6) class counsel shall have twenty five (25) days to file an amended complaint substituting the Intervenors and any Substituted Client as named class representatives.

AND IT IS SO ORDERED.



The Honorable J. Mark Hayes, II
Circuit Court Judge

STATE OF SOUTH CAROLINA)
) IN THE CIRCUIT COURT
COUNTY OF BEAUFORT

05 JAN 19 PM 12:42

CLERK OF COURT
BEAUFORT COUNTY

John Cardamone and his wife, Sally Cardamone, and Benjamin T. Clark and his wife, Diane M. Clark, and Ramona Gianni, and Nathan W. Gordon, individually and on behalf of others similarly situated in the State of South Carolina,

Plaintiffs,

vs.

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

Defendants.

Civil Action No. 2002-CP-07-1377

CONSENT ORDER RELIEVING CERTAIN OF PLAINTIFFS' COUNSEL

COPY

This is an action seeking declaratory and injunctive relief and damages arising from the installation of artificial stucco siding manufactured by Dryvit Systems. Inc. It was commenced in August 2002. Over three years later, four of the original counsel for plaintiffs no longer have individual clients with an interest in the litigation. Those four—William M. Bowen, P.A.; Leath Bouch & Crawford; Michael A. Seekings; and William Dixon Robertson III—ask to be relieved as counsel for the plaintiffs and for the class previously certified. None of the remaining counsel for plaintiffs, nor counsel for defendants, object. Accordingly, it is hereby

ORDERED ADJUDGED AND DECREED that William M. Bowen, P.A.; Leath Bouch & Crawford; Michael A. Seekings; and William Dixon Robertson III, shall be and hereby are relieved as counsel for plaintiffs and for the class of plaintiffs previously certified. This order is without prejudice to any claim these lawyers may make for attorneys' fees, if any be awarded in this case, based on services rendered by them prior to this order.

IT IS SO ORDERED.

Spartanburg, South Carolina

January 18, 2006.

J. Mark Hayes II
Circuit Court Judge

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2008-CP-07-3145
STEVEN AND JEANEEN TUCKER CHARLES AND STEPHANIE DAVIS, TIMOTHY AND JANIE P. TREON, P. JENNINGS SCEARCE and JOHN DOE and JANE DOE individually and on behalf of others similarly situated in the State of South Carolina,	)	
Plaintiffs,	)	
v.	)	
LEATH, BOUCHE & CRAWFORD, LLP, W. JEFFERSON LEATH, JR., WILLIAM DIXON ROBERTSON, III, MICHAEL S. SEEKINGS, FRANK E. GRIMBALL & MULLEN WYLIE, LLC formerly, MULLEN, WYLIE & SEEKINGS, LLC, JOHN CARDAMONE and his wife SALLY CARDAMONE, BENJAMIN T. CLARK and his wife DIANE M. CLARK, RAMONA GIANNI, NATHAN W. GORDON,	)	
Defendants.	)	

10 FEB -2 PM 3:58
BEAUFORT COUNTY, S.C.
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2008-CP-07-0774
TIMOTHY TREON and P. JENNINGS SCEARCE, individually and on behalf of others similarly situated in the State of South Carolina,	)	
Plaintiffs,	)	
v.	)	

DRYVIT SYSTEMS, INC.; JOHN CARDAMONE and his wife, SALLY CARDAMONE; BENJAMIN T. CLARK and his wife, DIANE M. CLARK; RAMONA GIANNI; NATHAN W. GORDON; and JOHN DOE AND MARY ROE,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISQUALIFY PLAINTIFFS' COUNSEL

This matter comes before the Court upon Motion to Disqualify Plaintiffs' Counsel filed by the Defendants, John and Sally Cardamone, Benjamin T. Clark and Diane M. Clark, and Ramona Gianni (collectively "Defendants"). The Plaintiffs opposed the motion, and the parties submitted legal memoranda and affidavits in support of their respective positions. The Court heard oral argument on July 22, 2009. After carefully considering the evidence, the arguments of the parties, and the applicable legal authorities, the Court issues the following order granting Defendants' Motion to Disqualify Plaintiffs' Counsel from further representation in the above-captioned cases:

FINDINGS OF FACT

In 1999, Defendants John and Sally Cardamone ("Cardamones") filed a lawsuit in the Circuit Court of Beaufort County, South Carolina, styled "*John Cardamone and Sally Cardamone v. Graves Commercial Builders, Inc., American Way Applicators of South Carolina, and Dryvit Systems, Inc.*," Civil Action No. 1999-CP-07-1237 (the "Lawsuit") due to problems related to the design, construction, application, manufacture and installation of a synthetic stucco

exterior cladding on our home, known as an Exterior Insulated Finish System ("EIFS"). The Cardamones were represented in the Lawsuit by the law firm of Mullen Wylie & Seekings ("Mullen Wylie"). Thomas J. Finn, Esquire ("Finn") was an attorney employed by Mullen Wylie while the Lawsuit was pending. Finn actively represented the Cardamones, including, among other thing, signing pleadings, attending a deposition, and receiving correspondence in the Lawsuit.

While the Lawsuit was pending, the Cardamones were named as class representatives in a class action suit against Dryvit Systems, Inc. ("Dryvit"), styled "*John and Sally Cardamone, et al. vs. Dryvit Systems, Inc., et al.*," Civil Action No. 2002-CP-07-1377 (the "Class Action") for EIFS-related problems. In 2003, while both the Lawsuit and the Class Action were pending, the Cardamones settled the Lawsuit against all of the Defendants against whom they had individually brought a claim.

In September 2005, Plaintiffs' Counsel ("Counsel") intervened and were appointed class counsel in the underlying Class Action. On March 7, 2008, Counsel sued the Cardamones in Beaufort County in the above captioned action, Civil Action No. 08-CP-07-00774 ("Treon suit"), for allegedly breaching fiduciary duties owed to the class in the Class Action by settling the Lawsuit. Included in the allegations in the Treon suit was that Defendants settled their individual cases for extraordinarily high, or inflated amounts because Dryvit allegedly paid them a "bonus" as part of the settlement of their individual claims. On August 26, 2008, Counsel filed essentially the same suit against the Cardamones again in Beaufort County in the above captioned action, Civil Action No. 08-CP-07-3145 ("Tucker suit"), for allegedly breaching fiduciary duties owed to the class in the Class Action by settling the Lawsuit. After the Cardamones settled their individual lawsuit, new individuals were substituted as class

COPY

representatives in the Class Action. In both the Treon and Tucker suits, it is alleged the Cardamones' breach of fiduciary duty to the class has essentially ruined the Class Action, as well as the ability for that class to effectively settle its claims. The Class Action is still pending.

Similarly, in 2001 Defendant Ramona Gianni ("Gianni") filed a lawsuit in the Circuit Court of Horry County, South Carolina, styled "*Ramona Gianni v. Regal Corporation of Myrtle Beach, Dryvit Systems, Inc., Commercial System Inc. and Best Exterminating, Inc.,*" Civil Action No. 2001-CP-26-5153 (the "Gianni Lawsuit") due to EIFS-related problems. Gianni was represented by Mullen Wylie. Finn was employed by Mullen Wylie while the Gianni Lawsuit was actively litigated. Like the Cardamones, in 2003, while both the Gianni Lawsuit and the Class Action were pending, Gianni settled the Gianni Lawsuit against all of the Defendants whom she had individually brought a claim. After Gianni settled her individual lawsuit, new individuals were substituted as class representatives in the Class Action. Gianni was also named as a Defendant in the Treon suit and the Tucker suit for allegedly breaching fiduciary duties owed to the class in the Class Action by settling the Gianni Lawsuit.

CONCLUSIONS OF LAW

The American judicial system functions only because of public trust in the system. The assurance of the public in the system's integrity is paramount. In this regard, it does not matter only what an attorney knew or did not know of the former clients' confidences; it matters also whether or not there was access to those confidences and whether or not those confidences could have been shared with those associated in the new case. The assurance of the public in the system's integrity includes the notion that, if allowance of the potential conflict cannot be easily explained to a layman, it cannot stand. This situation cannot be easily explained to a layman.

Although there has been no specific allegation or evidence of actual betrayal of any former clients' confidences by Finn, it is clear to the Court that Plaintiffs' counsel not only had access to former clients' confidences, but *could* have shared them with those associated in the new case as well. As a result, although I specifically make no finding of any ethical breach by any attorney in this case, I find an impermissible conflict of interest exists that mandates disqualification of Plaintiffs' counsel.

AN IMPERMISSIBLE CONFLICT OF INTEREST EXISTS WITH FORMER CLIENTS

1. Defendants were formerly represented by Mullen Wylie and its former associate, Thomas J. Finn.

The Cardamones and Gianni were formerly represented by Mullen Wylie. It is undisputed that Finn was an associate at Mullen Wylie during the pendency of the Lawsuit and Gianni Lawsuit. South Carolina Rules of Professional Conduct Rule 1.9(b)[1], "DUTIES TO FORMER CLIENTS" states:

> [A] lawyer ***shall not*** knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing." (emphasis added).

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[1] SCRPC Rule 1.9(a), "Duties to Former Clients", provides:

> "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." SCRPC Rule 1.9(a).

I find that SCRPC Rule 1.9(b) is controlling; however, the analysis and result would be the same under either rule.

I take particular note that the applicable rules in this matter use the imperative "shall not" as opposed to the permissive "may not", which appears in other parts of the rules.

I find the cases before the court involve a lawyer suing former clients of a firm by which he was employed, for settling the individual cases in which the firm previously represented them (allegedly in violation of a breach of fiduciary duty in a subsequent class action suit). I further find that Finn was actively engaged in the representation of the Cardamones in the Lawsuit. Defendants submitted uncontroverted evidence that Finn signed the Second Amended Complaint in the Cardamone Lawsuit.[2] Finn was counsel of record in at least one deposition in the Cardamone Lawsuit. He was sent and copied on correspondence in the Cardamone Lawsuit. He is now suing the Cardamones for settling the Cardamone Lawsuit.

Similarly, Finn was an attorney employed by Mullen Wylie during the active representation and litigation of the Gianni Lawsuit. This is demonstrated by various correspondence submitted in support of Defendants' Motion in the Gianni Lawsuit on Mullen Wylie letterhead and the undisputed overlap of time involving the respective actions.

I find Finn was associated with Mullen Wylie during its representation of the Cardamones and Gianni in their respective individual lawsuits, and also actively participated in the representation of the Cardamones. As such, his conduct constitutes a previous representation of the Cardamones and Gianni that falls within the purview of SCRPC Rule 1.9(b) and creates an impermissible conflict of interest.

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2 Our courts have recognized a signing of a pleading is an appearance of record:

> "The language of Rule 11(b) is clear. Once an attorney has made a formal appearance and become attorney of record in an action, withdrawal can only be accomplished by order of the court. *Id.; Culbertson v. Clemens, 322 S.C. 20, 471 S.E.2d 163 (1996). A formal appearance by an attorney is most commonly made by the signing of pleadings.* Rule 11(a), SCRCP; *Culbertson, supra.*"

Ex parte Strom, 334 S.C. 605, 609, 514 S.E.2d 599, 600 (S.C.App.,1999)(emphasis added). There is no doubt Finn signed a pleading, thereby making a formal appearance in the Cardamone Lawsuit.

2. **Finn's Actions in the Present Case are Materially Adverse to the Cardamones and Gianni.**

A materially adverse conflict is defined by the South Carolina Court of Appeals in Madison v. Graffix Fabrix, Inc., 304 S.C. 321, 404 S.E.2d 37 (Ct. App. 2001), as follows:

> Generally, an attorney cannot, on termination of employment, represent one whose interest in the transaction is adverse to that of his former client. However, an attorney is not prevented from representing a subsequent client against a former client, where the duties required of him do not conflict with those required in the first employment. ***The test of whether the attorney's employment is inconsistent with his duty to a former client is whether acceptance of the new retainer will require him, in forwarding the interest of the new client, to do anything that will injuriously affect a former client in any matter in which he formerly represented him, and also whether the attorney will be called on, in his new relation, to use against a former client any knowledge or information acquired in the former relationship.*** (emphasis added).

Applying this test, I find Finn's actions could create a conflict of interest under SCRPC 1.9(b). Finn is undertaking to affect his former clients, the Cardamones and Gianni, in a matter arising out of his and his firm's former representation of them. Comment 3 to SCRPC Rule 1.9 gives an example of an action by a lawyer that would be materially adverse to the interests of his former clients: "[A] lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations..." This is analogous to Finn's actions in the case at bar. Finn helped the Cardamones and Gianni sue for damage to their homes, yet now on behalf of his new clients he is seeking to disgorge the settlement funds the Cardamones and Gianni received for settling those same claims. Finn's actions in the Treon and Tucker suits are materially adverse to the interests of the Defendants, which creates an impermissible conflict of interest.

3. **Finn's Prior Representation of the Cardamones and Gianni is the Same or Substantially Related Matter as the Present Case.**

The previous representation of the Cardamones and Gianni in their individual lawsuits is the "same or substantially related matter" under SCRPC Rule 1.9(b) as the Treon and Tucker suits.

"In determining whether the matter is 'substantially related,' one should consider, among other things, whether the affected lawyer '*would have or reasonably could have* learned confidential information in the first representation that would be of significance in the second.' 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.9:104, at 293 (1996)." Townsend v. Townsend, 323 S.C. 309, 317-318, 474 S.E.2d 424, 429 - 430 (S.C.,1996). In Townsend, an attorney served as the *guardian ad litem* for a minor in a domestic-relations action between the parents and later represented the father in an action to reduce support for the same minor ward for whom he had previously served as guardian ad litem. Id., at 323 S.C. 316. The Court concluded that the matters were substantially related and that such representation would completely undermine the trust and confidence necessary to an informed recommendation by the *guardian ad litem.* Id., at 323 S.C. 316.

As in Townsend, Finn *would have or reasonably could have* learned confidential information in the previous representation of the Cardamones and Gianni that would be of material significance in the current cases against the Defendants. This is further illustrated by Comment 6 to SCRPC Rule 1.9 (under the caption "Lawyers Moving Between Firms") which states, "[a] lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; *it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients.*" The Cardamones and Gianni were represented by Mullen Wylie during Finn's tenure with the firm, and accordingly it must be inferred that he was

privy to everything in their individual lawsuits (he was actively involved with the Cardamone Lawsuit, creating the possibility that he had actual access to confidential factual information related to the Cardamones and their individual lawsuit). Finn reasonably would and could have learned confidential and material information such as: the value of the Cardamones/Gianni's property, the extent and amount of damage to their respective homes, the scope of repairs necessary to their homes, the proposed settlement values of the Cardamone Lawsuit and Gianni Lawsuit, case strategy, and personal financial information. Any of this information could be materially significant and relevant to the Treon and Tucker suits, since the basis for the alleged wrongdoing by the Cardamones and Gianni is settling their individual suits (in which Finn and his former firm were involved). This is particularly true in light of the Plaintiffs' allegations that the Cardamones and Gianni allegedly received a bonus for settling their individual suits in recognition of their status as class representatives and desire to disgorge those settlement monies.

I further find no evidence of any screening methods employed to shield Finn from access to Gianni's (or the Cardamones') confidential information.[3] Nor is there any evidence that Finn did not have access to any confidential information related to the Gianni Lawsuit or Cardamone Lawsuit.

I find that since Finn was in a position where he would have or reasonably could have learned confidential information in the first representation that would be of significance in the second, the Treon and Tucker suits are the "same or substantially related matter" under SCRPC

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[3] Nor would they necessarily have done much good, as many jurisdictions favor disqualification when there is a question about the effectiveness of measures taken (Court resolving conflict of interest in favor of disqualification when effectiveness of the screening procedures employed by a law firm to avoid the appearance of impropriety and preserve the public's trust and confidence in the judicial system was questionable), Burgess-Lester v. Ford Motor Co., 2008 WL 4643362, 8 (N.D.W.Va.) (N.D.W.Va.,2008).

Rule 1.9(b) as the Cardamone Lawsuit and Gianni Lawsuit, and creates an impermissible conflict of interest requiring this Court to grant Defendants' Motion to Disqualify.

4. <u>There was no Informed Consent or Waiver of the Conflict of Interest.</u>

South Carolina Rules of Professional Conduct Rule 1.0(f) define "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." I find no informed consent or waiver was given by the Cardamones or Gianni to this conflict of interest.

5. <u>There was no Allegation of or Actual Betrayal of Former Client Confidences.</u>

Though the conflict may have unintentionally arisen, the outcome remains the same- there exists an unquestionable conflict of interest which not only gives the appearance of impropriety, but precludes the tainted attorneys from further representation of the Plaintiffs. Despite this, I find that there were neither allegations made, nor any evidence of actual betrayal of confidences of the former clients.

<u>CONFLICT IMPUTED TO ALL PLAINTIFFS' COUNSEL</u>

1. <u>Public policy dictates a presumption of conflict of interest to avoid the appearance of impropriety.</u>

The most important underlying consideration to the Court in analyzing the Motion to Disqualify Plaintiffs' Counsel is the assurance of the public in the judicial system's integrity. This Court has determined Finn's conduct created a conflict of interest that is materially adverse to the Defendants in a substantially related matter. When determining whether to disqualify counsel for conflicts of interest, courts should prevent the "the appearance of impropriety," by

resolving all doubts in favor of disqualification. Donaldson v. City of Walterboro Police Dept. 2008 WL 906707, 4 (D.S.C.) (D.S.C.,2008) (internal citations omitted).

It is the view of this Court that all doubts should be resolved in favor of disqualification to avoid the appearance of impropriety (much less any actual impropriety). In Donaldson, the plaintiff sued the Police Departments of the City of Walterboro and the Town of Ridgeland for violation of 42 U.S.C. § 1983, assault and battery, malicious prosecution and negligence. Counsel for the defendant moved to disqualify plaintiff's attorney because a different attorney in the law firm (who did not even work out of the same office of the law firm as the attorney actually representing the plaintiff) of plaintiff's counsel had done work for the Town of Ridgeland. The plaintiff argued that since this attorney 1) did not get a regular retainer from the Town, 2) did not engage in litigation on behalf of the Town, and 3) her work was limited to primarily real estate matters, then her work for the Town would not interfere with the representation of the plaintiff nor be adverse to the Town. The Donaldson Court disagreed, finding that "this court is not to 'weigh the circumstances 'with hair-splitting nicety' but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing 'the appearance of impropriety,' it is to resolve all doubts in favor of disqualification." Donaldson v. City of Walterboro Police Dept., 2008 WL 906707, 4 (D.S.C.) (D.S.C.,2008) (internal citations omitted).[4]

This presumption of disqualification is also evident in Townsend, supra. By disqualifying the attorney *guardian ad litem*, the Townsend Court sought to eliminate conflicts of interest- whether real or potential- when an attorney is put in a position where s/he *could have* obtained information that would be relevant to the second:

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[4] Although Donaldson involves the analysis of concurrent representation, presumably under SCRPC Rule 1.8, this Court finds the logic and analysis applicable to the present case.

> Nevertheless, ***in evaluating the lawyer guardian ad litem's potential conflict of interest in subsequent representations, it seems reasonable to find that matters are "substantially related" when the guardian ad litem reasonably could have gained information in the first matter that will be relevant in the second matter.*** Such a construction of the phrase "substantially related" furthers the policy rationale of encouraging candid disclosure to the guardian ad litem by all parties to a custody dispute. Here, although he claims none of the same information was actually used in the two matters, Lawyer should have recognized the risk that information he gained during the custody matter in which he was Daughter's guardian ad litem might prove relevant to the child support claim and particularly to the college support claim in the action in which he represented Father. Id., at 317-318. (emphasis added).

The Court's positions in Donaldson and Townsend underscore the foundation of our legal system - the confidence clients place in their attorney. Lawyers have a duty to refrain from disclosing the confidences of their clients, and courts have gone to great lengths to protect the attorney-client privilege. The use and disclosure of any such confidential information is expressly prohibited by South Carolina Rules of Professional Conduct Rule 1.6(a):

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Much like judges must recuse themselves for the appearance of impropriety or conflict of interest, Townsend recognized that lawyers *must* be disqualified if they, by virtue of previous representation, put themselves in a position where they *could have* obtained confidential information. The Court in Townsend stated that the judge "had ample authority, and, in fact, a duty to remove Lawyer from his representation of Father. The family court must ensure the integrity of the proceedings before it." Townsend, 323 S.C. at 316.

The Court finds Counsel's reliance on State v. Smart, 278 S.C. 515, 299 S.E. 2d 686 (S.C., 1982) for the proposition that the analysis for disqualification of counsel is whether any material or confidential information *was actually* learned by Finn that could be used against the

Defendants in the present case unpersuasive.[5] Smart is a criminal case that was decided eight years prior to the enactment of SCRCP 1.9, and accordingly offers no guidance, much less authority, on the issue.[6] Moreover, I find Smart does not comport with South Carolina case law and public policy in preserving the public's trust in the American legal system.

Reviewing the record before the Court, I find more than an "appearance of impropriety" by Finn. By virtue of the former representation of the Cardamones and Gianni as set forth above, Finn was in a position where he would have and could have obtained confidential information (despite his assertion that he did not), which is enough to create not only an appearance of impropriety, but also an actual conflict of interest. Townsend, 323 S.C. at 317.

2. **Finn Law Firm, P.C. is Disqualified.**

South Carolina Rules of Professional Conduct Rule 1.10(a), "IMPUTATION OF CONFLICTS OF INTEREST" states:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Finn and Thomas E. Williams ("Williams") are partners in the Finn Law Firm, P.C. Finn clearly has a conflict of interest with the Defendants as a result of his subsequent lawsuits against them arising out of the same or substantially related matter in which he and his former firm previously represented them. Because SCRPC Rule 1.10 expressly prohibits a lawyer associated in a firm (Williams) from representing a client when one of the lawyers associated with that firm

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[5] Counsel also relies on Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2nd Cir. 1975), a case from another jurisdiction predating the adoption of the applicable South Carolina Rules of Professional Conduct by fifteen years.

[6] Even Counsel acknowledges as much on page 7 of their Supplemental Response: "Prior to adoption of Rule 1.9, no specific rule covered the duty owed to former clients..."

is prohibited from doing so under Rule 1.9 (Finn), the conflict of interest is imputed to the Finn Law Firm, P.C., and Williams.

3. **Finn's Involvement has Tainted all Plaintiffs' Counsel, Requiring Disqualification.**

The Court concludes it must be assumed that under SCRPC Rule 1.10 those associated with a conflicted lawyer, in the same matter, share the conflict. SCRPC Rule 1.0(d) defines "firm" or "law firm" as a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship *or other association*, or in a legal services organization; lawyers employed in the legal department of a corporation, government, or other organization; and lawyers associated with an enterprise who represent clients within the scope of that association (emphasis added). Comment 2 to SCRPC Rule 1.0 states that "the terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, *as is the fact that they have mutual access to information concerning the clients they serve.* The evidence presented to the Court, including the Affidavits of Fees and Costs in the underlying Class Action and appearances by Finn and Williams, demonstrate that Counsel had mutual access to information. By meeting, conferring and strategizing in their representation, all Counsel necessarily shared information by often meeting, conferring and strategizing in their representation. Consequently, the conflict is imputed to all Counsel.

CONCLUSION

For the foregoing reasons, this Court then finds that Counsel is hereby disqualified from further representation of the Plaintiffs in the above-captioned cases. In recognition of the problems this disqualification may create, Plaintiffs are hereby granted ninety (90) days from the date of entry of this Order to obtain new counsel. Any existing Scheduling Orders shall be

subject to modification upon hiring new counsel. Moreover, Counsel is prohibited from conferring or sharing any information with newly hired counsel, lest the conflict be imputed to them.

IT IS SO ORDERED!

Marvin H. Dukes, III
Master-in-Equity and Special Circuit Judge

Beaufort, SC
Monday, February 01, 2010

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2008-CP-07-3145
STEVEN AND JEANEEN TUCKER CHARLES AND STEPHANIE DAVIS, TIMOTHY AND JANIE P. TREON, P. JENNINGS SCEARCE and JOHN DOE and JANE DOE individually and on behalf of others similarly situated in the State of South Carolina,	)	
Plaintiffs,	)	
v.	)	
LEATH, BOUCHE & CRAWFORD, LLP, W. JEFFERSON LEATH, JR., WILLIAM DIXON ROBERTSON, III, MICHAEL S. SEEKINGS, FRANK E. GRIMBALL & MULLEN WYLIE, LLC formerly, MULLEN, WYLIE & SEEKINGS, LLC, JOHN CARDAMONE and his wife SALLY CARDAMONE, BENJAMIN T. CLARK and his wife DIANE M. CLARK, RAMONA GIANNI, NATHAN W. GORDON,	)	
Defendants.	)	

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BEAUFORT COUNTY, S.C.
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2008-CP-07-0774
TIMOTHY TREON and P. JENNINGS SCEARCE, individually and on behalf of others similarly situated in the State of South Carolina,	)	
Plaintiffs,	)	
v.	)	

DRYVIT SYSTEMS, INC.; JOHN CARDAMONE and his wife, SALLY CARDAMONE; BENJAMIN T. CLARK and his wife, DIANE M. CLARK; RAMONA GIANNI; NATHAN W. GORDON; and JOHN DOE AND MARY ROE,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO RECONSIDER, ALTER OR AMEND PURSUANT TO SCRP RULES 59(e) AND 60(b)

This matter came on the motion of Plaintiffs' counsel to reconsider, alter, or amend this Court's Order filed on February 2, 2010, which disqualified Plaintiffs' present counsel from representing the Plaintiffs in this case. A duly noticed hearing on the motion to reconsider was held on March 4, 2010, and counsel for all parties attended the hearing in person or by telephone.

The issues raised by Plaintiffs' counsel ("Counsel") in support of their motion to reconsider are virtually the same as those presented at the hearing on the disqualification motion, and this Court's disqualification Order was issued only after careful consideration of all such issues. Accordingly, Plaintiffs' motion to reconsider their disqualification is DENIED.

The last sentence in the Order states: "Moreover, Counsel is prohibited from conferring or sharing any information with newly hired counsel, lest the conflict be imputed to them." At the hearing Plaintiffs counsel requested clarification of that sentence in order to provide them guidance in connection with their transfer of this file to new counsel for the Plaintiffs. A client's file belongs to the client and should be returned at the client's request. In re Matter of Haddock, 283 S.C. 116, 117, 321 S.E.2d 601, 601 (1984). Accordingly, the last sentence of the Order is hereby expanded and clarified to read as follows:

"Moreover, Counsel is prohibited from conferring or sharing any information with newly hired counsel, lest the conflict be imputed to them." This Order does not prohibit Counsel from returning the file to their clients, or prohibit Counsel from providing newly hired counsel with non-confidential information regarding the status of this case, such as the date of any scheduled matters or the due dates for any outstanding discovery. Newly hired counsel shall have the right to move this Court to allow newly hired counsel to receive additional information from Counsel if newly hired counsel deems the receipt of such information necessary for newly hired counsel to protect the client's interests in this case."

IT IS SO ORDERED!

Marvin H. Dukes, III
Presiding Judge
Fourteenth Judicial Circuit

March 16, 2010
Beaufort, South Carolina

COPY

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

2010 JUN 10 P

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2002-CP-1377

TIMOTHY TREON and his wife, JANE TREON, P. JENNINGS SCEARCE, and STEPHEN CHRISTIAN, individually and on behalf of others similarly situated in the State of South Carolina,

Plaintiffs,

v.

DRYVIT SYSTEMS, INC.,

Defendants

ORDER AND JUDGMENT GRANTING FINAL APPROVAL OF SETTLEMENT AGREEMENT

INTRODUCTION[1]

This is a complex products liability action filed pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. By Order dated November 13, 2009 and filed November 17, 2009, the Court granted the Plaintiffs' Motion for Preliminary Approval of Settlement and scheduled a Fairness Hearing for June 7, 2010. The purposes of the Fairness Hearing were to determine whether the proposed settlement between the Class through its Class Representatives and Dryvit Systems, Inc. (the "Settling Defendant") is fair, reasonable, and adequate under the circumstances, to hear and determine any objections to the Settlement Agreement, to receive evidence on the basis and rationale for the Settlement Agreement and the ability of the Parties to practically implement the terms of the Settlement Agreement, to receive evidence on implementation of the Notice Plan and information about its actual effectiveness and adequacy and compliance with Due Process and applicable law under Rule 23, to determine whether the

[1]Capitalized terms used in this Order and Judgment have the meanings set forth in the "Definitions" section of the Settlement Agreement or as defined in this Order and Judgment.

requirements of Rule 23 and applicable law have been met for the discontinuance and dismissal of the class action claims against Settling Defendant, to appoint the Special Master as provided for in the Settlement Agreement and to otherwise provide for implementation of the Settlement Agreement, to consider requests for compensation for expenses and service of Class Representatives, and to consider any other matters raised by the Parties. The Court will also consider and address the allocation of compensation and expenses to the Class Representatives.

The Court also set for consideration at the Fairness Hearing, any application or request for attorneys' fees as well as litigation costs and expenses of Class Counsel. The Court will address issues relating to allocation among Class Counsel for fees, costs and expenses by separate order.

Upon convening the Fairness Hearing at the appointed time in the Beaufort County Courthouse, the case was called in accordance with statutory requirements and objections to the Proposed Settlement were invited, but none were raised. Therefore, having heard from the Parties, the Parties' submissions, the settlement documentation, considered the evidence presented at the hearing, considered the rules, applicable law, arguments of counsel and deliberated thereon, the Court grants Final Approval to the Settlement Agreement and makes such other orders as appropriate to implement its terms as set forth herein.

BACKGROUND

Since a hearing conducted on December 5, 2005, the Court has presided over extensive hearings and has conducted settlement conferences under Rule 16 of the South Carolina Rules of Civil Procedure. The Parties have engaged in hard fought litigation, extensive and thorough document and other discovery, and participated in time consuming and often contentions arms length negotiations for a period of more than four (4) years. The Court observed and presided

over sufficient discovery, motions practice, legal arguments, briefing and other proceedings to determine that the Parties were sufficiently informed about the facts and the law to make reasonable decisions regarding settlement and the alternatives to settlement. During the negotiations the Parties kept the Court well informed of the status of the negotiations and the difficulties they confronted in reaching a settlement. The Parties were aided, from time to time, in their negotiations by mediators and by this Court.

The Settling Defendant, Dryvit Systems, Inc. and Class Representatives entered into a Settlement Agreement (the "Settlement Agreement"), effective November 12, 2009, intended to resolve this litigation pending in South Carolina. Class Representatives filed a Motion for Preliminary Approval of the Settlement Agreement with attached exhibits. On October 8 and 9 and November 12 and 13, 2009, the Parties appeared before this Court in the Spartanburg County Courthouse[2] to explain the Settlement Agreement to the Court in support of the request for preliminary approval of the settlement. The Court considered the Settlement Agreement and exhibits, the argument of counsel, the voluminous filings, and the Court's thorough knowledge of the case in deciding to grant the Motion for Preliminary Approval of the Settlement Agreement. By Order dated, November 13, 2009, this Court granted Preliminary Approval, authorized Notice to the Class pursuant to the Notice Plan and scheduled the Fairness Hearing.

The Settlement Agreement, together with the exhibits attached thereto, set forth the terms and conditions for the settlement and dismissal with prejudice of this Action against the Settling Defendant. This Action is one in which the Court first presided over vigorous litigation between the Parties including both discovery and motions practice, then presided over a period of negotiations between the Parties which resulted in this Settlement Agreement and now has presided over a period of Notice to the Class, opportunity for Class Members to exclude

[2] See Order dated August 31, 2006.

themselves and opportunity for Class Members to object to the Settlement Agreement or any of its terms. As a result, the Court has extensive knowledge of the facts and procedural history of this Action. That knowledge has given the Court a unique vantage point from which to evaluate the reasonableness and fairness of the terms and conditions of the Settlement Agreement and its overall fairness to the Class.

FINDINGS OF FACT

1. This action was commenced on August 12, 2002. A Third Amended Complaint was filed by Intervening Class Counsel on November 17, 2009 and presents not only Plaintiffs' initial allegations in this Action but also allegations asserted in a separate civil action brought by intervening Class Counsel entitled, *Treon, et al. v. Dryvit Systems, Inc., et al., 2008-CP-07-0774* also filed in the Beaufort County Circuit Court. The claims against Dryvit in the 0774 case were dismissed without prejudice by Order of Judge Marvin Dukes dated November 9, 2009 (amended by Order dated November 19, 2009).

2. In these actions and currently in the Third Amended Complaint, Plaintiffs sought recovery for alleged damages to Structures owned now or formerly by Plaintiffs and by similarly situated Class Members as well as other relief and damages from Settling Defendant. The claims asserted by Plaintiffs include negligence, breach of warranty, Unfair Trade Practices, fraudulent concealment, conspiracy, and aiding and abetting a breach of fiduciary duty.

3. Defendant Dryvit Systems, Inc. denies and disputes the material allegations in this Action, the 0774 action and each of the various Complaints, and denies that it owes any damages, compensation or other relief to Plaintiffs or Class Members.

4. On September 3, 2002, this Action was certified as a class action, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure, by the Honorable Thomas Kemmerlin in the Court of Common Pleas for Beaufort County, South Carolina. The Class Certification Order, dated August 30, 2002, *nunc pro tunc*, defined the class as:

"All persons who own or have owned a one- or two-family residential dwelling or townhouse (hereinafter 'structure') in the State of South Carolina who would be a member of the Class purportedly created in the action pending in Tennessee, Posey, et al. v. Dryvit Systems, Inc."

and

"All persons who own or have owned a structure in the State of South Carolina on which an Exterior Insulation and Finish System ('EIF system') has been installed or any previous owner of such structures who incurred any costs or expenses to inspect, repair or replace the EIF system or other property damages by the EIF system at any time from January 1, 1989, until the date the Defendants' continuing conducts is terminated (the 'Class Period')."

5. By Order dated November 17, 2009, the Court re-certified this Action with a settlement Class consisting of:

> All Persons who, as of the Notice Date, own or owned a Structure on which a Dryvit EIFS was installed during the Class Period.

This Class is more fully described in the Settlement Agreement and includes Structures upon which Dryvit EIFS was installed between January 1, 1989 and September 3, 2002.

6. The Court notes that the various class definitions in this action use similar but different wording. The Court finds that the current Class definition as set forth in the Settlement Agreement encompasses all of the class members of the class originally certified by this Court on September 3, 2002 or thereafter and that the Notice to the current Class as more fully described below was effective as Notice to all members of previously defined classes in this Action.

7. The Court has previously found and reaffirms that the named Plaintiffs are adequate Class Representatives for the Class. Mr. and Mrs. Treon and Mr. Scearce have served as Class Representatives since intervening in December of 2005. The Court has observed these representatives, either directly or through their counsel, vigorously and ably prosecuting this case

on behalf of the Class. Mr. Christian joined as a Class Representative as part of the Settlement process. While the Court has had less opportunity to observe Mr. Christian, his shorter service has also been able and beneficial to the Class and to the settlement process.

8. The following counsel were designated by the Court as Class Counsel: (a) Gregory M. Alford, Esq., (b) Thomas J. Finn, Esq., (c) Thomas E. Williams, Esq., (d) Donald Jonas, Esq., (e) Robert B. (Sam) Phillips, Esq. of the Finkel Law Firm, LLC (Intervening Class Counsel), and (f) Francis E. Grimball, Esq. of the Mullen Wylie law firm (an Original Class Counsel); and pursuant to the Order for Preliminary Approval of Settlement, this Court ordered submission of Class Counsel's application for an award of attorneys' fees and costs to be presented as part of the June 7, 2010 Fairness Hearing.

9. Since December 5, 2005, this Court has had numerous opportunities to directly observe these lawyers and the Court finds that the Class has been provided outstandingly diligent and prompt representation by these attorneys, in the aggregate.

10. The Court finds that the Class has been adequately represented as to this Settlement Agreement and its terms and otherwise sufficiently for an attorney's fee in the amount contemplated by the terms of the Settlement Agreement.

11. Even though this Court makes the finding in paragraph 9 as to the representation by Class Counsel "in the aggregate" since December 5, 2005, this Court is aware that the attorneys have numerous ongoing disputes regarding the conduct of Original Class Counsel including (i) the pending Intervening Class Counsels' Motion to Disqualify, and (ii) an Opposition by Intervening Class Counsel on behalf of the Class Representatives to the appropriateness of Mullen Wylie, LLC being apportioned a part of the herein approved attorney fees. These disputes have not been resolved and the Court does not resolve them by this Order.

The Court simply finds here that the Class has been adequately represented as to the Settlement and that these disputes have not prevented the Settlement achieved from being fair and adequate to the Class under all the circumstances. The Court makes no specific finding here as to the adequacy or inadequacy of representation in this case by any individual attorney or attorneys reserving those issues for later determination. The Court is informed that there is no dispute among existing Class Counsel that Intervening Class Counsel's representation has been adequate and materially beneficial in reaching a Settlement for the benefit of the Class, even though, again, dispute does exist as to the appropriateness of one present class counsel being allocated an award and distribution from the attorneys fees and costs approved herein.

12. The Court further specifically holds that this Order is without prejudice to the rights of Intervening Class Counsel and Original Class Counsel to present any fact and make any argument concerning the distribution of fees and costs. In support of this finding, the Court notes that Class Counsel, collectively, have stipulated that with the exception of paragraph 30, nothing stated or omitted from this Order may be used in any subsequent motion or hearing in support of or in an effort to prevent the award or distribution of attorneys fees and costs.

13. Subject to paragraph 11, the Court finds that Class Counsel in the aggregate has adequately represented the Class as to the Settlement Agreement and its terms and otherwise sufficiently for an attorney's fee in the amount of $995,000.00 contemplated by the terms of the Settlement Agreement. Of that amount, the Court finds that $82,000.00 was advanced by Dryvit to Class Counsel to defray a portion of the cost of the Notice Plan.

14. Since the intervention, the Parties have contested this case vigorously. Class Counsel has engaged in extensive discovery and motions practice related to the many issues presented in the Complaints and by Defendants' defenses. As to other issues, EIFS litigation is

mature and ripe litigation which has been the subject of many individual lawsuits both in South Carolina and elsewhere as well as the subject of a number of class actions. This process has informed the Parties and the Court sufficiently about the facts and law pertaining to Plaintiffs' claims to allow the Parties to negotiate an arms length settlement of this Action and all issues presented herein and to provide Class Representatives with sufficient basis to knowingly and voluntarily evaluate and agree to settlement terms on behalf of the Class. The process also has provided the Court with sufficient knowledge and understanding of the applicable facts and law to allow for its review and evaluation of the fairness and adequacy of a settlement of this Action and to otherwise undertake those tasks required of the Court.

15. As a result of arm's length intensive, lengthy, hard fought, and often contentious negotiations between the Parties, beginning in early 2009 and spanning months, the Parties reached a settlement that, under the circumstances, provides substantial benefits to Class Members, in return for a release, a Bar Order, and dismissal of all the claims at issue in this Action against the Settling Defendant. On November 13, 2009, the Court preliminarily approved the resulting Settlement Agreement subject to review and evaluation at a Fairness Hearing with the benefit of comments and objections from Class Members as well as from the presentation of supporting evidence and argument from counsel for the Parties.

16. On June 7 and 8, 2010, the Court held a Fairness Hearing at the Beaufort County Courthouse, Courtroom 2 as provided in the Notice and in this Court's Order dated November 13, 2009. At that hearing counsel for all Parties, the Class Representatives, and other Persons appeared and were heard. The Court heard evidence as detailed more fully below and arguments from counsel and others desiring to speak to the terms of the Settlement Agreement, the resolution of this Class Action, the adequacy of the Notice and other pertinent matters.

17. In the Court's November 13, 2009 Order, a deadline for objecting was set and a procedure for communicating objections was established. As of the deadline for the filing of objections, no objections were filed.

18. In the Order Granting Preliminary Approval of the Settlement Agreement, this Court approved a Notice Plan, Class Notice and a Summary Class Notice, designed to provide Class Members with Notice of this Class Action lawsuit and the Settlement Agreement. The Court approved Notice Plan provided for access to the Notice and Claim Forms, through direct mail, a website, newspaper and other advertising, and a toll-free number to provide the best notice practicable under the circumstances to reach current and former owners of Dryvit EIFS clad Structures in South Carolina.

19. At the Fairness Hearing, the Court received evidence about the implementation of the Notice Plan and its actual effectiveness. That evidence was provided by the Affidavit of Sara DiGiusto Sewell, employed by Post No Bills, a national media company, as an expert in the mass dissemination of information to consumers and identifiable groups. Based upon her testimony on November 12, 2009 and the evidence of her qualifications and experience, the Court has previously qualified her as an expert in this field and found that her opinion testimony would be of assistance to the Court as the finder of fact.

20. Rather than relying on "traditional" notice in the legal classified section of a newspaper, the Notice Plan, as implemented, in this matter relied on print ads run in the main body of select newspapers and "banner ads" placed on those newspaper's websites that linked to the Settlement's website, www.SCstucco.com. The Notice Plan was designed to attract the attention of the target audience and direct them to the Settlement's website to pursue additional information they needed to understand and assert their legal rights. This approach was especially

important in this matter because the average homeowner may not be able to either determine the manufacturer of a home's EIFS or determine if there is any latent moisture damage behind the EIFS.

21. The Court finds that Post No Bills designed a Notice Plan to reach the largest possible number of Treon Class Members in a cost effective manner by: (1) a direct mailing of the court-approved Short Form Notice to more than 8,000 known or potential class members, (2) providing notice of the Treon settlement to professional organizations whose membership may include, or be in contact with, possible class members, (3) development of a professional interactive website to disseminate notice to the Class, answer their questions, and assist them in the settlement process, and (4) placement of a compelling notification and call to action in the print and on-line versions of the following local newspapers:

Statewide > The State (www.thestate.com)
Charleston> Post and Courier (www.postandcourier.com)
Florence > The Morning News (www.scnow.com)
Greenville > The Greenville News (www.greenvilleonline.com)
Myrtle Beach > The Sun News (www.thesunnews.com)
Spartanburg > Spartanburg Herald Journal (www.goupstate.com)
Low Country > Beaufort Gazette/Island Packet (www.islandpacket.com),

22. The Court finds that the ¼ page advertisement designed by Post No Bills for placement in the main body of the seven (7) newspapers listed above was effective in reaching the primary and secondary targets of the Notice Plan. Unlike the circulation of most local newspapers which is not independently audited, the Notice Plan relied on what are known as Audit Bureau Circulation ("ABC") audited newspapers because their readership can be quantified and an opinion can be rendered about who will likely receive a particular message. The Notice Plan's ¼ page newspaper ad ran in the following newspapers on the indicated days:

Florence Morning News – Florence, SC > 1/10/10, 1/17/10
Greenville News – Greenville, SC > 1/10/10, 1/17/10

Island Packet/Beaufort Gazette – Low Country > 1/10/10, 1/17/10, 1/24/10, 1/31/10
Myrtle Beach Sun News – Myrtle Beach, SC > 1/10/10, 1/17/10
Post and Courier – Charleston, SC > 1/10/10, 1/17/10
Spartanburg Herald-Journal – Spartanburg, SC > 1/10/10, 1/17/10
The State – Statewide circulation > 1/10/10, 1/17/10, 1/24/10, 1/31/10.

To catch the attention of potential class members and direct them to the Treon settlement's website, www.SCstucco.com, Post No Bills designed and posted a banner ad for use on the following sites. The number of times and the date the banner was displayed on the site (impressions) are indicated below:

Florence Morning News (www.scnow.com) 160,000 impressions, Jan. 4-18, 2010
Greenville News (www.greenvilleonline.com) 150,000 impressions, Jan. 4-18, 2010
Island Packet (www.islandpacket.com) 140,000 impressions, Jan. 4-18, 2010
Myrtle Beach Sun News (www.thesunnews.com) 100,000 impressions, Jan. 4-18, 2010
Post and Courier (www.postandcourier.com) 140,000 impressions, Jan. 4-18, 2010
Spartanburg Herald (www.goupstate.com) 140,000 impressions, Jan. 4-18, 2010
The State (www.thestate.com) 555,700 impressions, Jan. 4-31, 2010.

Post No Bills created a professional website for the Treon Settlement which provided class members with detailed information about both the settlement and litigation that lead to it. The website provided class members with all of the forms necessary to file a successful claim along with answers to the most frequently asked questions. To help class members understand the settlement and the claims dispute resolution process, the website contained an easy to use email link so that class members could ask their question directly to the lawyers who represent the Class. A toll free number and fax contact number were also provided for those who wished to ask a question by a more traditional method.

23. Based upon this evidence, Ms. Sewell's prior testimony and its extensive knowledge of this case, the Court finds that Notice to the Class exceeded the Notice ordered and described in the Notice Plan and that the Notice was reasonably calculated to provide, and was effective in providing, the best practicable notice to the Class of both this Class Action lawsuit

and the Settlement Agreement. The Court further finds that the Notice adequately explained a Class Member's right to exclude himself or herself from the Class and provided a reasonable means of doing so. The Notice also informed Class Members of their right to object to the Settlement Agreement and provided an effective means of doing so.

24. Any person who wished to be excluded from this Class Action was provided an opportunity to exclude themselves by mailing a Request for Exclusion to Settling Defendant. The Court was provided a copy of all such Requests for Exclusion as part of an affidavit filed by Settling Defendant. The Court has reviewed the Request for Exclusion forms and the evidence. Based upon this review, the Court finds that those persons and Structures listed on Exhibit A timely, properly and validly excluded themselves from this Action and from any and all Benefits provided by the Settlement Agreement. The Court further finds that all other purported Requests for Exclusion were ineffective and are disallowed.

25. Those Persons who timely, properly and validly excluded themselves from this Action have no rights under the Settlement Agreement, are not bound by the Settlement Agreement and shall receive no Benefits from the Settlement Agreement or this Action. Settlement Class Members do not have any further opportunity to exclude themselves from this Action or to avoid being bound by the results of this Action except with the express consent of the Settling Defendant to be provided or not in Settling Defendant's sole discretion. The Settlement Agreement provides that an excluded former Class Member may request to revoke his or her election to be excluded by mailing a letter to the Settling Defendant requesting to revoke a Request for Exclusion. Any Person who elected to be excluded from this Action and as to whom Settling Defendant does not consent to revocation, as provided in the Settlement Agreement, has no rights under the Settlement Agreement.

26. The Settlement Agreement provided that Settling Defendant had the option of terminating the Settlement Agreement in the event the number of timely, proper and valid Requests for Exclusion exceed a specified number. That number was not exceeded and the Settling Defendant cannot terminate the Settlement Agreement on this basis.

The Fairness of the Settlement Agreement

27. At the Preliminary Approval Hearing and the Fairness Hearing, Class Counsel submitted evidence to the Court regarding the terms of the settlement, the fairness and adequacy of that settlement to the Class, the risks of litigation as an alternative to the settlement, the evaluation of the Settlement Agreement by the Class Representatives, the ability of Settling Defendant to comply with the settlement terms, the ability of the Class to comply with the settlement terms, the ability of the settlement to be practically and fairly implemented, the science which supports the settlement terms and the Inspection Protocol, and other matters pertinent to the Court's evaluation of the Settlement. Class Counsel also explained their rationale for recommending to the Class Representatives that they accept the Settlement Agreement in full, final and complete resolution of this Acton. This evidence and rationale included and supported the following factors relating to the fairness, reasonableness and adequacy of the Settlement Agreement:

Factors Applicable to Qualifying Claimants who purchased their Structures before January 1, 2003

a. There are numerous liability issues which can and will be disputed by Settling Defendant including issues such as the claim that Dryvit EIFS is unfit for its intended purpose. There are general issues relating to this issue and issues which depend upon the knowledge of individual Class Members. This Settlement Agreement eliminates these liability issues for qualifying Claimants who purchased their homes before January 1, 2003 with the exception of product identification which is still required under the terms of the Settlement Agreement. As to product identification, a simplified procedure and objective standard has been established by the Settlement Agreement.

b. There are numerous causation and damages issues which can and will be disputed by Settling Defendant with regard to any particular Structure which implicate not only the performance of Dryvit EIFS but also the performance of other products, the conduct of other Persons in the construction process, environmental factors and the extent to which current and former owners have maintained their Structures properly. The burden of proof on these causation and damage issues lies with the Plaintiffs. The Settlement Agreement eliminates these issues for qualifying Claimants who purchased their homes before January 1, 2003 in exchange for a simplified and objective Actual Damage standard. Causation is not an issue in the Settlement Agreement as to such qualifying Claimants.

c. There are numerous issues relating to Dryvit's conduct both in selling and marketing its EIFS and with respect to claims that Dryvit conspired with others to improperly impair the prosecution of this Action. Dryvit, and others, deny and dispute these conduct based allegations. An effect of this Settlement Agreement is, to resolve all disputes between Dryvit and the Class through a voluntary settlement of the allegations presented in the complaints filed in this Court. The Settlement Agreement specifically reserved and recognized that claims against third parties who are alleged to have injured the Class are preserved and in no way affected by this Order or Settlement.

d. All other liability issues in this Action are denied and will be vigorously contested as well. Further litigation about each of these issues will result in significant additional delay in Class Members obtaining relief, if any, from Settling Defendant. Class Counsel expressed concerns about the effect of these delays on the Class. The Court shares these concerns. The Settlement Agreement provides Class Members an opportunity for immediate resolution of their claims against Dryvit, and substantial Benefits without further delay. This advantage is available to those Class Members with pending individual EIFS cases[3] against Settling Defendant as well as Class Members who never filed suit and likely would otherwise be barred by statutes of limitations or repose.

e. This settlement provides Structure owners the opportunity for a substantial cash benefit. At the same time, pursuant to the South Carolina Contribution Among Joint Tortfeasors Act, S.C. Stat. Ann. § 15-38-50, Plaintiffs' good faith release of claims against Settling Defendant should discharge Settling Defendant from all liability for contribution to any other potential tortfeasors for damages to Class Members' Structures. *Cowden Enterprises, Inc. v. East Coast Millwork Distributors*, 611 S.E.2d 259 (S.C. App. 2005), *rehearing and certiorari denied.*

f. The Inspection Protocol, Inspector Qualifications and the Claim Form exhibits to the Settlement Agreement as well as the agreement's terms address scientific issues related to detection of water intrusion and its effects, determining product

[3] The Court is aware that there are several individual EIFS cases pending against Settling Defendant before the various Courts in South Carolina, most of which also involve claims against contractors and parties other than Settling Defendant.

identification and calculating the amount of product installed on a Structure. These procedures and terms were reviewed by David Bennett, a construction professional trained and skilled in forensic investigation of buildings and construction materials as well as water intrusion into buildings who testified by affidavit as to his observations and opinions about the procedures and terms at the request of Class Counsel on behalf of the Class. The Court finds him to be an expert qualified to review and opine about the practicality and effectiveness of the Inspection Protocol, Inspector Qualifications, Claim Form and Settlement Agreement from a scientific and forensic perspective. The Court recognizes that in the event of a trial in this case, Settling Defendant would have offered other testimony from other experts and would have disputed some or all of the testimony of this expert. Yet, for present purposes of evaluating whether the Settlement Agreement is fair, reasonable and adequate as to the Class, the Court views this testimony in the light most favorable to the Class and its claims, does not find it necessary to adjudicate any dispute between the Parties as to which view is in fact accurate and does not do so.

g. Based upon the expert testimony as well as the other evidence and the description provided to the Court by Class Counsel of their professional evaluation of the Settlement Agreement, its terms and litigation alternatives, the Court finds, for purposes of evaluating and approving the Settlement Agreement in this case and only for this purpose, that:

i. the 22% moisture level and the two square feet of deteriorated sheathing standards for Actual Damage are susceptible of ready determination using available inspection methodologies and are suitable for use in determining eligibility for Benefits under the Settlement Agreement;

ii. the documentation required by the Claim Form is sufficient for fair consideration of Claims and for making determinations required by the Settlement Agreement; and

iii. the Inspection Protocol is a reasonable and practical guideline for making the determinations required by the Settlement Agreement;

iv. the format for the Inspection Report provides a means for fairly and accurately recording and reporting inspection results;

v. the methodologies for calculating square footage of EIFS on a Structure are capable of implementation and verification with sufficient accuracy to satisfy the needs of the Settlement Agreement;

vi. the qualifications for Inspectors are sufficient to allow for reasonable compliance with the Inspection Protocol,

vii. the monetary consideration provided to individual Claimants under the Settlement Agreement (eight dollars and four dollars per square foot)

is net of litigation costs and under the applicable facts and circumstances is fair and reasonable.

viii. the monetary consideration provided by Settling Defendant in the Settlement Agreement has been evaluated by Class Counsel as a fair settlement amount under all the circumstances and in light of applicable law and potential defenses available to the Defendant, and the Court concurs.

Factors Applicable to Qualifying Claimants who purchased their Structures on or after January 1, 2003

h. For Class Members who purchased their Structures on or after January 1, 2003, Settling Defendant asserts various individualized notice defenses based upon not only specific disclosures which may have been provided to these Class Members at the time of their purchase but also based upon changes in applicable building codes and real estate disclosure requirements which had become effective as of January 1, 2003. The Parties were unable to resolve these defenses in the context of the Settlement Agreement and Settling Defendant was not willing to waive these defenses.

i. As a result, Class Counsel negotiated for these Class Members a waiver of certain defenses based upon the *Posey v. Dryvit Systems, Inc.* class action settlement in Tennessee and a tolling of applicable statutes of limitations and repose. These benefits to these Class Members enable them to pursue actual resolution of their individual actions in South Carolina courts and give them the benefit of the filing date in this Class Action for statutes of limitation and repose purposes. These concessions by the Settling Defendant squarely present the products liability and notice issues for efficient resolution in a manner similar to how individual EIFS cases have been handled in South Carolina for a number of years.

Generally Applicable Factors

j. The Settling Defendant has settled two prior class actions including one in North Carolina, *Ruff, et al. v. Parex* and a class action with a national scope in Tennessee, *Posey v. Dryvit Systems, Inc.* These class action settlements are in addition to a number of individual settlements undertaken by Settling Defendant in the state of South Carolina including individual settlements with individual clients of a number of the Class Counsel in this Action. Class Counsel reports that Settling Defendant satisfactorily implemented those prior settlements and has the capacity to fund and implement this Settlement Agreement. Settling Defendant has already funded $82,000 in benefits to the Class for use in paying costs associated with Notice.

k. The Settlement Agreement is clearly, and the Court so finds, a result of hard-fought litigation between the Parties and not a result of any collusion on the part of

Class Counsel, Class Representatives, Settling Defendant, Counsel for the Settling Defendant or any other Persons.

l. Class Members retain the right to pursue claims against other Persons whom they believe may be responsible for damages to their Structures based upon the conduct, actions or products supplied or installed by those other Persons, as distinguished from Settling Defendant's actions, conduct, fault or products.

m. The claims procedure established under the Settlement Agreement is fair, a simplified process and workable. In any event, this Court will retain jurisdiction to work out any unanticipated problems.

n. This litigation, like most litigation, is fraught with risk including the risk that a trial of this Action would result in the Class Members receiving nothing and with Settling Defendant paying nothing. The Settlement Agreement on the other hand provides all Parties and Class Members with a known resolution which is the result of voluntary negotiations and agreements. The law prefers that Parties resolve their own disputes.

o. The decision of the Court to approve this settlement is supported by the fact that no objections were filed or presented at the Fairness Hearing.

28. This Court received testimony from each of the following Class Representatives Timothy Treon, P. Jennings Scearce, and Stephen Christian, with regard to their services as Class Representatives, their understanding of the facts, issues, defenses and disputes. Each of these Class Representatives testified that under all of the facts and circumstances, they believe that the Settlement Agreement is a fair, adequate and reasonable compromise of disputed claims. Each of these Class Representatives testified about his involvement in the prosecution of this Action and the settlement negotiations. This Court finds that the Class Representatives have fulfilled their obligations in representing the Class fully and adequately and therefore approves the payment of $20,000 fee described in this Order as follows: $10,000 to P. Jennings Scearce, $5,000 to Timothy and Janie Treon, and $2,500 to Stephen Christian with the balance of $2,500 used to reimburse the personal expenses of the Class Representatives that are related to his matter with any excess funds being distributed to the Class Representatives on a pro rata basis.

29. The Court finds that Intervening Class Counsel and Settling Defendant are capable of implementing the terms of the Settlement Agreement without a third-party administrator, especially in light of the continuing jurisdiction of this Court. The Court further finds that the Settlement Agreement resolves disputes between the Class and the Settling Defendant in a way which does not unfairly or unconstitutionally favor resolution of common issues over individual issues and as a result of both concessions by the Settling Defendant and the claims administration process, including use of a Special Master, affords individual Class Members a fair opportunity to present and resolve material individualized issues of import to the claims against the Settling Defendant. The Court further finds that to the extent there is any impairment of Class Member ability to present and obtain resolution of individual issues, it is de minimus in light of applicable law and the facts presented here. The Court notes that all Class Members had the means to exclude themselves from this Class Action and this settlement to pursue their claims and issues individually.

30. Settling Defendant agrees to contribute, or already has contributed in contemplation of this settlement, the following as consideration for the Settlement Agreement and in full settlement for all Claims asserted in this Action: (a) $8.00 per square foot of Dryvit EIFS for Class Members who timely file a Claims Form and who meet other eligibility requirements set forth in Section 6(a) of the Settlement Agreement; (b) $4.00 per square foot of Dryvit EIFS for Class Members who timely file a Claims Form and who meet other eligibility requirements set forth in Section 6(b) of the Settlement Agreement; (c) $50,000 for the Equitable Claims Adjustment Fund as set forth in Section 6(c) of the Settlement Agreement; (d) $20,000 for the Class Representatives, (e) $82,000 for compensating Intervening Class Counsel for a portion of the cost of implementing the Notice Plan, and (f) $913,000 for use in compensating

Class Counsel and Class Representatives and to defray their costs and expenses of implementing the Settlement Agreement and assisting Claimants in the Settlement process. The Court recognizes that the Mullen Wylie firm has applied for 20% of the $913,000 or $182,600 as a fee in this matter and that Intervening Class Counsel has opposed the Mullen Wylie application. This Court therefore orders that $182,600 be escrowed in the trust account of Alford & Wilkins, L.L.C. until such time as this Court issues an order regarding the Mullen Wylie application. Having received no other applications for fees or costs after having provided prior original class counsel with notice of the need to submit any requests for fee allocations now, and having been informed by counsel for certain prior original class counsel that they make no claim as to amounts described in this paragraph, the Court finds that the balance of the $913,000 fee, or $730,400, is available for immediate distribution, upon receipt of funds as provided in the Settlement Agreement, to Intervening Class Counsel and does not prejudice any claim they may make in the future regarding additional fees in this matter.

31. Based upon all of the factors discussed above, the able service of Class Representatives and Class Counsel as described in paragraphs 8 through 13 above, the arm's length negotiations, the Court's observations about the complexity and difficulty of the issues presented, the certainty of further delay in any recovery for the Class in the absence of this settlement, and the inherent risks of litigation, the Court finds that the Settlement Agreement presents a fair and reasonable compromise and is adequate under all the circumstances.

32. Class Counsel's intent to seek compensation, fees and expenses was stated adequately in the Class Notice and Summary Class Notice. Submissions in support or opposition to allocation requests were due by June 7, 2010.

33. Class Counsel and counsel for Defendant conducted a search for suitable candidates to serve as the Special Master as provided in the Settlement Agreement. Two candidates were presented to the Court and each is well qualified and well suited for this responsibility. The two candidates are Bonum Wilson of Charleston, South Carolina and Francis Mack of Columbia, South Carolina. Each candidate has over twenty five years of experience practicing law, is duly licensed as an attorney in the State of South Carolina, has a practice which includes significant work as a neutral in either mediation or arbitration, has prior experience with EIFS litigation and the issues presented in this litigation, has a reasonable hourly rate for service as a neutral, and is willing and available to serve. The Parties are directed to select one of these two candidates and make arrangements for him to serve as the Special Master. In the event the Parties cannot agree or otherwise fail to make suitable arrangements, the Court will choose one of these two candidates to serve in this capacity.

NOW, THEREFORE, ON THE BASIS OF THE FOREGOING FINDINGS OF FACT, THE COURT HEREBY MAKES THE FOLLOWING:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the Parties and the subject matter of this proceeding.

2. Pursuant to Rule 23(a) and (c) of the South Carolina Rules of Civil Procedure, the conditional certification of the settlement Class is made final with the Class defined as:

> All Persons who, as of the Notice Date, own or owned a Structure on which a Dryvit EIFS was installed during the Class Period.

3. The Court finds that by virtue of the Settlement Agreement and concessions and agreements of the Parties therein, the requirements of Rule 23(a) of the South Carolina Rules of Civil

Procedure are satisfied and a class action is an appropriate method for resolving the disputes in this litigation.

4. The named Class Representatives are Timothy and Jane Treon, P. Jennings Scearce and Stephen Christian.

5. A Bar Order is necessary and appropriate to implement the terms of the Settlement Agreement. The consideration provided by the Settling Defendant to the Class in the Settlement Agreement constitutes adequate consideration for a full Release of Settling Defendant by the Class and entitles Settling Defendant to complete peace to the extent practical as to those Class Members who do not exclude themselves or pursue claims pursuant to Section 6.2(c) of the Settlement Agreement. Moreover, this Court already has devoted considerable resources and time to address the claims of the Class. As a result, the Parties and the Court wish to avoid further litigation and desire full, final and complete resolution of this Action. A Bar Order will facilitate this result and is a reasonable means for doing so.

6. The Court grants final approval to the Settlement Agreement as being fair, reasonable and adequate, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure.

NOW, THEREFORE, ON THE BASIS OF THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Motion for Final Approval of the Settlement Agreement is **GRANTED.**

2. This Court authorizes distribution directly to Class Members by Settling Defendant of those amounts calculated by reference to square footage of Dryvit EIFS installed on individual Structures as provided in the Settlement Agreement. Except for costs and expenses incurred directly by Settling Defendant, the remainder of the consideration, described in Paragraph 30 above, shall be paid to Class Counsel c/o Gregg Alford, Esq. for distribution as authorized by this Court pursuant to a separate order from this Court. This Court has previously

authorized distribution of $82,000.00 to Intervening Class Counsel by Settling Defendant. This amount will be credited by the Court to Class Counsel in considering any amount awarded for compensation, fees and expenses.

3. Those Structures listed on Exhibit A to this Order and Judgment are excluded from this Class Action and the Settlement Agreement.

4. Except as provided to the contrary in the Settlement Agreement, costs and expenses of the Special Master shall be borne equally by Plaintiffs and Settling Defendant.

5. The Motion for a Bar Order is **GRANTED**. Except for claims filed pursuant to Section 6.2(c) of the Settlement Agreement, all Settlement Class Members are permanently barred and enjoined from (i) filing, commencing, prosecuting, intervening in, participating in as Class Members or otherwise, or receiving any benefits or other relief from any other lawsuit, arbitration or administrative, regulatory or other proceeding or order in any jurisdiction based on Settled Claims against Released Parties, and (ii) organizing, or attempting to organize, Settlement Class Members, or any of them, into a separate class for purposes of pursing as a purported class action (including by seeking to amend a pending complaint to include class allegations, or by seeking class certification in a pending action in any jurisdiction) any lawsuit or other proceeding of any kind against a Released Party based on Settled Claims. The Court finds that issuance of this permanent injunction is necessary and appropriate in aid of the Court's jurisdiction over the Action and to protect and effectuate the Court's Final Order and Judgment.

6. This Action and all claims, rulings and motions against the Settling Defendant are dismissed with prejudice, but the Court shall retain 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.

7. Except as provided to the contrary in the Settlement Agreement or this Order and Judgment, all Parties are to bear their own costs.

AND IT IS SO ORDERED this 9th day of June, 2010.

The Honorable J. Mark Hayes II
Beaufort County Court of Common Pleas

Exhibit A
Excluded Structures (Opted Out)

1. McClean, Gordon
72 Full Sweep
Hilton Head Island, SC 29928

2. Torjussen, Martin P.
7 Buckfield Lane
Hilton Head Island, SC 29928

3. Thorne, Katherine F. and John C.
15 Ashley Court
Columbia, SC 29204

4. Oppenheimer, Stanton T.
360 Long Cove Dr.
Hilton Head Island, SC 29928

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE CIRCUIT COURT
Timothy J. Treon and his wife, Jane Treon, and P. Jennings Scearce and Steven Christian individually, and on behalf of other similarly situated in the State of South Carolina, Plaintiffs, vs. Dryvit Systems, Inc., Defendant.	Case No. 2002-CP-07-1377 **WILLIAM DIXON ROBERT III'S RESPONSE TO RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING**

In response to this Court's Rule to Show Cause and Order for Accounting dated June 1, 2012 ("the Court's Order"), William Dixon Robertson III ("Mr. Robertson"), respectfully responds and alleges as follows:

1. This Court lacks *in personam* jurisdiction over Mr. Robertson in this action, to which Mr. Robertson is not a party and was relieved as counsel by this Court.

2. No process has been issued in this case—Mr. Robertson was served with no summons—and no action for accounting has been filed and served in this matter. To the extent this Court is attempting to exercise personal jurisdiction under the Rules of Professional Conduct, Mr. Robertson respectfully submits that the Supreme Court of South Carolina has exclusive jurisdiction to enforce those Rules.

3. In its Order, the Court recognized that an issue of fact exists concerning whether the fees that were paid to former Class Counsel were paid for work in this case, known as *Cardamone*, or in another case in Tennessee, known as *Posey*. The court said:

> One theory proffered by Original Class Counsel is that the monies were paid solely for the representation of Posey Objectors William and Allison Deloach. Another theory is that it was for work done for the Posey class. However, from the documents in the record in this case, one can reasonably conclude that the payments were based on Original Class Counsel's status as being named "Class Counsel" and the agreement to compromise and ultimately dismiss this case; . . ."

See Rule to Show Cause, p. 8 of 11. However, the Court has erroneously and improperly decided that question of fact when it makes its own "reasonable conclusion" from the documents in this case. Accordingly, while Mr. Robertson believes any hearing pursuant to the Court's Order should not be held until the factual determination has been made by a jury, as discussed below, Mr. Robertson respectfully submits this Court should recuse itself from any such hearing on the grounds that it has already decided one or more factual issues to be determined by the triers of fact, not this Court.

4. Mr. Robertson is informed and believes that the only testimony before this Court, in the form of his affidavit previously filed in this action, is that any fees paid to Mr. Robertson were earned in *Posey.* However, because this Court has acknowledged the existence of a question of fact, which is presently pending in another related proceeding, Mr. Robertson is entitled to have this question of fact determined by a jury in accordance with due process and the applicable Rules of Civil Procedure.

5. In that regard, Mr. Robertson submits that the procedure set forth in the Court's Order fails to provide the safeguards of due process in connection with the testimony to be elicited from Mr. Robertson and other Original Class Counsel. For example, the Court's Order makes no provision for participation by any counsel for Mr. Robertson or for the calling of any witnesses or introduction of evidence by Mr. Robertson. Further, this Court's Order improperly

places the burden of proving that the fees were not earned in the *Cardamone* case on former Class Counsel rather than upon the accusing parties seeking the relief.

CONCLUSION

The Court should dismiss and withdraw the Rule to Show Cause and deny the Plaintiffs' motion until a jury in another proceeding has made the necessary factual finding for it to proceed. The Court's Order improperly decides a question of fact based on its own "reasonable conclusion" from the documents in this case and, accordingly, in the event the Rule to Show Cause proceeds, this Court should permit another judge to preside over same. Further, the Court's Order improperly denies former Class Counsel a trial before a jury for that issue of fact to be decided and due process in that factual determination. Finally, the Court's Order improperly attempts to assert *in personam* jurisdiction over former Class Counsel over this disputed factual issue.

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Attorneys for Defendant
William Dixon Robertson III

July 17, 2012

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2002-CP-07-1377
	)	
TIMOTHY TREON, AND HIS WIFE, JANIE TREON, P. JENNINGS SCEARCE, AND STEVEN CHRISTAIN, individually and on behalf of others similarly situated in the State of South Carolina,	)	
Plaintiffs,	)	**NOTICE OF SPECIAL APPEARANCE AND RETURN TO RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING AND MOTION TO QUASH AND/OR DISMISS SAME**
vs.	)	
DRYVIT SYSTEMS, INC.,	)	
Defendant.	)	

COME NOW the undersigned counsel, in a special appearance on behalf of non-parties Timothy W. Bouch, W. Jefferson Leath, Jr., and Michael S. Seekings (herein collectively referred to as "Movants"), pursuant to SCRCP Rule 12(b), and respectfully move this Court to quash and/or dismiss the Rule to Show Cause and Order for Accounting (hereinafter referred to as "Order" or "Rule to Show Cause") pending in the above captioned action ("Lawsuit"). Specifically, the Movants would show as follows: (1) this Court lacks subject matter jurisdiction; (2) the Court lacks personal jurisdiction over Movants; (3) the Movants have not been properly served with a Summons and Complaint; (4) venue is improper; and (5) the Order fails to state facts sufficient to constitute a cause of action upon which the relief might be granted by this Court. Accordingly, under Rule 12(b) SCRCP, the Order should be quashed and the matter dismissed.

In support of this Motion, Movants rely upon and incorporate by reference herein, all pleadings on record with the court at the time of the hearing on this matter as well as any memoranda or supporting documentation that may be submitted to the Court at the time of argument.

I. No Subject Matter Jurisdiction

Dismissal Pursuant to Rule 12(b)(1)

In its Order and Judgment Granting Final Approval of Settlement Agreement (herein after the "Settlement Order") in this case, the Court ordered, "This Action and all claims, rulings and motions against the Settling Defendant are dismissed *with prejudice*, but the Court shall retain 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." Settlement Order, p. 22, para 6 (*emphases added*). Since the Action has been dismissed and the only jurisdiction that remains involves people other than these Movants and issues other than those involved in the Rule to Show Cause, this Court has, by its own action and otherwise by the operation of law, divested itself of the any jurisdiction to proceed in this the matters involved in the Order.

Beyond the absence of the Court's jurisdiction as set forth above, the Court has no jurisdiction over the Movants such that they could be required to appear for the purposes of an accounting or for the purposes of ordering them to forfeit their money. None of the Movants are parties to this Lawsuit, nor has any action been taken to make them parties (which would be impossible, given the dismissal of the Action as set forth above). Despite those facts, the Court has sought – through its Order - to require Movants to appear in Spartanburg County for the

ultimate purpose of causing Movants to relinquish and pay monies to the Court, for the benefit of the Plaintiffs. See, Order, p. 11.

The Court's Order seeks to establish some jurisdictional base by stating that it "believes a sufficient showing has been made for it to invoke its powers under SCRCP Rule 23 and its *inherent* judicial powers to issue this Rule to Show Cause and Order for Accounting." Order, p. 2 (*emphasis added*). The Order provides limited authority in support of some jurisdictional base for the actions attempted to be taken against Movants. See, Order, p. 9. However, a review and proper analysis of the authority relied upon by the Order fail to establish any authority for this Court to compel Movants to appear in this action for the purpose of relinquishing any rights or moneys to the court.

The Court first cites State v Brantley to suggest the Movants can be compelled to appear before it because the Movants are "officers" of the court. See, Order, p. 9. However, nothing in State v Brantley granted a court jurisdiction to hail any officer of the court for the purpose of having that officer defend his right against involuntary forfeiture of property. To the contrary, the officer of the court in that case, a sheriff producing documents at a criminal sentencing hearing, specifically admitted to having already waived jurisdiction. The Court of Appeals' sole issue of review related to the right of the trial court to then hold the officer in contempt for failing to appear. See, State v Brantley, the 279 S.C. 215, 305 S.E.2d 234 (1983). Not only does this case not grant the Court subject matter jurisdiction, none of the subsequently cited authorities of the Court's Order offer a remedy to this jurisdictional problem.

In further support of its premise that the Court has authority over Movants for the purposes described above, the Order also cites to Rule 3.4(c), RPC, Rule 407, SCARC. The

Order indicates that Rule prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal and, therefore, the Movants are obligated to appear for the purposes stated in the Order. See, Order, p. 9. However, Rule 3.4 is not a jurisdictional rule. Rule 3.4 provides guidance to attorneys in the "Fairness to Opposing Party and Counsel" as indicated in the title of the Rule. Id. The Rule specifically states, "A lawyer shall not: ... (c) knowingly disobey an obligation under the rules of a tribunal, *except for an open refusal based on an assertion that no valid obligation exists*; ...." Id., at (c) (*emphasis added*). Even if the Rule created any jurisdictional ground, which it does not, Movants are not lawyers in the action who have any duty to the opposing party and counsel. Therefore, pursuant to the Rule, Movants maintain that *no valid obligation* exists to compel their attendance before the court in a proceeding that would effectively make them a party in the action.

Finally, the Court relies on Rule 1.15(d), RPC, Rule 407, SCARC for the premise that a lawyer shall promptly render a full accounting regarding contested property. See, Order, p. 9. However, that Rule is also not a jurisdictional rule. Rule 1.15 addresses a lawyer's relationship with clients, specifically the safekeeping of a client's property. See, Rule 1.15(d), RPC, Rule 407, SCARC. In the instant Order, the money which the Court seeks to exercise jurisdiction over was never the property of any party in the Lawsuit. Instead, the money the Order seeks to exercise control over relates solely to attorneys' fees which Movants were paid from the law firm of Doffemyre, Shields, Canfield, Knowles &Devine, LLC, relative to services provided in a separate piece of litigation, the *Posey* case. (See Affidavit of Everette L Doffermyre, attached hereto as Exhibit "A" and previously marked as an Exhibit at the Hearing on the Plaintiffs' Motion for the Rule to Show Cause). To the extent the Order seeks an accounting of other funds, such as those received by, or in connection with the settlement of the Original Class

Representatives individual claims, the evidence previously placed in the record of this case by Dryvit demonstrates that those funds were never the property of the Plaintiffs in this case. (See Affidavit of Kenneth J. Nota, attached* as hereto as Exhibit "B" and previously made a part of the record in this case; *NOTE: the affidavit is marked "Confidential" and because of that will not be filed or published until the undersigned counsel receives further direction from the Court). In short, the Rule dealing with the accounting of funds, as cited by the Court, cannot provide a jurisdictional basis in this case for these Movants to be required to appear in this case with the risk of a forfeiture of their funds.

In addition to the grounds set forth above, other parties who have been subjected to the Order have filed objections to this Court's attempt to exercise subject matter jurisdiction in this matter and these Movants adopt and incorporate their arguments and citations of authority as additional grounds for the quashing and/or dismissal of the Order and related requirements, under the requirements of SCRCP Rules 12(b)(1).

II. No Personal Jurisdiction, Rule 12(b)(2); Insufficiency of Process and Service of Process, Rule (12)(b)(4)&(5)

However designated, an action for the forfeiture of money against one citizen, brought by or in favor of another citizen, is a civil action that is subject to this State's well established rules of civil procedure. The first three of those rules provide that the rules, as a whole, govern the procedure in all South Carolina courts in all suits of a civil nature, whether legal or equitable, S.C.Rule Civ.P. 1; that "there shall be **one** form of action known as a 'civil action,'" S.C.Rule Civ.P. 2 (emphasis added); and that "[a] civil action is commenced by filing and service of a summons and complaint." S.C.Rule Civ. P. 3(a). Thus, while designated a Rule to Show Cause,

the action brought against these Movants to seek the forfeiture of their property, for distribution to the Plaintiffs in this case, is subject to all of those rules and provided for in, among others, the South Carolina Rules of Civil Procedure.

The Order itself provides that it "is to be served upon the Original Class Counsel and the Original Class Representative in accordance with Rule 4 of the SCRCP. That rule requires that a "Summons", of a specified form, be issued in a certain way and that it be served together with a Complaint in a specified way. Contrary to the Rules of this State, and to the terms of the Rule to Show Cause Order itself, that service did not take place as it relates to the Movants and they did not, and do not, waive the requirements of those Rules or that Order.

Each of the three Movants (Jeff Leath, Tim Bouch and Mike Seekings) were hand-delivered a similar document on June 22, 2011. A sample of what they each received is attached as Exhibit "C" (the only difference being the letters were individually addressed to each respective individual). As is clear, there was no Summons of any kind attached to it or associated with the documents they received. The "Affidavit of Service" filed in connection with each, shows that on June 22, 2012, the person delivering the documents performed such "service" as was accomplished by "delivering a true copy of the COVER LETTER, RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING .... (upon each named recipient) at the address of: Leath, Bouch & Seekings, LLP, 92 Broad Street, Charleston, SC 29401 and informed said person of the contents therein". (See documents collected as Exhibit "D").

Rule 65(f) of the South Carolina Rules of Civil Procedure provides other direction as to these matters, stating in part that: "No ... remedial writ shall be granted without notice of motion for the writ to the adverse party, *which notice shall be served, together with the summons and complaint*, in the event no summons and complaint have previously been filed and served in the

action, upon the adverse party *in accordance with the provisions of Rules 4 and 5....*" SCRCP 65(f)(*emphasis added*). The "Notes" to the Rule clarify, "An action may no longer be commenced by the service of an order or 'rule to show cause' only. Thus, Rule 65 makes it clear that the various remedial writs are not causes of action but remedies or relief, the right to which must be supported by the law and the facts. As mandated by Rule 65, service is not properly executed unless Rules 4 and 5 are satisfied, and the Court lacks personal jurisdiction.

The absence of a valid Summons and proper process is no mere technical denial. With the commencement of a forfeiture action utilizing proper civil and constitutionally recognized procedures, the rights and protections afforded by the Rules of Procedure are invoked. Otherwise, such rights and protections will or might be denied. There was, however, no Summons and Complaint accompanying the Order as it relates to the Movants in this Lawsuit. Nor have the Movants been properly served in this Lawsuit pursuant to Rules 4 and 5 of the SCRCP. The Movants expressly do not consent to the jurisdiction of this Court. For these reasons, there has been an insufficiency of process; there has been an insufficiency of service; this Court is without personal jurisdiction over the Movants; and as a result of each and all of these deficiencies, the Order should be quashed, and the proceeding dismissed against Movants pursuant to SCRCP Rules 12(b)(2), (4) and/or (5).

III. Venue is Improper as Against Movants,

Rule 12(b)(3)

Counsel for each of the Movants can and does state for this record that each of his clients lives and has his place of business in Charleston County, South Carolina - and conversely, does not live or have any place of business in Spartanburg County. Nevertheless, this Court has

attempted, through this Order, to require each of these individuals to appear in Spartanburg County to defend themselves against claims for the forfeiture of their property. Indeed, under the process outlined in the Order, they will be required to come into this County and carry the burden of showing why the property should not be taken from them and given to others!

Pursuant to S.C. Code Ann. §15-7-30, an action must 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. As stated above, none of the Movants reside in Spartanburg County and there is no indication that the most (or any) substantial portion of the alleged act or omission giving rise to the cause of action occurred in Spartanburg County. The only known connection between this case and Spartanburg County is that the Judge who issued the Order resides here. With due respect, that fact cannot be used to result in the disregard the rules controlling "venue" in this State.

Because Spartanburg County is neither the county where any of the Movants reside, nor is it the where the most (or any) substantial portion of any alleged acts or omissions occurred, Spartanburg County is an improper venue for this action. As a result, The Order should be quashed, and the proceeding dismissed against Movants pursuant to SCRCP Rules 12(b)(3).

IV. Failure to State Facts Sufficient to Constitute a Cause of Action, Rule 12(b)(6)

Rule 12(b)(6)provides for the dismissal of an action where there is a "failure to state facts sufficient to constitute a cause of action." The Order fails to set forth a valid claim for the recovery of money from the Movants and should, therefore, be quashed and/or dismissed.

There is no cause of action recognized in this (or any other) 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, 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 in that now dismissed lawsuit. While this Court seemingly looks to the case of Premium Investment Corp, 282 S. C. 464, 324 S.E. 2d. 72 (1984) as the basis for the assertion of some claim for money against these Movants, they submit that such case is factually, procedurally and otherwise legally distinguishable from this action and does not, therefore, provide any such support. Movants do submit, however, that the manner in which that case was pursued is insightful on the question of how a cause of action might be asserted if the circumstances warranted. Simply stated, the Premium Investment case involved a new and separate civil action, instituted by an allegedly injured party, in which the defendants were made parties to the action and were given all of the rights afforded by Due Process. That is, quite clearly, distinguished greatly from the current action, as described above.

Even if these Plaintiffs could assert some claim in this action for a forfeiture of money (which Movants deny), the Rule itself demonstrates those claims have clearly been barred by the applicable statute of limitations. See, S.C. Code Ann. § 15-3-530. The Order of this Court denying Dryvit's Motion for Summary Judgement, dated January 7, 2009, which is incorporated into the Rule to Show Cause, affirmatively demonstrates that the facts and circumstances that are stated to form the basis of the Rule to Show Cause and resulting forfeiture action, were known more than three years before the issuance of the Order. As a result, any claims by the Plaintiffs in this action for constructive trust, forfeiture of funds, accounting, or any other relief are barred by the statute of limitations.

For these and other reasons set forth within this Memorandum, within the related Motions of others (which are incorporated) and to be presented hereafter at any hearing or by

supplemental brief, the Rule and Order fail to state a cause of action recognized in this State and should be quashed and/or dismissed, pursuant to the requirements of Rule 12(b)(6).

V. Failure to Join a Party Under Rule 19, Rule 12(b)(7)

In the Order, the Court bases its decision to issue a Rule to Show Cause on the Court's perception of an alleged "agreement" between Movants (among others) and Dryvit, the defendant in the Lawsuit, wherein Movants (and others) allegedly "agreed to settle" individual cases of certain members of the Plaintiff class in exchange for a "significant attorneys' fee." Order, p. 5. The Order sets up a narrative of the case background replete with references to the alleged "agreement". See, Id., p. 5-8. The Order also incorporates by reference the Court's prior Order Denying Defendant Dryvit's Motion for Summary Judgment ("Summary Judgment Order"), that Order also being replete with allegations of a purported "agreement." Order, p. 2, fn. 2. While these Movants vehemently deny the existence of any such alleged "agreement" they submit that since such an alleged "agreement" forms the premise for this Rule to Show Cause proceeding, that the action cannot and should not proceed in the absence of the other party to the alleged "agreement". Since that party, Dryvit, has already been released from this action and cannot be brought back into the proceeding, the Movants submit (subject to their defense that they have not themselves been made a party to the action) that the claims asserted against them cannot and should not go forward in the absence of an indispensable party. Accordingly, these Movants submit that the Rule and related Order should be quashed and/or dismissed under the requirements of Rules 12(b)(7) and 19.

VI. Another Action is Pending Concerning this Claim, Rule 12(b)(8)

As this Court knows, an action has been previously filed and is currently pending, involving the same claims against these Movants. (See Exhibit "E"). In that lawsuit, over the objections of the Defendants in that case (the Movants in this case), this Court has issued an Order indicating that it will certify a Class to address the claims asserted in that action (See Exhibit "F"). While these Movants contest each of the actions on the basis that neither has merit or should be allowed to proceed, they do object to the duplicity of the actions and submit that the Court should quash and dismiss the Order, based upon the protections afforded by Rule 12(b)(8).

VII. Other Grounds for Dismissal

Other persons who have been the subject of the Order have filed returns, objections and motions relating the jurisdiction, process and claims attempted to be pursued in the matter. To the extent they have stated grounds for quashing or dismissing this Order and related Orders that are in addition to those asserted herein by the Movants, these Movants adopt and incorporate those arguments, as though they were expressly set forth in this Memorandum.

VIII. Conclusion

For the reasons set forth above and pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure and other applicable provisions of law, Movants respectfully request the Court vacate, quash and/or dismiss this Rule to Show Cause and Order for Accounting.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: _____
KENT T. STAIR

State Bar No.: 14029
M. ELIZABETH JOWERS
State Bar No.: 68288

Attorneys for Defendants Leath Bouch & Crawford, LLP, W. Jefferson Leath, Jr., and Michael S. Seekings

40 Calhoun Street, Suite 400
Charleston, SC 29401-3531

.....

843.727.0307

County of Fulton
State of Georgia

AFFIDAVIT OF EVERETTE L. DOFFEMYRE

The undersigned, being duly sworn, hereby swears and deposes as follows:

1. My name is Everette L. Doffemyre; I am over 21 years of age; and am otherwise competent to give this affidavit.

2. I am now, and have been since 1973, licensed to practice law in the State of Georgia. I am now, and have been since my admission, a member in good standing of the bar of the State of Georgia. I have also been admitted to practice in various trial and appellate divisions of the Federal Court system, as well as in various states, on a pro hac vice basis. Included in that last group of admissions was the order of the Tennessee court authorizing my participation in the case filed in the Circuit Court for Jefferson County, Tennessee, known as *Bobby R. Posey, et al v. Dryvit Systems, Inc.*, Case No. 17, 715-IV (hereinafter referred to as "Posey" or "Posey Case").

3. I graduated from the University of Virginia with a B.A. in Economics in 1970 and with a J.D. degree in 1973. Over the last fifteen years I have been deeply involved with various aspects of the University of Virginia, including serving as president of the Board of Mangers of its Alumni Association and

EXHIBIT A 0171

serving on the Board of Trustees of its College of Arts & Sciences. I currently serve as the Vice-Chair of the University's Capital Campaign.

4. After graduating from law school, I began my practice with the Atlanta firm of Kilpatrick Cody, Rogers McClatchy and Regenstein (now known as Kilpatrick Stockton LLP). I was elected to partnership in December, 1979, effective February 1, 1980.

5. In 1988 I withdrew from the Kilpatrick firm and established the Law Offices of Everette L. Doffermyre. In 1990, two of my colleagues from the Kilpatrick firm and I formed the firm now known as Doffermyre Shields Canfield & Knowles, LLC. I am proud of the fact that despite our small size (only 10 attorneys), the Firm has for the past number of years been ranked by *Chambers USA* as one of the seven best litigation firms in Georgia.

6. I have practiced with my Firm since it was formed and currently serve as the Manager, akin to "managing partner", of the Firm. I practice full-time. Currently, my practice is focused on business litigation. However, I have practiced extensively in past years in consumer class actions. I have served as lead or co-lead counsel on behalf of consumers in a number of nationwide and statewide class action cases. I am experienced in the conduct of class action cases and familiar with the manner in which counsel are compensated in such actions.

7. I have been fortunate to receive recognition from various entities that evaluate the competency of attorneys. I hold (and have held for many years) the highest rating given by Martindale-Hubbell. Other distinctions of note include selection by *James Magazine* as one of the "100 Best Lawyers in Georgia," as one of "Georgia's Elite" by *Georgia Trend* magazine; and as one of Atlanta's "litigation stars" by *Benchmark*. I have been designated as a "Best Lawyer" and as a "Super Lawyer" by those respective rating services.

8. Among my professional speaking experiences, I have twice had the privilege of being a presenter at seminars for state judges dealing with issues involving class actions. When the American Bar Association met in Atlanta in August 2005, I was invited by Judge Ben Tennille, of the North Carolina Business Court, to speak to the judges on state class actions. In 2005 I was invited by the Brookings Institute in Washington, D.C. to participate in a conference it was hosting for state court judges, also dealing with state class actions. In 2007 and 2008, I served on the ABA's Task Force on the Quality of mediations and Arbitrations.

9. During the early part of the last decade, Gary Mason, a Washington D.C. attorney, and I (and our respective firms) served as Co-Lead Counsel for the plaintiffs in the Posey Case.

10. The Posey Case was filed on November 14, 2000 as a class action against Dryvit Systems, Inc. ("Dryvit"). As certified, and with certain exceptions set forth within the definition established by the court, the Class included all persons who, as of June 5, 2002, owned homes, in any State other than North Carolina, on which Dryvit EIFS had been installed after January 1, 1989. The Class thus included residents of the State of South Carolina who owned homes on which EIFS had been installed during the Class Period.

11. Prior to the Posey Case, Mr. Mason and I (and a number of other counsel) had fought for four years against Dryvit in the North Carolina class action that was litigated in the North Carolina Business Court. That litigation was intense and frequently contentious; involved a tremendous amount of discovery; and was settled only on the eve of trial.

12. The Posey Case also resulted, ultimately, in a class-wide settlement. The settlement was reached after extensive and extended negotiations with Dryvit's counsel. The settlement was of course subject to court approval. Mr. Mason and I took the lead in the negotiations.

13. The settlement was preliminarily approved by Judge O. Duane Sloane on April 21, 2002. Finding the Settlement Agreement to be the result of good faith, arm's length settlement negotiations between competent and experienced

counsel for both sides, he preliminarily approved the terms of the Settlement Agreement, subject to consideration of objections, arguments and evidence presented before or at a Fairness Hearing that he set for October 1, 2002.

14. At the Fairness Hearing, lawyers from South Carolina raised certain objections to the Settlement Agreement and presented strong arguments as to why the terms of the Settlement Agreement, as previously negotiated and preliminarily approved, should be revised to make the proposed settlement more favorable to the members of the Class. As a result of those and other objections and arguments presented at the hearing, Judge Sloane withheld his approval of the Settlement Agreement, pending further negotiations between Class Counsel and Dryvit.

15. A group of the South Carolina attorneys, led by Jeff Leath, participated actively and effectively in the negotiations with Dryvit that followed the initial October 1 Fairness Hearing. The South Carolina attorneys were knowledgeable about the issues and very effective advocates for specific enhancements to the proposed settlement. As a result of their efforts, working in conjunction with Mr. Mason and me, substantial enhancements to the settlement were achieved. These included, as I recall, increasing the "cash out" recovery from $6.00 to $7.00 per square foot for eligible recipients; adding provisions to deal with the emerging issue of mold; making it easier for Class Members to obtain a "cash out" if they preferred rather than repairs and a warranty. These are some but not all of the

issues with respect to which the involvement of South Carolina counsel made material and highly beneficial enhancements to the settlement ultimately approved by Judge Sloane.

16. The Settlement Agreement, as revised, was presented to Judge Sloane and after due consideration and a further hearing, he entered an Order and Judgment Granting Final Approval of Settlement on January 14, 2003. In his Order, Judge Sloan awarded attorneys' fees and expenses to Co-Lead Counsel and Counsel for the Class in the amount of $11,600,000.

17. In Paragraph 15 of his Order, a copy of which is attached as Exhibit "A", Judge Sloane acknowledged the efforts of those attorneys who worked diligently following the October 1, 2002 hearing. Judge Sloane stated:

> These negotiations and discussions have resulted in 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.

While Judge Sloane did not refer by name to the South Carolina counsel who worked with Mr. Mason and me to secure these enhancements, I can state without qualification that the attorneys most responsible for securing the enhancements were the South Carolina counsel.

18. In recognition of their very substantial contributions to improving the Settlement Agreement, Mr. Mason and I agreed to share with the South Carolina counsel led by Mr. Leath $600,000 from the attorneys' fees awarded to Class

Counsel. In my opinion, their contributions to the Settlement Agreement fully merited this amount.

19. In summary, the South Carolina attorneys lead by Jeff Leath provided extremely valuable professional services to the Posey Class, which resulted in significant enhancements to the terms of the Settlement Agreement. Their efforts directly and significantly benefitted the Class and justified their receiving $600,000 from the court-awarded attorneys' fees.

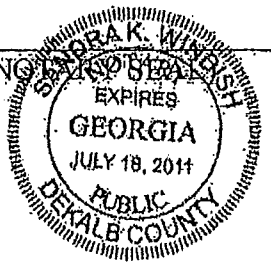
FURTHER AFFIANT SAYETH NOT.

Everette L. Doffemyre

Sworn to and subscribed before
me this 25th day of March 2010

Notary Public for the State of Georgia
My Commission Expires:

(AFFIX NOTARY SEAL)



2559358v.1

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*Also member Georgia Bar
**Also member Virginia Bar
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June 8, 2012

Via Personal Service
W. Jefferson Leath, Jr, Esq.
Leath, Bouch & Seekings, LLP
92 Broad St.
Charleston, SC 29401

Re: Timothy Treon et al v. Dryvit Systems, Inc. et al
Civil Action No.: 2002-CP-07-1377

Dear Mr. Leath,

Enclosed please find a copy of a Rule to Show Cause and Order for Accounting in the above referenced matter. This Order is being served upon you as the Original Class Counsel. Pursuant to this Order, you are required to appear before Judge Hayes on October 1, 2012 in Spartanburg, SC. Thank you for your attention to this matter.

Sincerely,
ALFORD, WILKINS & COLTRANE, LLC

Amanda DuBose
Paralegal

Encl.
Cc Thomas Williams, Esq.
Sam Phillips, Esq.
Samuel Outten, Esq

EXHIBIT C

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT TIMOTHY TREON and his wife, JANE TREON, P. JENNINGS SCEARCE and STEVEN CHRISTAIN individually and on behalf of others similarly situated in the State of South Carolina, Plaintiffs, V. DRYVIT SYSTEMS, INC., Defendant.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Civil Action No.: 2002-CP-07-1377 **RULE TO SHOW CAUSE and ORDER FOR ACCOUNTING**

2012 JUN -5 PM 1:42
BEAUFORT COUNTY, S.C.
JILL S. ROSENEAU
CLERK OF COURT

This matter is before the Court on Plaintiffs' Motion for an Accounting of attorney fees allegedly received by certain Class Counsels and for benefits paid to prior Class Representatives which were never disclosed to or approved by this Court. A hearing on the motion was conducted on March 31, 2010 and the Court's initial decision to grant the Plaintiffs' motion was announced at that time. After being appointed as the judge assigned with the responsibility of cases 2008-CP-07-3145 and 0774,[1] the Court delayed further action in this matter so that a global resolution of all three cases could be explored. No global resolution has occurred and this Court's present belief is that at this time proceeding with this Rule to Show Cause is proper.

The Plaintiffs seek an accounting of any attorneys' fees paid to or otherwise received by Original Class Counsel because of their status as Class Counsel in the present matter. Plaintiffs also seek an accounting of any benefits paid to or otherwise received by

[1] These two cases involve claims of professional malpractice and breach of fiduciaries arising from the present litigation.

Original Class Representatives because of their status as Class Representatives. The Plaintiffs also seek to have any fees and/or benefits received by Original Class Counsel and Original Class Representatives placed in a constructive trust for the benefit of the class.

The record of this case is substantial in its size. The vast majority of the record in this case, however, does not relate to the substantive product liability claim asserted in this lawsuit against the Defendant. But rather, the vast majority of the record relates to the use of a South Carolina Circuit Court judge's order granting class certification as a sword against a sister state's attempt to finalize a nationwide class action settlement and the subsequent conduct of Original Class Counsel and Original Class Representatives.

Based on the record of this case, this Court believes a sufficient showing has been made for it to invoke its powers under SCRCP Rule 23 and its inherent judicial powers to issue this Rule to Show Cause and Order for Accounting.

Background[2]

This class action lawsuit was commenced with the filing of a summons and complaint on August 12, 2002. It was originally captioned John and Sally Cardamone, et al. v. Dryvit Systems, Inc., et al. Attorneys Timothy W. Bouch; William M. Bowen; Francis E. Grimball; W. Jefferson Leath, Jr.; George E. Mullen; W. Dixon Robertson, III; Michael S. Seekings; and Robert L. Wylie, IV originally served as class counsel in this matter (hereinafter they will be collectively and individually referred to as "Original Class Counsel"). Original Class Counsel and Original Class Representatives moved for an order from the Honorable Thomas Kemmerlin, Jr. certifying a class in this action. As defined by

[2] The factual basis of this order includes and is hereby incorporated by reference, the facts found in this Court's prior order dated January 7, 2009.

the complaint, the Cardamone Class consisted of current and former owners of certain residential property in South Carolina clad with an Exterior Insulation and Finish System[3] manufactured by Defendant Dryvit Systems, Inc. who were also "members" of a purported nationwide class action settlement in a Tennessee action known as Posey, et al. v. Dryvit Systems, Inc., Tennessee Case No. 17,715.

After hearing the certification motion, Judge Kemmerlin certified the Cardamone class and specifically opted it out of the Posey action in Tennessee by Order dated September 3, 2002. (the "September 2003 Order"). This Court's opinion is that Judge Kimmerlin's Order placed Original Class Counsel and the Original Class Representatives in a representative capacity for absent class members and imposed upon them the fiduciary duties and Rule 23 obligations. Also, the September 2003 Order expressly required that a notice plan be submitted within 30 days. No notice plan was ever submitted by Original Class Counsel or Original Class Representatives.

Even though no notice plan was ever pursued by Original Class Counsel, on October 1, 2002, members of Original Class Counsel attended a hearing the Posey court conducted to consider the fairness of the purported nationwide settlement.[4] The Tennessee Court (The Posey Court) was made aware of the South Carolina's court decision to certify South Carolina class action when the Original Class Counsel spoke in opposition to the proposed settlement during the fairness hearing.[5] After participating in

[3] Exterior Insulation Finish Systems are commonly known as "synthetic stucco" or by their acronym EIFS. EIFS is a relatively new building product that looks very similar to traditional concrete-based stucco, but incorporates an insulation lawyer that traditional stucco does not have.

[4] Posey's purported nationwide settlement sought jurisdiction over EIFS homeowners in every state except for North Carolina due to a state-wide class action settlement Dryvit had entered into earlier.

[5] Frank Grimball, Robert Wylie, and Dixon Robertson - attended that Hearing in Tennessee. Although ostensibly appearing on behalf of two individual objectors, William and Alison DeLoache, Frank Grimball argued against the Posey Settlement on a variety of grounds and he explained that "the entire state of South Carolina at this point, Your Honor, has opted out [of the Posey Settlement]." Posey Hr'g Tr. dated October 1,

certain negotiations with the lawyers in Tennessee, members of the Original Class Counsel attended a second fairness hearing on December 18, 2002, where their support for the final approval of the national settlement was reported to the Posey court. See Dryvit Systems, Inc.'s Evidence in Support of Motion to Dismiss at Tab 4. The Posey Court was also told that with the modifications to the settlement, the Cardamone class was withdrawing its objections to Posey settlement. Hr'g Trans. Dated 12/18/2002 at p. 28, lines 8-18.[6]

The Posey Court issued an order granting final approval to the Posey settlement on January 14, 2003. In that Order, the judge specifically noted the contribution of the South Carolina class counsel in reaching a settlement:

> [Posey] Class Counsel, together with counsel for certain objectors, including those representing a proposed litigation class in South Carolina, have been engaged in numerous substantial discussions and negotiations since the Fairness hearing with Counsel for the Settling Defendant.[7]

The Tennessee Order specifically approved an attorney fee and expense award of $11,600,000.00 to be distributed "among counsel for the Class." January 14th Order at p. 10. That "counsel" included the Order's earlier reference to "counsel ... representing a proposed litigation class in South Carolina." Id. at pp. 8,10. The Order also specifically prohibited class members from participating in other class actions, such as the Cardamone action. Id. at pp. 6, 9.

2002 at p.16, lines 15-17; p.17, lines 6-10. He also argued that "opt-outs are really objectors, but they just had sense enough to go ahead and remove themselves from this situation, avoid this class so that they could effect a full recovery." Id. at p.115, lines 7-11.

[6] Attorney Robert Phillips, who represented the South Carolina objectors Harry and Trudy Creasy was also present at the Second Fairness Hearing. He responded to the claim that the Cardamone class no longer sought to opt-out of the Settlement by informing Judge Slone that his clients were

> intervening in the South Carolina class action. We filed that motion approximately a month ago, and it is not our position that the changes cure the fundamental legal defects that keep this class from being certified, much less a settlement. So I just wanted to correct that representation.

[7] Posey Order dated January 14, 2003 at p.5, ¶15.

Following the issuance of the January 14th Order, Original Class Counsel presented the proposition of the attempted compromise of the Cardamone action to Judge Kemmerlin. During a hearing on February 5, 2003, Michael Seekings of the Mullen, Wylie and Seekings firm, informed the court that:

> [Original Class Counsel] came – we opted out after we came to your Honor and asked for certification of a class in South Carolina. We then went to Tennessee and opted our class out. Participated in additional negotiations with both Dryvit and counsel for the plaintiffs at the direction of the court. The settlement changed. We as our certified class then went to a hearing and told the judge we thought now it is fair. ... Now this class de facto doesn't exist anymore. The Cardamone case underlined has been settled. The Dryvit settlement [in Tennessee] has been changed to the satisfaction of all involved.

In the present litigation, Dryvit was ordered to produce numerous documents including e-mails, letters, settlement agreements and other documents. The Court has reviewed these materials and is satisfied that they are authentic and reflect the ongoing dialogue between Original Class Counsel, Posey Class Counsel and Dryvit Counsel. The Court has also reviewed transcripts of the hearings in Posey and a hearing in front of the Honorable Thomas Kemmerlin, Jr., on February 26, 2003. After such review, it appears to this Court that following the Posey fairness hearing, Original Class Counsel and Dryvit's attorneys and Posey Class Counsel agreed to settle the individual lawsuits of certain Cardamone class members who were represented by Original Class Counsel and pay Original Class Counsel a significant attorneys' fee. See Dryvit Documents Numbers Card 092-094, Dry 0970, CARD 00088, CARD 00072-73; Dry 0277, 0379, 0103, CARD 06727-29, 06739.

After the agreement to settle the Class Representatives' cases and to pay the attorneys' fees to Original Class Counsel, it appears that the present case was allowed to

lie dormant until December 2005. During the nearly three (3) intervening years, Dryvit and Original Class Counsel finalized individual settlements with each of Cardamone's named class representatives.[8]

In an email dated September 29, 2005, Dryvit's counsel reaffirmed the agreement to pay Original Class Counsel a total of $825,000 as an attorneys' fee upon the ultimate dismissal of the Cardamone action. Shortly thereafter, Dryvit moved to Dismiss and Decertify the Cardamone action in South Carolina. Dryvit Documents Number CARD 0128-0129. One of the Original Class Counsel also referenced an agreement between Cardamone and Posey counsel in an email dated April 22, 2004:

> "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 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." Dry0970.

After learning that 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.

[8] In correspondence dated February 5, 2003, Dryvit's counsel confirmed the individual settlement it had reached with class representatives John and Sally Cardamone and acknowledged that the amount "Dryvit has agreed to pay [the Cardamones] 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."

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"). Although most members of Original Class Counsel chose to voluntarily withdraw from this action at that time, attorneys George Mullen and Frank Grimball remained in the action.

By order dated January 18, 2006, this Court allowed Intervening Class Counsel and Misters Mullen and Grimball to act as Class Counsel. (the "January 18, 2006 Order").

The existence of the agreement referenced above regarding the terms of the settlements and the attorneys' fees to be paid to Original Class Counsel were not disclosed to the Court by Original Class Counsel at the February 26, 2003 or December 2005 hearing. However, after Dryvit produced documents, the record reflects that Original Class Counsel have received the $600,000.00 payment promised by the April 22nd email.[9]

Plaintiffs' have asked the court for an accounting of the attorneys' fees promised and/or paid to Original Class Counsel while they were representing the Cardamone class along with the fees related to individual settlements they negotiated for certain class members. At this time, this Court is not requiring disclosure of fees related to individual cases of Class members who were not also named Class Representatives. Nevertheless, this Court is compelled to ascertain why fees of $825,000 were promised to Original Class Counsel which the e-mails and other documents in the record say are conditioned upon the dismissal of this case.

[9] The following checks were provided to the Court: Check issued by Doffermyre, Shields, Canfield, Knowles, & Devine, LLC ("Doffermyre, LLC") to Leath, Bouch & Crawford, LLP ("Leath Bouch") and Mullen Wylie & Seekings on 11/15/2005 for $310,345.00 with notation "Leath and Seekings share of attorney fees"; check issued by Doffermyre, LLC to Leath Bouch on 6/21/2006 for $93,103.00; check issued by Doffermyre, LLC to Leath Bouch for $196,552.00 on 9/18/2006 with notation "Attorneys Fees for Objectors."

Again, none of the payments or arrangements were disclosed to the Court. Further, the different reasons or justifications given by different members of Original Class Counsel made in statements and testimony before this Court compels the Court to inquire further. One theory proffered by Original Class Counsel is that the monies were paid solely for the representation of Posey Objectors William and Allison Deloach.[10] Another theory is that it was for work done for the Posey class.[11] However, from the documents in the record in this case, one can reasonably conclude that the payments were based on Original Class Counsel's status as being named "Class Counsel" and the agreement to compromise and ultimately dismiss this case; again, the substance of which was never presented to Court in accordance with SCRCP Rule 23(c) and (d).

Law/Analysis

This Court finds it has jurisdiction over the Original Class Counsel and the Original Class Representatives sufficient to require them to appear before me to answer the questions raised by the documents produced by Dryvit and the monies they received while they had fiduciary obligations to this Court and the Class. This Court's belief is that the present Order is needed, if for no other reason than to clarify for the record of this case that the South Carolina class action rules have been complied with, so that the integrity of the class action process is maintained.

In this matter, there is evidence that Original Class Counsel participated in the Posey action while representing this Class to which they owed a fiduciary duty. See Premium Investment Corp, 282 S.C. 464, 324 S.E.2d 72. It appears that Original Class

[10] Mrs. Deloach has testified in her deposition that she and her husband had no attorney- client relationship with any of Original Class Counsel.
[11] The final Order in Posey, does not designate any of Original Class Counsel as "Class Counsel" in Posey.

Counsel may have negotiated attorneys' fees for themselves based on a willingness to compromise the prosecution of this action. Original Class Counsel did not disclose to nor have they sought approval by the Court for the payment of any attorneys' fees or for approval of the settlement of the claims of the Original Class Representatives.

The Court therefore finds it necessary to require each member of Original Class 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. Original Class Representatives and Original Class Counsel invoked the jurisdiction of this Court to make themselves the fiduciaries of this Court and the Class under Rule 23 SCRCP and therefore this Court feels it appropriate to exercise its jurisdiction over them.

Furthermore, as officers of the court, Original Class Counsel have an obligation to appear before a circuit court judge seeking their testimony on a pending matter for which their input is required. See State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983) (holding trial court could order sheriff from adjoining county, as an officer of the court, to appear without issuing a subpoena), cf. Rule 3.4(c), RPC, Rule 407, SCACR (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Rule 1.15(d), RPC, Rule 407, SCACR (a lawyer shall promptly render a full accounting regarding contested property). The exercise of this power is enhanced by the operation of Rule 23, SCRCP which grants each trial court broad powers to oversee the conduct of a class action lawsuit and protect the interests of unnamed class members.

Accordingly, this Court finds the issuance and service of an Order and/or Rule to Show Cause appropriate in order to allow the Class to properly account for the benefits, if any, promised and/or paid to Original Class Counsel and the Original Class

Representatives. Additionally, the appearance of Original Class Counsel in this matter allows this court to examine and, if necessary, to correct conduct that is calculated to obstruct, degrade, and undermine the administration of justice. Brandt v. Gooding, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006).

From the information provided to the Court, there appears to be no dispute that Original Class Counsel aided in the settlement of the individual cases of the Original Class Representatives. Those settlements create an appearance of being in violation of South Carolina law.[12] The U.S. Supreme Court has stated: due process requires adequate representation "at all times." *Shutts*, 472 U.S. at 812 (1985):

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 Rules of Civil Procedure "specifically permits the trial court to maintain continual control over class action proceedings." Salmonsen v. CGD, Inc., 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). This allows the trial court, "at any time, [to] impose such terms as shall fairly and adequately protect the interest of the person on whose behalf the action is brought." Rule 23(d)(2), SCRCP. A trial court has a specific responsibility to account for the benefits derived by Class Representatives and Class Counsel in this action in accordance with Rule 23, SCRCP. See Premium Investment Corp. v. Green, 282 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 imposing a constructive trust on any benefits obtained as a

[12] Class representatives may not enter into settlements of their individual claims because of their fiduciary duty to the class. [*Prem. Investment Corp. v. Green*, 324 S.E.2d at 77; *See In re Green*, 354 S.E.2d 557 (S.C. 1987); *Rogers v. U.S. Steel Corp.*, 70 F.R.D. 639 (1976)]

result of a breach of that duty). These obligations are merely specific applications of, and possibly enhancements to, a court's inherent power to protect the legal process in all matters that come before it.

It is therefore Ordered that Original Class Counsel and Original Class Representatives appear before this Court on October 1, 2012 at the Spartanburg County Court House at 9:30 am in Courtroom West-B to be examined and account to this Court for all fees and benefits, if any, received and or promised in connection with this action, specifically as follows:

1) An accounting for the $825,000 referenced herein;
2) An Accounting of all fees received from the settlement of the individual cases of the Original Class Representatives;
3) An accounting of all benefits received by the Original Class Representatives;
4) 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.

This Order is to be served upon the Original Class Counsel and the Original Class Representatives in accordance with Rule 4 of the SCRCP.

AND IT IS SO ORDERED.

J. Mark Hayes, II
Presiding Judge

This 1st day of June 2012

AFFIDAVIT OF SERVICE

State of South Carolina **County of Beaufort** **Common Pleas Court**

Case Number: 2002-CP-07-1377

Plaintiff:
TIMOTHY TREON, ET AL
vs.
Defendant:
DRYVIT SYSTEMS, INC., ET AL

For:
Gregory M. Alford, Esq.
Alford & Wilkins, P.C.
18 Executive Park Rd., Bldg. 1
P. O. Drawer 8008
Hilton Head Island, SC 29938

Received by PROCESS SERVICE, INC. to be served on **W. Jefferson Leath Jr., Esq., Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401.**

I, John R. Gamble, being duly sworn, depose and say that on the **22nd day of June, 2012** at 11:07 am, I:

PERSONALLY served by delivering a true copy of the **COVER LETTER, RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING** with the date and hour of service endorsed thereon by me, to: **W. Jefferson Leath Jr., Esq.** at the address of: **Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401,** and informed said person of the contents therein.

I am over eighteen and have no interest in the above action.

2012 JUN 26 PM 2:38

John R. Gamble
PROCESS SERVER

PROCESS SERVICE, INC.
P.O. Box 20097
Charleston, SC 29413
(843) 577-2355

Our Job Serial Number: 2012001747

Subscribed and Sworn to before me on the 22nd day of June, 2012 by the affiant who is personally known to me.

NOTARY PUBLIC
Commission Expires: 05/14/20

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EXHIBIT D

AFFIDAVIT OF SERVICE

State of South Carolina **County of Beaufort** **Common Pleas Court**

Case Number: 2002-CP-07-1377

Plaintiff:
TIMOTHY TREON, ET AL
vs.
Defendant:
DRYVIT SYSTEMS, INC., ET AL

For:
Gregory M. Alford, Esq.
Alford & Wilkins, P.C.
18 Executive Park Rd., Bldg. 1
P. O. Drawer 8008
Hilton Head Island, SC 29938

Received by PROCESS SERVICE, INC. to be served on **Timothy Bouche Esq., Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401.**

I, John R. Gamble, being duly sworn, depose and say that on the **22nd day of June, 2012** at 11:09 am, I:

PERSONALLY served by delivering a true copy of the **COVER LETTER, RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING** with the date and hour of service endorsed thereon by me, to: **Timothy Bouche Esq.** at the address of: **Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401**, and informed said person of the contents therein.

I am over eighteen and have no interest in the above action.

2012 JUN 26 PM 2:38

John R. Gamble
PROCESS SERVER

PROCESS SERVICE, INC.
P.O. Box 20097
Charleston, SC 29413
(843) 577-2355

Our Job Serial Number: 2012001748

Subscribed and Sworn to before me on the 22nd day of June, 2012 by the affiant who is personally known to me.

NOTARY PUBLIC
Commission Expires: 05/14/20

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STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
TIMOTHY TREON, JANIE TREON, P. JENNINGS SCEARCE, STEVE TUCKER, JEANEEN TUCKER, CHARLES H. DAVIS, STEPHANIE H. DAVIS individually and on behalf of Others similarly situated in the State of South Carolina, Plaintiffs, v. LEATH, BOUCHE & CRAWFORD, LLP W. JEFFERSON LEATH, JR., WILLIAM DIXON ROBERTSON, III, MICHAEL S. SEEKINGS, FRANK E. GRIMBALL & MULLENWYLIE, LLC formally MULLEN, WYLIE & SEEKINGS, LLC, WILLIAM M. BOWEN JOHN CARDAMONE and his wife SALLY CARDAMONE, BENJAMIN T. CLARK and his wife, DIANE M. CLARK, RAMONA GIANNI, NATHAN W. GORDON, Defendants.	Civil Action No.: 2008-CP-07-3145 FIRST AMENDED CLASS ACTION COMPLAINT (JURY TRIAL DEMANDED)

ELIZABETH M. SMITH
BEAUFORT COUNTY, S.C.
CLERK OF COURT
2009 OCT 13 PM 1:15

Plaintiffs, by and through their undersigned counsel, on their own behalf and on behalf of all other similarly situated members of a class do complain and allege in this Class Action Complaint as follows:

Description of Case

1. This case is brought as a class action pursuant to Rule 23, SCRCP, to recover monetary and punitive damages for civil conspiracy, breach of fiduciary duty; aiding and abetting breach

EXHIBIT E
0192

of fiduciary duty and fraudulent concealment.

2. The wrongful acts and omissions complained of herein by the Plaintiffs are the result of the Defendants violation of a Court Order and Rule 23 of the SCRCP, and the violation of other laws of the State of South Carolina because the Defendants participated in and facilitated the abandonment of a South Carolina class action known as John and Sally Cardamone, et. al. vs. Dryvit Systems, Inc., et al., Civil Action No. #2002-CP-07-1377, through a scheme wherein the Original Class Attorneys as defined below where paid $600,000 with a promise of an additional $225,000 upon dismissal of the Cardamone Action defined below.

Definitions

3. In this Complaint the term "Cardamone Action" refers to a class action lawsuit brought in Beaufort County, South Carolina and originally known as John and Sally Cardamone, et. al. vs. Dryvit Systems, Inc., et al., Civil Action No. #2002-CP-07-1377. Whose members comprise the "Cardamone Class"

4. In this Complaint the term "Posey" refers to legal action in Jefferson County, Tennessee that eventually became a class action lawsuit known as Bobby R. and Sabrina Posey, et. al. vs. Dryvit Systems, Inc., et al., Civil Action No. #17,715-IV.

5. In this Complaint the term "EIFS" refers to Exterior Insulation and Finish Systems. EIFS is a synthetic stucco cladding comprised of several components including, but not limited to, (1) an interior substrate (usually either plywood, OSB, or gypsum board) covering the building's frame or superstructure, (2) an adhesive or mechanical attachment, (3) an insulator (usually panels of Expanded Polystyrene) which is held in place by the underlying adhesive or mechanical fastener, (4) a reinforcing mesh embedded into a cementitious base coat which

covers the insulator, and (5) a troweled-on exterior finish coat. Dryvit was a major manufacturer of EIFS and was the Defendant in the Cardamone Action.

Parties, Capacity and Jurisdiction

6. This Complaint is filed and these proceedings are instituted pursuant to Rule 23 SCRCP. The parties named herein and the subject matter alleged herein are within the jurisdiction of this Court.

7. Defendant, MullenWylie, LLC formally Mullen, Wylie & Seekings, LLC, is a South Carolina Limited Liability Corporation doing business in South Carolina as a law firm. This firm was appointed as class counsel in the Cardamone action. The firm subsequently entered into a settlement agreement with Dryvit and abandoned its representation of the Cardamone Class and the prosecution of the Cardamone Action.

8. Defendant, Michael S. Seekings (Seekings), was a Partner in Mullen, Wylie & Seekings, LLC and was appointed as Class Counsel, but in violation of his fiduciary duties to the Cardamone Class, Rule 23 SCRCP, and of a Court Order, he subsequently entered into a settlement agreement with Dryvit and abandoned his representation of the Cardamone Class and the prosecution of the Cardamone Action.

9. Defendant, Frank E. Grimball, was appointed as Class Counsel, but in violation of his fiduciary duties to the Cardamone Class, Rule 23 SCRCP, and of a Court Order, he subsequently entered into a settlement agreement with Dryvit and abandoned his representation of the Cardamone Class and the prosecution of the Cardamone Action.

10. Defendants, William M. Bowen and William Dixon Robertson, III, were appointed as Class Counsel, but in violation of their fiduciary duties to the Cardamone Class, Rule 23,

SCRCP, and of a Court Order, they subsequently entered into a settlement agreement with Dryvit and abandoned their representation of the Cardamone Class and the prosecution of the Cardamone Action.

11. Defendant, Leath, Bouche & Crawford, LLP, is a South Carolina Limited Liability Partnership doing business in South Carolina as a law firm. This firm was appointed as class counsel in the Cardamone Action. The firm subsequently entered into a settlement agreement with Dryvit and abandoned its representation of the Cardamone Class and the prosecution of the Cardamone Action.

12. Defendant, W. Jefferson Leath, Jr., was a partner in the above firm and was appointed as Class Counsel, but in violation of his fiduciary duties to the Cardamone Class, Rule 23 SCRCP, and of a Court Order, he subsequently entered into a settlement agreement with Dryvit and abandoned his representation of the Cardamone class and the prosecution of the Cardamone Action.

13. Defendants, John and Sally Cardamone (hereinafter collectively referred to as the "Cardamones") are residents of Beaufort County, South Carolina and were appointed as named class representatives to the Cardamone Action, but in violation of their fiduciary duties to the Cardamone Class, Rule 23, SCRCP, and of a Court Order, the Cardamones subsequently entered into a lucrative individual settlement with Dryvit and abandoned their representation of the Cardamone class.

14. Defendants Benjamin T. and Diane M. Clark, (hereinafter collectively referred to as the "Clarks") are citizens and residents of Beaufort County, South Carolina. The Clarks were appointed as named class representatives to the Cardamone Action, but in violation of their

fiduciary duties to the Cardamone class, Rule 23, SCRCP, and a Court Order, the Clarks subsequently entered into a lucrative individual settlement with Dryvit and abandoned their representation of the Cardamone class.

15. Defendant, Ramona Gianni ("Gianni") is a citizen and resident of South Carolina. Ms. Gianni was appointed as a named class representative to the Cardamone Action, but in violation of her fiduciary duties to the Cardamone Class, Rule 2,3 SCRCP, and a Court Order, subsequently entered into a lucrative individual settlement with Dryvit and abandoned her representation of the Cardamone class.

16. Defendant, Nathan W. Gordon ("Gordon") is a citizen and resident of South Carolina. Mr. Gordon was appointed as a named class representative to the Cardamone Action, but in violation of his fiduciary duties to the Cardamone Class, Rule 23 SCRCP, and a Court Order, subsequently entered into a lucrative individual settlement with Dryvit and abandoned his representation of the Cardamone class.

17. In abandoning the class, the Defendants allowed Dryvit to reach final judgment in *Posey* in September of 2005 over three years after the Cardamone Action was filed. Dryvit's primary defense in the Cardamone Class is now that *Posey* is a "final judgment" and it has a preclusive, *res judicata* effect and that all claims in the "Cardamone Action" are barred. Plaintiffs have been left without a remedy. Additionally, while Dryvit has historically settled claims such as the Plaintiffs', Dryvit's position now is that it has already settled this case by payments to these Defendants and "bought its peace." As a result, the Plaintiffs have lost the settlement value of their claims.

18. Unless otherwise indicated, the Defendant attorneys and firms are hereinafter referred to collectively as the "Original Class Counsel." and the Cardamones, Clarks, Gianni and Gordon are collectively referred to as "Original Class Representatives."

19. Named Plaintiffs, Timothy J. Treon, Janie Treon and P. Jennings Scearce, were absent members of the Cardamone Class (i.e. not Court Appointed Class Representatives) who intervened in the Cardamone Action as named class representatives because the Original Class Representatives, and Original Class Counsel under the belief that they were not being adequately represented. Subsequently they discovered that these Defendants failed to represent the absent class members' interests in favor of individual settlements for themselves and payment of fees to Original Class Counsel. Charles H. Davis, Stephanie H. Davis, Steve Tucker and Jeaneen Tucker are South Carolina residents and absent class members who were damaged by the acts of these Defendants.

Factual Background

20. Dryvit manufactures various products to be used as the exterior wall cladding of commercial and residential structures. These cladding systems are designed to look like cementitious stucco exteriors and are generally known as Exterior Insulation Finish Systems or by its acronym, EIFS. As a result of defects in the product, from 1989 to 2002, Dryvit was the defendant in numerous legal actions involving allegations that its EIFS products were defective.

21. In order to contain its liability on a nationwide basis, Dryvit agreed to the certification of a National Settlement Class in Jefferson County Tennessee. On April 8, 2002, the Circuit Court for Jefferson County, Tennessee at Dandridge entered an order granting preliminary approval to a settlement class in the Posey Action.

22. The settlement class created by the Posey Court's April 8th Order included all persons who, as of June 12, 2002, in any state other than North Carolina, own property that is clad in whole or in part with Dryvit EIFS installed after January 1, 1989. Persons who had already prosecuted or settled an EIFS claim with Dryvit were excluded from the *Posey* conditional settlement class. Notice of the proposed settlement class was disseminated beginning in or about June of 2002.

23. Posey class members wishing to opt-out of the proposed settlement had until September 3, 2002 to file an opt-out form with the Posey claims administrator.

24. Original Class Representatives and Original Class Counsel instituted the Cardamone Action in the Beaufort County Court of Common Pleas on August 12, 2002, wherein the Original Class Representatives sought class certification to represent the interests of all South Carolina citizens whose claims against Dryvit were about to be subsumed in *Posey* because the Original Class Members claimed that the *Posey* settlement was wholly inadequate to compensate South Carolina Class Members for their damages. The Cardamone Class Amended Complaint alleged that the *Posey* Settlement injured Cardamone class of homeowners by:

a. denying the Plaintiffs and the Class their due process rights;

b. imposing on the Plaintiffs and the Class the law of a state other than South Carolina;

c. preventing the Plaintiffs and the Class from recovering the damages necessary for the Plaintiffs to be made whole;

d. attempting to avoid its joint and several liability and responsibility;

e. so restricting the rights of the Plaintiffs and the Class as to make the settlement worthless, amounting to a sham;

f. avoiding responsibility for the consequential damages which occur because of defective EIFS Systems;

g. avoiding its responsibility under the laws of the State of South Carolina; and

h. attempting to impose a uniform settlement on Plaintiffs and members of the Class who have suffered, continue to suffer, and will suffer damages that are unique to each Plaintiff and member of the Class.

25. In paragraph 25 of their Complaint, the Original Class Representatives stated:

> **Plaintiffs will fully and adequately protect the interest of Class Members. Plaintiffs have retained counsel experienced in complex class action, unfair or deceptive trade practice litigation and construction defect litigation. Plaintiffs and Plaintiffs Counsel have the necessary financial resources to adequately and vigorously litigate this class action. Plaintiffs are aware of their fiduciary responsibilities to the Class and are determined to diligently discharge those duties, and have no interest in conflict with other members of the Class.**

26. In response to the Original Class Members Motion for Class Certification, by Order dated August 30, 2002 and entered on September 3, 2002 (hereinafter referred to as the "August 30th Order", Judge Thomas Kemmerlin, Jr. certified a class in the Cardamone Action and designated the Original Class Representatives as Class Representatives for a class designated as:

> **"all persons in South Carolina who were members of the Posey class and who own, or have owned a one- or two-family residential dwelling or townhouse (hereinafter "structure") in South Carolina on which an Exterior Insulation and Finish System (hereinafter "EIFS") have been installed or any previous owner of such structures who incurred any costs or expenses to inspect, repair, or replace the EIFS or other EIFS-related property damage from January 1, 1989 until the date Dryvit's continuing conduct is terminated."**

27. On September 3, 2003, the Original Class Representative, John Cardamone filed an opt-out in *Posey* in Tennessee, effectively opting the State of South Carolina (Cardamone Class Members) out of the *Posey*.

28. Subsequent to Judge Kemmerlin's Order certifying a Class Action in South Carolina and the Opting Out of the South Carolina Class, the Original Class Representatives and Original Class Attorneys undertook the settlements with Dryvit in order to eliminate the Cardamone Action.

29. In violation of the August 30th Order requiring, *inter alia*, that a proposed class notice plan be presented to the Court within thirty (30) days after entry of the order, and in an attempt to conceal their individual settlements, the Defendants failed and refused to file any notice plan with the Court.

Class Action Allegations

30. This action is brought by the Plaintiffs on their own behalf and all other persons similarly situated, pursuant to Rule 23, SCRCP, as representatives of the Class defined herein below.

31. The Class of the instant action is comprised of members of the class created by the Cardamone Action and include those members of the Cardamone action:

> Who without formal notice, settled their claims against Dryvit for reduced compensation based on the assertion that the *Posey* settlement ended their right to make claims against Dryvit.

32. Plaintiffs estimate the size of the aforementioned Class to exceed one-hundred (100) individuals and the amount in controversy for each exceeds One Hundred Dollars ($100). The Class is sufficiently numerous that joinder of all its members is impracticable.

33. There are numerous common questions of law and fact regarding the wrongful acts and omissions complained of herein.

34. Class action treatment provides a fair and efficient method for the adjudication of the controversy herein described, affecting a large number of persons, joinder of whom is impracticable. The class action provides an effective method whereby the enforcement of the rights of Plaintiffs and class members can be fairly managed without unnecessary expense or duplication.

35. If class members were to pursue individual litigation, it would be unduly burdensome to the South Carolina courts. Individual litigation would magnify the delay and expense to all parties in resolving the controversy engendered by Defendants' course of conduct with respect to EIFS. By contrast, the class action device presents far fewer management difficulties and provides the benefits of unitary adjudication, economies of scale, and comprehensive supervision by a single court.

36. Notice for the pendency and any resolution of this action can be provided by publication of notice to Class Members.

37. The expense and burden of individual litigation of a case of this magnitude make it impractical for individual Class Members to seek redress for the wrongs done to them and, therefore, requires consolidation of all such claims in one action.

38. The claims of Plaintiffs, as the Class Representatives, are typical of the claims of the various members of the Class.

39. The Plaintiffs will fairly and adequately protect the interests of the Class they represent. The interests of Named Plaintiffs, as the Class Representatives, are consistent with those of the members of the Class. In addition, the Named Plaintiffs are represented by experienced and able counsel who have represented plaintiff classes.

40. Given the scope of harm inflicted by the Defendants and the egregiousness of the misconduct, rendering an award of punitive/exemplary damages appropriate, the prosecution of separate actions by individual members of the Class would create a risk of inconsistent adjudications with respect to individual members of the Class.

41. An adjudication of an individual class member's claim would, in the absence of a class action, be dispositive of the interests of the other members not parties to the adjudication or would substantially impair or impede the other members' ability to protect their interests thus creating the possibility of a rush to judgment as individuals seek to avoid the dispositive effect of earlier judgments.

42. A substantial claim for punitive/exemplary damages exists on behalf of all Class Members, including the Named Plaintiffs. In order to achieve maximum judicial economy and fairness to litigants, a class action is desirable to assure that an award of punitive damages is made in a single proceeding and fairly and uniformly allocated among all members of the Class.

43. Prosecution of this matter as a class action will significantly reduce the possibility of repetitious litigation, while providing redress for Class Members who would not or could not prosecute this complex litigation on an individual basis.

44. The Named Plaintiffs and Class Members envision no unusual difficulty in the management of this action as a class action.

45. Certification is appropriate under Rule 23 of the SCRCP.

<u>Common Deficiencies Relating to Defendants' Conduct</u>

46. By undertaking to serve the Cardamone Class as its attorneys and class representatives, the Original Class Counsel and Class Representatives owed a fiduciary duty to the class which

included all unnamed class members.

47. The Original Class attorneys in reaching individual settlements for the class representatives and for certain clients of theirs which Dryvit conditioned on the dismissal of the Cardamone Action, knew or should have known would violate their fiduciary duties, Rule 23 SCRCP and the duties imposed by Judge Kemmerlin's August 30th Order.

48. Upon information belief, the Original Class Counsel and Original Class Representatives failed and refused to give notice to the Court because they knew these acts could not withstand judicial scrutiny required by Rule 23 SCRCP and other authority, because such settlements were conditioned on the abandonment and elimination of the Cardamone Action.

49. Cardamone through his counsel Seekings of Mullen, Wylie & Seekings, LLC agreed to settle their individual case against Dryvit and dismiss the South Carolina Class Action for cash which included a "bonus reflecting Cardamone's status as a named Plaintiff in the South Carolina Class Action."

50. In an email dated April 25, 2004, Dryvit's attorney Peter Morgan memorialized Dryvit's agreement to contribute $225,000.00 towards a fee of $825,000.00 for "S.C. Counsel" that would be fully payable "after the final dismissal of the" *Cardamone* action. (In addition to Dryvit's $225,000.00 contribution towards this fee, *Posey*'s class counsel pledged $600,000.00 to *Cardamone*'s original class counsel thus totaling the $825,000).

51. In addition to the cash settlements with the Original Class Representatives and its contribution toward the $825,000.00 attorneys' fee, Dryvit also agreed to settle cases brought against it by certain *Cardamone* class members who were being represented by the Original Class Counsel who were then representing the *Cardamone* class.

52. On February 5, 2003, settlement conferences were agreed to by Original Class Class Counsel. On or about April 22, 2003, Dryvit, Original Class Counsel and various class members and class representatives held settlement conferences wherein the outstanding cases were resolved. As a result of these settlements, the remaining members of the Cardamone class (i.e. the Plaintiffs and those similarly situated) were left without active representation.

53. As a result of the lack of prosecution of the Cardamone Action, *Posey* became final. Until that time South Carolina residents routinely settled their cases against Dryvit. Rarely if ever did a case require a trial. As a result of these Defendants' acts, Dryvit no longer settles such cases as they have in the past and in fact now asserts that all claims of the class are barred by *Posey*.

Common Allegations Relating to Damages

54. As a result of aforementioned acts and omissions, Plaintiffs and class members have suffered direct, actual, special and consequential damages in an amount to be proven at trial because the harm to the Plaintiffs and those similarly situated arises from the same operative set of circumstances surrounding the Defendants' participation in and facilitation of the abandonment of the Cardamone Class and the damages to be awarded to the class alleged herein are either uniform or capable of uniform calculation.

Claims for Relief

For a First Cause of Action As To All Defendants
(Civil Conspiracy)

55. The foregoing paragraphs are hereby re-alleged as if fully set forth.

56. The Defendants combined together and engaged in improper and wrongful conduct for the purpose of injuring the Plaintiffs and all those similarly situated by proximately causing actual, special and consequential damages by agreeing to abandon and eliminate the claims of

the unrepresented Cardamone Class members in exchange for individual cash settlements and the payment of $825, 000 in attorneys fees.

57. The damages to the Class are a natural and proximate result of the civil conspiracy between the Original Class Representatives and Original Class Counsel. Such conduct on the part of the Defendants was in willful, intentional, and wanton disregard for the rights of the absent class members so as to entitle the absent class members (i.e. the Plaintiffs and those similarly situated) to actual, special, consequential and punitive damages.

For a Second Cause of Action as to all Defendants
(Breach of Fiduciary Duty)

58. The foregoing paragraphs are realleged as if fully set forth herein verbatim.

59. The Original Class Representatives and Original Class Counsel owed a fiduciary duty to all of the unnamed members of the class created by the Cardamone Action. As fiduciaries, both the representatives and their counsel have an absolute obligation to notify class members of: (1) the existence of the class action, (2) any proposed compromises of the action, and (3) the settlement or dismissal of the action.

60. The aforementioned Defendants violated their fiduciary duty by acting in bad faith and without due regard to the interests of the Plaintiffs and class members because in exchange for individual settlements and attorney fees, the Original Class Representatives and Original Class Counsel agreed to abandon the Cardamone Class and as a result failed and refused to provide the class with notice of the Cardamone Action, and the rights of class members there under, as required by the certifying court and Rule 23 of the SCRCP.

61. The aforementioned Defendants also breached their fiduciary duty to the Plaintiffs and class members by failing to prosecute the Cardamone Action while and after they negotiated and

entered into settlement with Dryvit.

62. The aforementioned Defendants further breached their fiduciary duty to the Plaintiffs and Cardamone Class members by failing to fully inform the Plaintiffs and class members regarding the status and proceedings of both the Cardamone and Posey Actions.

63. The numerous acts and omissions of the Defendants as set forth in this Complaint have deprived the Plaintiffs and Class Members of the ability to fully exercise their lawful rights against Dryvit.

64. As a result of the Defendants' aforementioned breaches of fiduciary duty, Plaintiffs and class members have been damaged in an amount at be proven at trial. Damages may include but are not limited to the following: 1) the loss settlement value of their claims; and 2) the loss of the right to receive damages through the litigation of claims against Dryvit.

65. Additionally, an attorney or class representative who breaches a fiduciary duty must disgorge the benefits to the client and under no circumstances are they to be permitted to profit from the breach of their duty as fiduciaries.

For a Third Cause of Action as to Original Class Counsel
(Inducing, Aiding, and Abetting a Breach of Fiduciary Duty)

66. The foregoing paragraphs are re-alleged as if fully set forth herein verbatim.

67. Original Class Counsel are sophisticated legal entities with extensive experience in EIFS litigation.

68 At all times relevant to this Complaint, the Original Class Counsel had a significant financial interest in resolving the claims of the South Carolina Class.

69. The Original Class Counsel knew that the Original Class Representatives owed a fiduciary duty to the Plaintiffs and the unnamed members of the class and that they knew or

should have known that settling the Original Class Representatives' claims with individual cash settlements and accepting the promise of the payment of $825,000 in attorneys fees induced them to violate Rule 23, SCRCP, a Court Order and other controlling authority, was improper and was an act of encouraging, participating in, aiding and abetting the Original Class Representatives in their breach of their fiduciary duties to the absent Cardamone Class members.

70. As a condition of settlement, Dryvit required that the Cardamone Action be dismissed or eliminated and at the time it imposed such condition, these Original Class Attorneys knew or should have known that they were requiring the Original Class Representatives to breach their fiduciary duty to the Plaintiffs and unnamed class members by settling their individual claims and by abandoning the Cardamone Class. By accepting settlements, bonuses and substantial payments to Original Class Representatives' counsel, the Original Class Counsel knowingly participated in, encouraged and aided and abetted Original Class Representatives' breach of their fiduciary duties.

71. Plaintiffs were damaged by the Original Class Representatives' breach of their fiduciary duty to Plaintiffs as set forth in this Complaint.

72. As a result, Plaintiffs are entitled to the appropriate relief as set forth below.

For A Fourth Cause of Action As To All Defendants
(Fraudulent Concealment)

73. The foregoing paragraphs are re-alleged as if fully set forth.

74. Defendants in their capacities as participants in the Cardamone Class Action case and based on the August 30th Order of Judge Kemmerlin were in a fiduciary relationship or a relationship that was intrinsically fiduciary, to the absent Cardamone Class members.

75. Defendants had knowledge of material facts that were relevant to the interest of the unnamed, absent Cardamone Class members.

76. Defendants owed a duty to make those material facts and information known to the Cardamone unnamed, absent Class Members.

77. Defendants breached their duties and or obligations to the Cardamone unnamed, absent class members by failing to disclose material information regarding the prosecution of and attempted compromise of the Cardamone Action and by failing to implement a Notice Plan as ordered by the Court.

78. As a proximate result of the Defendants' fraudulent concealment of their abandonment of the class, the failure and refusal to give notice, the Plaintiffs and those similarly situated have been damaged in an amount to be proven at trial. Because the Defendants' acts of fraudulent concealment were willful, intentional, and wanton, the Plaintiffs and those similarly situated are entitled to an award of punitive damages.

For A Fifth Cause of Action As to Original Class Counsel
(Negligence)

79. The foregoing paragraphs are hereby re-alleged as if fully set forth.

80. These Defendants as Class Counsel owed a duty of care to the Plaintiffs. They were negligent, grossly negligent, wanton and willful and breached their duty of care in one or more of the following particulars:

a) Failure to give notice to the Plaintiffs of the pending action;

b) Failure to allow Class Members to opt-out of settlement;

c) Failure to prosecute the pending action;

d) Settlement of the action without notice;

e) Failure to understand the procedural history of the *Posey* action;

f) Failure to ensure that class representatives adequately represented the absent class members;

g) Failure to seek court approval of the settlement;

h) Receiving fees for their representation of the class without notice to class or Court approval.

81. As a proximate result of the Defendants' negligence, the Plaintiffs and those similarly situated have been damaged in an amount to be proven at trial. Damages may include but are not limited to the following: 1) the loss settlement value of their claims; and 2) the loss of the right to receive damages through the litigation of claims against Dryvit. Because the Defendants' acts were grossly negligent and wanton, the Plaintiffs and those similarly situated are entitled to an award of punitive damages.

RELIEF REQUESTED

Wherefore, Plaintiffs and class members pray the Court to hold Defendants jointly and severally liable for the conduct complained of herein, to enter judgment against Defendants and in favor of Plaintiffs and class members, and to award the following relief:

A. Disgorgement of all fees and settlements paid as a result of the breach of fiduciary duty.

B. Awarding Plaintiffs and class members special, compensatory and punitive damages, and other damages, for the acts complained of herein, in an amount to proven at trial, plus interest;

C. Awarding Plaintiffs and class members' attorneys' fees and costs against Defendants, as allowed by law; and

D. Granting such other and further relief as the Court deems just and proper.

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(803) 254-1570

DEJ by

Donald E. Jonas

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Thomas J. Finn
Thomas E. Williams

October 10th, 2008
Hilton Head, SC

STATE OF SOUTH CAROLINA)) COUNTY OF BEAUFORT)))	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 2008-CP-07-3145
TIMOTHY TREON, JANIE TREON, P. JENNINGS SCEARCE, STEVE TUCKER, JEANEEN TUCKER, CHARLES H. DAVIS, STEPHANIE DAVIS, individually and on behalf of Others similarly situated in the State of South Carolina, Plaintiffs, v. LEATH, BOUCHE & CRAWFORD, LLP, W. JEFFERSON LEATH, JR., WILLIAMS DIXON ROBERTSON, III, MICHAEL S. SEEKINGS, FRANK E. GRIMBALL, MULLEN WYLIE, LLC, formerly MULLEN, WYLIE & SEEKINGS, WILLIAM M. BOWEN, JOHN CARDAMONE and his wife, SALLY CARDAMONE, BENJAMIN T. CLARK and his Wife DIANE M. CLARK, RAMONA GIANNI, and NATHAN W. GORDON, Defendants,	CERTIFICATE OF MAILING

I, Ryann Clifford, Legal Assistant, with the law firm of Alford & Wilkins P.C., certify that I have this date, served on the following a copy of the First Amended Summons and First Amended Complaint, with respect to the above-captioned civil action, via email and U.S. Mail with first class postage prepaid to:

Susan Wall, Esquire Parker Poe Adams & Bernstein, LLP 200 Meeting Street, Suite 301 Charleston, SC 29401-3156 *Attorney for Mullen & Wylie, LLC* *Attorney for Frank Grimball*	**Dawes Cooke, Esquire** Barnwell Whaley Patterson & Helms, LLC P.O. Drawer H Charleston, SC 29402-0197 *Attorney for John & Sally Cardamone* *Attorney for Benjamin & Diane Clark* *Attorney for Ramona Gianni & Nathan Gordon*

William M. Bowen, Esquire P.O. Box 6128 Hilton Head Island, SC 29938	**Kent Stair, Esquire** Carlock Copeland Semler & Stair, LLP 40 Calhoun Street, Suite 400 Charleston, SC 29401 *Attorney for Leath, Bouche & Crawford, LLP* *Attorney for W. Jefferson Leath, Jr.* *Attorney for Michael S. Seekings*

ALFORD & WILKINS, P.C.

By: Ryann Clifford
Ryann Clifford
Legal Assistant

Sworn to and subscribed before me on
this 27 day of Oct 2008

Amanda L. Bowen
Notary Public for South Carolina
My Commission Expires: 5-11-2014

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
TIMOTHY TREON, JANIE TREON, P. JENNINGS SCEARCE, STEVE TUCKER, JEANEEN TUCKER, CHARLES H. DAVIS, STEPHANIE H. DAVIS individually and on behalf of Others similarly situated in the State of South Carolina, v.Plaintiffs, LEATH, BOUCHE & CRAWFORD, LLP W. JEFFERSON LEATH, JR., WILLIAM DIXON ROBERTSON, III, MICHAEL S. SEEKINGS, FRANK E. GRIMBALL & MULLENWYLIE, LLC formally MULLEN, WYLIE & SEEKINGS, LLC, WILLIAM M. BOWEN JOHN CARDAMONE and his wife SALLY CARDAMONE, BENJAMIN T. CLARK and his wife, DIANE M. CLARK, RAMONA GIANNI, NATHAN W. GORDON, Defendants.	Civil Action No.: 2008-CP-07-3145 FIRST AMENDED SUMMONS

2008 OCT 13 PM 1:15
ELIZABETH M. SMITH
BEAUFORT COUNTY, S.C.
CLERK OF COURT

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you and to serve a copy of your answer to said Complaint upon the subscriber, Gregory M. Alford, Esquire, in his office at Alford & Wilkins, P.C., 18 Executive Park Road, Building 1, Post Office Drawer 8008, Hilton Head Island, South Carolina, 29938 within Thirty (30) days after the service hereof, exclusive of the day of such service, and

if you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you.

ALFORD & WILKINS, P.C.

By: _____

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(843) 682-3558

Thomas J. Finn
Thomas E. Williams

Dated this 10th day of October 2008
Hilton Head Island, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

2008 FEB 16 PM 3:16
JEAN H. ROSEBEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

JUDGMENT IN A CIVIL CASE

CASE NO. 2008-CP-07-3145
CASE NO. 2008-CP-07-0774

Tucker	Leath, Bouche & Crawford, LLP, et al.
Treon	Dryvit, et al.
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

This matter came before the Court seeking class certification. The issue of certification was briefed extensively by the parties and lengthy oral arguments were presented to the Court. After reviewing the information offered by the parties, the Court requests that Plaintiff's counsel prepare an order granting certification in both cases.

The two cases presently before the court should be considered consolidated. A motion was filed to consolidate the cases, and at the beginning of the hearing, the Court informed the parties to consider the cases consolidated for purposes of the certification arguments. Previously an order related to certification consolidated the cases for discovery purposes. The Court also requested that the parties point out positions related to non-consolidation during their arguments on certification if a particular position existed which a party wished the Court to consider. Since the pleadings in the two cases are virtually identical and no response was filed opposing the consolidation, the Court considers the two cases consolidated. In the order, state that if a party wishes to oppose consolidation, the proper motion stating grounds as to why these cases should not be consolidated should filed with the Court.

As alleged in the present Complaints, these actions stem from allegations which generally assert that class counsel and class representatives, in companion cases Posey and Cardamone, committed acts of a conspiracy, breached fiduciary duties, aided and abetted in breaches of fiduciary duties, and acted fraudulently in performing their respective duties in regards to the underlying class action case of 2002-CP-07-1377. The history of the present case is extensively documented in the Clerk's file and with this Court. Additionally, the present file contains numerous filings from the companion cases. Plaintiff's counsel may provide as much procedural history as he deems necessary, but give some history as to the

EXHIBIT F

development of the two prior class actions (Posey and Cardamone) as is supported from the present file, so that a subsequent reader may have a basis of understanding the common legal and factual threads.

Also reference the depositions of Nance Moore and Allison Deloache, and summarize the testimony which assists in establishing the common factual and common legal basis upon which the present action arises. Even though Ms. Deloache is not a member of the present class (her home did not contain the Dryvit product), her deposition testimony adds to the proposition of a common factual background and/or common legal theory for certification of the class. However, make specific reference to the class certification sought by the class representative and class counsel in 2002 and Judge Kimmerlin's August 30, 2002 Order granting class certification, and the Judge's specific directive that the class representatives "shall" provide the Court with a notice plan within thirty (30) days of the Order, and that no such notice plan was ever submitted to the Court.

The common factual and legal issues which, standing alone, justify the certification of a class in these matters, center around allegations that class counsel and class representatives failed to properly pursue the companion case of 1377 once the South Carolina circuit judge had authorized the establishment of the South Carolina class. While the Plaintiffs have met the burden of establishing other common facts and legal issues, the issues surrounding the failure to issue a notice to potential class members when the class representatives and class counsel sought and gained approval from the South Carolina Court is important enough for this Court to find the essence of a common question of fact or law for purposes of Rule 23. Additionally, there exists a similarity of the legal and remedial theories of the named class members and potential class members. Given that each class member will be an owner of a separate and distinct house, the Court anticipates a lack of uniformity regarding damages, however this fact does not prevent a finding of typicality. There is a common nucleus of operative facts and a common basis of law which give rise to the claims which will be asserted by the class members. Based on the class definition contained herein, the Court concludes that each of the class members will present a claim for damages arising from a common and uniform series of facts from which duties and breaches of those duties for each member's claims will be the same even though the damages proximately caused by the alleged breaches may differ. The claims of the class are typical because they arise from the same course of conduct that gives rise to the claims of the other class members and because the claims are based on the same legal theories. Additionally, based upon the class definition contained herein the Court can find the members are so numerous that joinder of all members is impractical as it would be difficult.

Concerning named class representatives, only Mr. and Mrs. Davis and Mr. and Mrs. Tucker remain as class representatives for purposes of the present litigation. The allegations go unchallenged that they were not previously court appointed as class representatives and that they were damaged by the acts of the Defendants. By order of this Court, discovery was directed to be done as to the class certification issues. Again, no substantive challenge has been offered to the Davises or the Tuckers serving as class representatives. The Court also notes that, contrary to assertion of potential conflict asserted against the Searces and Treons, no such claim is made against these parties. Given the quality and thoroughness of the defense presented thus far, the Court can take comfort that if the defense had a reasonable basis for challenging the Davises or Tuckers, the Court would have been made aware of the concerns. Based on the information available to the Court, the conclusion is that Mr. and Mrs. Davis and Mr. and Mrs. Tucker are proper class representatives.

As to the definition of the class, in making this determination, this Court has the benefit of at least three relevant class definitions previously certified by courts of law; The Tennessee Court in the original nationwide Dryvit settlement class, the original South Carolina opt out of Posey class in 1377 certified in

by Judge Kemmerlin, and the settlement class certified by this judge in 1377 when the settlement of 1377 was approved. Based upon the prior class definitions, history, and the allegations which give rise to the present litigation, this Court requests the order be prepared to direct class counsel to redefine the class to be limited to those who received individual benefits as a result of the 1377 settlement. Since the primary allegations which give rise to the present lawsuit involve failure to give notice once Judge Kimmerlin certified the class, restricting the class to those who responded to the notice (notice of the 1377 settlement) and were successful in establishing the existence of Dryvit on their home, provides this Court with an assurance that the breadth of class is properly identified, but yet provides proper safeguards which coincide with theoretical basis of the alleged wrongful acts which form the basis of the liability claim. Also, restricting the class to those who responded to the settlement notice in 1377, filed claims, and were subsequently approved to receive benefits, addresses the issues raised by the defendants concerning the need to have only those in privity to the defendants (either through duties arising from being class representative or class counsel) being able to assert a claim as a member of the class. Please note also that the "class period" is restricted to same time frame previously approved in 1377 as January 1, 1989 to September 2, 2002.

Again, the class will not encompass persons outside of those who qualified under 1377. Based on the present record, the Court is approving the class for certification with only Davis and Tucker as class representatives. Given the allegations in the Complaint, it does appear they share the necessary common interest sufficient to perform their duties as class representatives. However, the Court sees wisdom in having additional class representatives appointed to mirror the subclasses found in the 1377 settlement documents in the event this litigation class transforms itself into a settlement class. Nevertheless, this class is not being approved as settlement class but rather a litigation class, and based on the information presented to the Court, there is no need to break the class into subclasses contained in the 1377 settlement.

The Court has no concern as to the adequacy, competency and appropriateness of present class counsel representing the class in this matter.

The formal order, once signed and filed with the clerk's office, will be the final order of the Court on this matter.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX **Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**		
Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
		$
		$

		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge | Judge Code | Date

For Clerk of Court Office Use Only

This judgment was entered on the 16 day of Feb 2012 and a copy mailed first class or placed in the appropriate attorney's box on this 21 day of Feb 2012 to attorneys of record or to parties (when appearing pro se) as follows:

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CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2002-CP-07-1377
TIMOTHY TREON and his wife, JANE TREON, P. JENNINGS SCEARCE and STEVEN CHRISTAIN Individually and on behalf of others Similarly situated in the State of South Carolina,	)	RECEIVED JUL - 9 2012 NEXSEN PRUET, LLC
Plaintiffs,	)	**NOTICE OF SPECIAL APPEARANCE AND RETURN TO PLAINTIFFS' APPLICATION FOR RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING, and MOTION TO DISMISS OR TO QUASH.**
v.	)	
DRYVIT SYSTEMS, INC.,	)	
Defendant.	)	

Now come the undersigned counsel, appearing specially on behalf of the non-parties John and Sally Cardamone, Benjamin and Diane Clark, and Ramona Gianni (hereinafter referred to collectively as "Former Class Representatives"), who specifically reserve all objections to this Court's exercise of jurisdiction over them, and submit this Return to the Plaintiffs' Application for Rule to Show Cause and Order for Accounting, and hereby move this Honorable Court for an Order Dismissing the Rule to Show Cause as to the Former Class Representatives, or alternatively to Quash the Rule to Show Cause as to the Former Class Representatives. This Return and Motions are made pursuant to Rules 1, 4, 12, and 23 of the South Carolina Rules of Civil Procedure and pursuant to the Court's inherent authority under the. Specifically, this Return and Motions are made on the grounds that:

- This Court does not have jurisdiction over the Former Class Representatives or claims, as the Former Class Representatives were dismissed from the above-captioned matter and this Rule to Show Cause cannot be used to obtain jurisdiction over non-parties;
- The underlying motion on which the Rule to Show Cause was initiated is directed

only toward former class counsel and is not directed toward the Former Class Representatives. The Plaintiffs specifically elected not to include the Former Class Representatives in the Rule to Show Cause, and in fact counsel for Plaintiffs had been disqualified from prosecuting litigation against the Former Class Representatives;

- The relief demanded in the Rule to Show Cause is the subject of other pending litigation, and the determination of the same issues in this action would violate the constitutional and statutory right to a jury trial of the Former Class Representatives;
- The claims for the relief sought in the Rule to Show Cause are barred as to the Former Class Representatives by the applicable statute of limitations; and
- Even if this Court was to find jurisdiction and proceed with the Rule to Show Cause as to the Former Class Representatives, it is undisputed that they settled only their individual lawsuits without any settlement or compromise whatsoever of the above-captioned class action.

This Return and Motions will be supported by any pleadings, discovery, affidavits, and accompanying exhibits and Memorandum of Law that may be filed with the Court.

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By: _____

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July 6, 2012
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned employee of Barnwell Whaley Patterson & Helms, LLC, hereby certifies that on this 6th day of July, 2012, she served a copy of the foregoing via United States Mail upon counsel of record as follows:

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{Client Matter\003323\0001\MTN\00370714.DOC}

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2002-CP-07-1377
TIMOTHY TREON and his wife, JANE TREON, P. JENNINGS SCEARCE and STEVEN CHRISTAIN Individually and on behalf of others Similarly situated in the State of South Carolina, Plaintiffs, v. DRYVIT SYSTEMS, INC., Defendant.	)	**MEMORANDUM OF LAW IN SUPPORT OF RETURN TO PLAINTIFFS' APPLICATION FOR RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING, and MOTION TO DISMISS OR TO QUASH.**

Now come the undersigned counsel, appearing specially on behalf of the non-parties John and Sally Cardamone, Benjamin and Diane Clark, and Ramona Gianni (hereinafter referred to collectively as "Former Class Representatives"), who specifically reserve all objections to this Court's exercise of jurisdiction over them, and submit this Memorandum of Law in Support of Return to the Plaintiffs' Application for Rule to Show Cause and Order for Accounting, and Motion to Dismiss or to Quash.

SUMMARY

The Former Class Representatives wish to have their day in court. When that day comes, they will establish beyond cavil that they have not breached their duties to their fellow class members in this case. They did only what reasonable litigants are supposed to do: they agreed to compromise their individual claims when an acceptable offer – albeit far short of compensating them fully for their damages- was made. They did not anticipate, let alone intend, that their individual settlements would be perceived as impairing the rights of their fellow class members.

The Former Class Representatives are anxious to explain their actions in the proper forum. Yet, the Rule to Show Cause that this Court has issued does not provide the proper forum for the Former Class Representatives to tell their story. They are presently being sued in another action, in which the plaintiffs seek the same relief sought here. For this reason, and the related reasons set forth below, the Former Class Representatives must respectfully object to this Court's assertion of jurisdiction over them in this manner.

FACTUAL BACKGROUND

Dryvit Systems, Inc. ("Dryvit") manufactures various exterior wall cladding products for commercial and residential structures. As a result of failures with its Exterior Insulation Finish Systems (hereinafter referred to as "EIFS"), Dryvit was the defendant in numerous legal actions involving allegations that its EIFS products were defective. A class was certified in Jefferson County, Tennessee in order to define and control Dryvit's liability on a nationwide basis, styled as *Bobby R. and Sabrina Posey, et. al. vs. Dryvit Systems, Inc., et al.*, Civil Action No. 17,715-IV ("Posey Action"). On April 8, 2002, the Circuit Court for Jefferson County, Tennessee at Dandridge entered an order granting preliminary approval to a settlement class in the Posey Action. The settlement class included all persons, who, as of June 12, 2002, in any state other than North Carolina, owned property that was clad with Dryvit EIFS installed after January 1, 1989. Persons who had already prosecuted or settled an EIFS claim with Dryvit were excluded from the Posey conditional settlement class. Posey class members who wished to opt-out of the proposed settlement had until September 3, 2002, to file an opt-out form with the claims administrator. The Posey Action sought to bind Dryvit homeowners in most states, including South Carolina.

Prior to September 3, 2002 (the opt-out date in Posey), the Former Class Representatives all filed opt-out forms individually removing them from being bound by the Posey Action *See* Opt Out Forms, attached as Exhibit 1. The Former Class Representatives had all filed respective individual lawsuits in South Carolina prior to the opt-out date in the Posey Action:

On August 10, 1999, Defendants John and Sally Cardamone ("Cardamones") filed a lawsuit in the Circuit Court of Beaufort County, South Carolina, styled "*John Cardamone and Sally Cardamone v. Graves Commercial Builders, Inc., American Way Applicators of South Carolina, and Dryvit Systems, Inc.*," Civil Action No. 1999-CP-07-1237 (the "Cardamones' Individual Lawsuit") arising out of problems related to the design, construction, application, manufacture and installation of Dryvit EIFS on their home located at 16 Brams Point Road, Hilton Head Island, South Carolina. The Cardamones were represented by the law firm of Mullen Wylie & Seekings, LLC ("Mullen Wylie").

On October 10, 2001, Ramona Gianni filed a lawsuit in the Circuit Court of Horry County, South Carolina, styled "*Ramona Gianni v. Regal Corporation of Myrtle Beach, Dryvit Systems, Inc., Commercial Systems, Inc., and Best Exterminating Inc.*," Civil Action No. 01-CP-26-5153 ("Gianni's Individual Lawsuit"). Ms. Gianni's Individual Lawsuit arose out of problems related to the design, construction, application, manufacture and installation of Dryvit-manufactured synthetic stucco at her home located at 818 Green Bay Trail, Myrtle Beach, South Carolina. Ms. Gianni was also represented by Mullen Wylie.

On May 24, 2002, Benjamin and Diane Clark ("Clarks") filed a lawsuit in the Circuit Court of Beaufort County, South Carolina, styled "*Benjamin T. Clark and Diane M. Clark v. Estate Builders, Inc. and Dryvit Systems, Inc.,*" Civil Action No. 02-CP-07-905 ("Clarks' Individual Lawsuit"). The Clarks' Individual Lawsuit arose out of problems related to the

design, construction, application, manufacture and installation of Dryvit-manufactured synthetic stucco on their home at 21 Castlebridge Court, Hilton Head Island, South Carolina. The Clarks were represented by Leath, Bouch & Crawford, and William M. Bowen, P.A.

Concerned with the possible binding effect on South Carolina homeowners and terms of a proposed Posey Action settlement, a group of attorneys (W. Jefferson Leath, Jr., William Dixon Robertson, III, Michael S. Seekings, Frank E. Grimball, William M. Bowen, and their respective firms, collectively referred to as "Original Class Counsel") filed this class action on August 12, 2002 in the Circuit Court of Beaufort County, for the purpose of opting South Carolina residents out of the Posey Action. This action was styled, "*John Cardamone and his wife, Sally Cardamone, and Benjamin T. Clark and his wife, Diane M. Clark, individually and on behalf of others similarly situated in the state of South Carolina vs. Dryvit Systems, Inc., et al.,*" Civil Action No. 2002-CP-07-1377 (the "-1377") for EIFS-related problems. John and Sally Cardamone, Benjamin T. and Diane M. Clark, Ramona Gianni, and Nathan Gordon were designated the named class representatives in -1377.[1] During the pendency of -1377, the Former Class Representatives settled their respective individual lawsuits, but did not settle or in any way compromise this class action.

Settlement of the Cardamones' Individual Lawsuit

The Cardamones suffered extensive and costly damage to their home, requiring them to move out for approximately three months while the repair work was completed. The estimate for their damages totaled $467,871.44, and their actual repair costs ended up costing approximately $420,000.00. *See* Damage Repairs, attached as Exhibit 2. The Cardamones had their home repaired prior to the resolution of their Individual Lawsuit.

[1] Upon information and belief, Nathan Gordon is deceased and was never served in any of the pending litigation, nor has any counsel, including the undersigned, ever made an appearance or represented Mr. Gordon in the pending litigation.

The Cardamones mediated their Individual Lawsuit on November 1, 2001, which did not result in a settlement. Ultimately, the Cardamones settled with the general contractor who built their home, Graves Commercial Builders, Inc. ("Graves"), for $125,000.00.

In September 2002, the Cardamones' Individual Lawsuit was high on the Beaufort County roster and subject to trial. The Cardamones amended their complaint to bring a direct claim against Pella Window and Door Company, Inc. ("Pella"), which had only been a third-party defendant brought into the matter by Graves. The Cardamones received a continuance to bring the direct claim against Pella. The Cardamones continued to attempt to settle their lawsuit, and in early 2003 reached an agreement with the EIFS subcontractor, American Way, to settle for $92,500.00. By February 2003, the Cardamones' case was again facing the prospect of going to trial. They reached a settlement with Pella for an undisclosed amount. On February 5, 2003, the Cardamones and Dryvit agreed to terms of settlement in the Cardamones' Individual Lawsuit, wherein the Cardamones dismissed their individual claims and suit against Dryvit in consideration for $90,000.00. *See* Cardamone Settlement, Release, and Confidentiality Agreement, attached as Exhibit 3[2]; John Cardamone Affidavit, ¶ 12, attached as Exhibit 4.

The Cardamones total settlement from all the defendants in their Individual Lawsuit totaled $350,000.00. They had to pay their attorneys' and experts' fees out of that amount. Ex. 4,¶ 14. The Cardamones did not make a profit or obtain any unjust enrichment as a result of the settlement of their Individual Lawsuit, as collectively the defendants paid less than their out-of-pocket expenses to have their home repaired. Ex. 4, ¶ 11. They did not condition the settlement of their Individual Lawsuit on a dismissal of -1377, nor did they settle -1377. Ex. 4, ¶18. They

[2] The respective Settlement and Release Agreements for the Cardamones, the Clarks and Ramona Gianni contain confidentiality provisions wherein the terms of the respective agreements shall not be released except for income tax reporting purposes, by written agreement or upon order of a court of competent jurisdiction. The Former Class Representatives are responding to an Order for Accounting by this Court, and as such have revealed terms. Out of an abundance of caution, the actual agreements may be produced by order of this Court.

did not receive any 'bonus' payment or other consideration from Dryvit for their roles as named class representatives in -1377. Ex. 4, ¶ 19.

A Stipulation of Dismissal was entered for the Cardamones' Individual Lawsuit on May 8, 2003. *See* Stipulation of Dismissal attached as Exhibit 5.

Settlement of Gianni's Individual Lawsuit

Ms. Gianni also suffered significant damage to her home. The estimate for her damages totaled $90,247.00. *See* Damage Estimate, attached as Exhibit 6. Her individual lawsuit was mediated on February 21, 2003. Ms. Gianni and Dryvit agreed to terms of settlement in Ms. Gianni's Individual Lawsuit, wherein she dismissed her individual claims and suit against Dryvit and others. *See* Gianni Settlement, Release, and Confidentiality Agreement, attached as Exhibit 7[3]; Ramona Gianni Affidavit, attached as Exhibit 8. In consideration, Ms. Gianni accepted approximately $52,458.00 as a total settlement, of which Dryvit paid $9,125.00. Ex. 8, ¶ 9.

Ms. Gianni had to pay her attorneys' and experts' fees out of that amount. Ex. 8, ¶ 12. She did not make a profit or obtain any unjust enrichment as a result of the settlement of her Individual Lawsuit, as collectively the defendants paid less than her out-of-pocket expenses to have her home repaired. She did not condition the settlement of her Individual Lawsuit on a dismissal of -1377, nor did she settle -1377. Ex. 8, ¶¶ 17-21. She did not receive any 'bonus' payment or other consideration from Dryvit for her role as a named class representative in -1377. Ex. 8, ¶ 19.

A Stipulation of Dismissal was entered for Ms. Gianni's Individual Lawsuit on July 28, 2003. *See* Stipulation of Dismissal attached as Exhibit 9.

Settlement of the Clarks' Individual Lawsuit

[3] See Footnote 2.

The Clarks also suffered expensive damage to their home resulting from, among other things, the Dryvit EIFS. The Clarks had their home repaired in April 2000, prior to the resolution of their Individual Lawsuit. *See* Affidavit of Benjamin T. Clark, attached as Exhibit 10. They paid approximately $125,000.00 out of pocket to have their home repaired, of which $85,463.15 was attributable to remediation of the Dryvit EIFS. *See* Invoices, attached as Exhibit 11, and Ex. 10, ¶ 6. A settlement conference was conducted in April 2003 but no settlement was reached. The Clarks and Dryvit agreed to terms of settlement in July 2003 in the Clarks' Individual Lawsuit, wherein they dismissed their individual claims and suit against Dryvit in consideration for $50,000.00. *See* Clarks' Release, attached as Exhibit 12[4], and Ex. 10, ¶ 8).

The Clarks had to pay their attorneys' fees out of their settlement with Dryvit. They did not make a profit or obtain any unjust enrichment as a result of the settlement of their Individual Lawsuit, as collectively the defendants paid less than their out-of-pocket expenses to have their home repaired. Ex. 10, ¶ 8. The Clarks did not condition the settlement of their Individual Lawsuit on a dismissal of -1377, nor did they settle -1377. Ex. 10, ¶ 14-19. They did not receive any 'bonus' payment or other consideration from Dryvit for their role as named class representatives in -1377. Ex. 10, ¶ 16.

A Stipulation of Dismissal was entered for The Clarks' Individual Lawsuit on September 11, 2003. *See* Stipulation of Dismissal attached as Exhibit 13, Ex. 10, ¶10.

Substitution of Class Representatives

Original class counsel state that they took a cautious approach and determined that nothing could be done in -1377 until it was determined whether the Posey Action would, in fact, be binding on South Carolina and how it would impact the ability for -1377 to proceed. On September 21, 2005, shortly after the Posey Action was finalized, Gregory M. Alford, Thomas J.

[4] See Footnote 2.

Finn, Thomas E. Williams, Robert B. Phillips, Richard Gleissner, Donald E. Jonas, and their respective firms (collectively "-1377 counsel") filed a Motion to Intervene as Class Counsel and Substitute Class Representatives. See Motion to Intervene, attached as Exhibit 14. Timothy J. Treon and P. Jennings Scearce (collectively "Intervening Class Representatives") sought to intervene in -1377 as named class representatives. *Id.* In their motion to be substituted as class representatives, -1377 counsel and Intervening Class Representatives told the Court that "**the presently named representatives, John Cardamone, Sally Cardamone, Benjamin T. Clark, Diane M. Clark, Ramona Gianni** and Nathan W. Gordon**, have settled their cases with Dryvit. The personal settlements between Dryvit and the Representatives have essentially mooted their claims** so there can be no question that they are not adequate representatives of the unnamed class members whose claims are still outstanding, the current representatives simply do not possess the standing necessary to continue to prosecute this suit." *Id.* at 5-6 (emphasis added). The Intervening Class Representatives believed that the Former Class Representatives had "abandoned the representation of the absent class members interests in favor of lucrative individual settlements with Defendant Dryvit." *See Treon* Complaint, page 4, attached as Exhibit 15.

A hearing was conducted on December 5, 2005 before the Honorable J. Mark Hayes, II, and it was explicitly disclosed to Judge Hayes that the Former Class Representatives settled their individual claims. In fact, this was known by -1377 counsel:

> "The other named parties [Former Class Representatives] have already settled. The attorneys who represented the other parties, the attorneys that are sitting here now, went out and settled all those cases with Dryvit even though they were class

reps, never gave notice to the court they were settling individual claims, never substituted new class representatives to the class."

Thomas Williams, Dec. 5, 2005 Hearing Transcript, p. 20:14-20, attached as Exhibit 25.

"Their clients, the current class representatives [Former Class Representatives], have settled their individual claims and, therefore, as their clients, they no longer have a stake in this litigation, and that's why we believe we should be substituted because Treon and Scearce have an active stake in this litigation."

Richard Gleissner, *Id.* at 30:14-19.

The fact that the Former Class Representatives settled their individual claims was also made clear to the Court by former class counsel Greg Mullen, who stated:

"**My firm represented John Cardamone which was one of the named class members. He did settle his individual claim. That settlement did not have any terms whatsoever affecting his representation of the class action.**"

Id. at 31:6-10. (emphasis added).

With the knowledge that their individual claims were settled by the Former Class Representatives, Judge Hayes properly granted the Motion allowing Intervening Class Representatives to be substituted as the named class representatives in -1377:

"Lastly, at the hearing, Current Class Counsel informed this Court that the current class representatives [i.e., Former Class Representatives] have resolved their claims against Dryvit. Therefore, the current class representatives [Former Class Representatives] do not have a personal stake in this litigation and do not adequately represent the interests of the Intervenors. Therefore, this Court finds

that it is appropriate for the Court to Grant the Motion to Intervene and the request of the Intervenors to be substituted as class representatives."

Order Granting Motion to Intervene to Substitute Class Representatives and Substitute as Class Counsel, pg. 2., attached as Exhibit 26.

Because the Former Class Representatives did not settle or compromise the pending -1377 action, but rather settled their respective pre-existing individual lawsuits, the terms of the settlements were not inquired of by the court under SCRCP Rule 23(c) nor required to be disclosed or approved. As is usual in class actions cases where a class representative for one reason or anther no longer can or is unwilling to serve as the named representative, the Court allowed Intervening Class Representatives to step in and continue the -1377 litigation forward in the place of the Former Class Representatives because it was informed by the parties that they had settled their Individual Lawsuits. The Former Class Representatives were dismissed from -1377.

Subsequent Litigation (*Treon* and *Tucker*)

On March 7, 2008, the Former Class Representatives were sued by -1377 counsel and Intervening Class Representatives in an putative class action styled as "*Timothy J. Treon and P. Jennings Scearce, Individually and on behalf of Others similarly situated in the State of South Carolina vs. Dryvit Systems, Inc., John Cardamone and his wife, Sally Cardamone, Benjamin T. Clark and his wife, Diane M. Clark, Ramona Gianni, Nathan W. Gordon and John Doe and Mary Roe,*" Civil Action No. 08-CP-07-00774 ("*Treon*"). *See* Ex. 15. The Plaintiffs in *Treon* alleged that the Former Class Representatives breached their fiduciary duties to the -1377 class "in reaching lucrative individual settlements which Dryvit conditioned on the dismissal of the Cardamone Action (-1377)" and refusing to give notice to the Court "because such settlements

were conditioned on the abandonment and elimination of the Cardamone Action (-1377)." Ex. 15, ¶ 43. *Treon* Plaintiffs also alleged that the Former Class Representatives received bonuses from Dryvit for their status as named plaintiffs in -1377. Ex. 15, ¶ 44. The causes of action in *Treon* against the Former Class Representatives included civil conspiracy, breach of fiduciary duty, and fraudulent concealment. Ex. 15, ¶¶ 49-59, 70-75. Dryvit was a named defendant in *Treon*, and removed the case to federal court.

While the *Treon* Plaintiffs attempted to remand *Treon*, the Former Class Representatives were again sued on August 26, 2008 by -1377 counsel, the Intervening Class Representatives, and additional plaintiffs Steven and Jeaneen Tucker, and Charles and Stephanie Davis, in an putative class action styled as "*Steven and Jeaneen Tucker, Charles and Stephanie Davis, Timothy and Janie P. Treon and P. Jennings Scearce, and John Doe and Jane Doe, Individually and on behalf of Others similarly situated in the State of South Carolina vs. Leath, Bouch & Crawford, LLP, W. Jefferson Leath, Jr., Williams Dixon Robertson, Michael S. Seekings, Frank E. Grimball & Mullen Wylie, LLC formally Mullen, Wylie & Seekings, LLC, John Cardamone and his wife, Sally Cardamone, Benjamin T. Clark and his wife, Diane M. Clark, Ramona Gianni, Nathan W. Gordon*" Civil Action No. 08-CP-07-3145 ("*Tucker*"). *See Tucker* Complaint attached as Exhibit 16. The causes of action in *Tucker* against the Former Class Representatives included the same causes of action as in *Treon*: civil conspiracy, breach of fiduciary duty, and fraudulent concealment, with the only new cause of action of negligence directed to the Original Class Counsel. *Id.* The *Treon* and *Tucker* complaints are nearly identical, save for the actual identification of Original Class Counsel in *Tucker* (in lieu of John Doe and Jane Roe in *Treon*).

-1377 Counsel Disqualification

The Plaintiffs in *Treon, Tucker*, and -1377 allege that the Former Class Representatives breached their fiduciary duty in -1377 by settling their preexisting individual lawsuits during the pendency of the class action suit. However, in the summer of 2009, after the Former Class Representatives had been substituted for and dismissed from -1377, and during the pendency of *Treon* and *Tucker*, the undersigned learned that -1377 counsel Thomas J. Finn was a former employee of Mullen Wylie. During his tenure with Mullen Wylie, Mr. Finn actively represented the Cardamones in their Individual Lawsuit. He signed pleadings, attended at least one deposition as counsel of record, and received correspondence in the Cardamones' Individual Lawsuit. Mr. Finn was also employed by Mullen Wylie during its representation of Ramona Gianni in her Individual Lawsuit. It was discovered that -1377 counsel was suing not only his former employer, but his former clients for settling the same lawsuit in which he previously represented them, and without any waiver or consent from his former clients to do so.

This conflict of interest was immediately brought to the attention of -1377 counsel via a letter seeking withdrawal of their representation of the *Treon* and *Tucker* Plaintiffs. *See* June 9, 2009 letter, attached as Exhibit 17. Despite the obvious conflict of interest, -1377 counsel declined to withdraw and a Motion to Disqualify was filed on June 22, 2009 and re-filed with a supporting affidavit on July 10, 2009. *See* Motion to Disqualify attached as Exhibit 18.

After a hearing on July 22, 2009 and subsequent briefing by both sides, the Honorable Marvin H. Dukes, III, Master-In-Equity and Special Circuit Judge for Beaufort County issued a February 1, 2010 Final Order Disqualifying Plaintiffs' (-1377) Counsel. *See* Order Attached as Exhibit 19. Specifically, Judge Dukes held that:

- Former Class Representatives were formerly represented by Mullen Wylie and its former associate, Thomas J. Finn;

- Mr. Finn's current representation of *Treon* and *Tucker* was materially adverse to the Cardamones and Ms. Gianni, creating a conflict of interest under SCRPC Rule 1.9(b);
- Mr. Finn's prior representation of the Cardamones and Gianni is the same or substantially related matter under SCRPC Rule 1.9(b) as *Treon* and *Tucker*;
- There was no informed consent or waiver of the conflict of interest under SCRPC Rule 1.0(f);
- The conflict of interest was imputed to all -1377 counsel;
- Finn Law Firm, P.C. is disqualified from *Treon* and *Tucker* under SCRPC Rules 1.10 and 1.9(b); and
- Mr. Finn's involvement tainted all -1377 counsel, requiring disqualification under SCRPC Rules 1.10 and 1.9(b). *Id.*

Judge Dukes found that there were no allegations or evidence of betrayal of former client confidences by Mr. Finn and -1377 counsel.

Having been expressly disqualified from seeking to disgorge the Former Class Representatives of settlement proceeds from their respective Individual Lawsuits or seek any other relief against the Former Class Representatives, disqualified counsel was allowed to continue in their role as -1377 counsel.

Subsequent to -1377 counsel's disqualification, Thomas J. Pendarvis, of Pendarvis Law Offices, P.C., and I. Gregory Hodges, Timothy D. Roberts, and William J. Hunter of Oliver Maner, LLP in Savannah, Georgia (admitted *pro hac vice*) filed notices of appearance in *Treon* and *Tucker* as counsel of record ("*Treon* and *Tucker* counsel").

Treon and _Tucker_ Post-Disqualification

On January 12, 2010, -1377 counsel 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 ("First RTSC"). *See* Motion for Accounting, attached as Exhibit 20. With the knowledge that the impending Order from Judge Dukes was gong to disqualify them from *Treon* and *Tucker*, and also from seeking relief the Former Class Representatives, -1377 counsel omitted the Former Class Representatives from the

First RTSC. -1377 counsel apparently recognized that not only were they prohibited from seeking this relief- whether in the *Treon* and *Tucker* cases or in -1377- but that the Court had no jurisdiction over the Former Class Representatives because they were properly dismissed from -1377 in 2005. The First RTSC did not seek an accounting from or disgorgement of any benefits paid to the Former Class Representatives from the settlements of their Individual Lawsuits. The First RTSC did not even mention the Former Class Representatives or benefits paid to them.

A hearing was held on the First RTSC on March 31, 2010, wherein this Court announced its decision to grant the motion. The Former Class Representatives were not given notice of, nor participated in the hearing. Subsequent to the hearing, Judge Hayes was assigned the responsibility of *Treon* and *Tucker*, in addition to -1377. Because of his involvement in all three case, the Court delayed further action on the First RTSC to allow for exploration of a global resolution.

On October 15, 2010 *Treon* and *Tucker* counsel filed a Motion for Class Certification in *Treon* and *Tucker*, and served all counsel in -1377, *Treon* and *Tucker*. On March 4, 2011, Leath Bouch & Crawford, LLP, W. Jefferson Leath, Jr. and Michael S. Seekings (hereinafter collectively referred to as the "LBC Defendants") filed a Memorandum in Opposition to Plaintiffs' Motion for Class Certification challenging the adequacy of the representatives of the class. Thereafter, the remaining defendants adopted the arguments in the LBC Defendants memorandum by reference.

A hearing was held on July 21-22, 2011 in Spartanburg on several motions, including the *Treon* and *Tucker* Motions for Class Certification. During the first day of hearings, counsel for Original Class Counsel pointed out to the Court the inherent conflicts between the same class representatives in -1377, and *Treon* and *Tucker*, seeking the 'same pot of money' based upon the

same alleged conduct in multiple lawsuits. As a result, on day two of the hearings, *Treon* and *Tucker* counsel announced they were withdrawing certain class representatives and claims for disgorgement. *Treon* and *Tucker* counsel followed this announcement by filing a Conditional Stipulation for Consent Order Withdrawing Certain Proposed Class Representative and Claim for Disgorgement, dated August 18, 2011. *See* Conditional Stipulation, attached as Exhibit 21. Specifically, the Conditional Stipulation withdrew the Treons and P. Jennings Scearce as class representatives in *Treon* and *Tucker*, and proposed to stipulate to a revised caption adding Stephen and Jeaneen Tucker, and Charles and Stephanie Davis as substituted class representatives in *Treon*. *Id.* It also withdrew the claim by the class representatives for disgorgement of all attorney's fees paid to Original Class Counsel in *Tucker*. *Id.*

During the July 2011 hearings in Spartanburg, counsel for the *Treon* and *Tucker* defendants made an oral Motion to Recuse Judge Hayes based on perceived bias in comments made from the Bench. On April 27, 2012, the Court issued an Order Denying Motions to Recuse and Temporarily Staying Matters. *See* April 27, 2012 Order attached as Exhibit 22. In denying the *Treon* and *Tucker* Defendants' Motions to Recuse, the Court determined that "[e]ven though the underlying class action's (-1377) settlement has received final approval through appropriate Rule 23 procedures, the one remaining unresolved aspect of the case is the Rule to Show Cause... After extensive research on the issue of recusal and this Court's obligations under Rule 23, the better approach at this time is for the present two cases (*Treon* and *Tucker*) 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. Thus, the final decision, whatever it may be in the underlying litigation, will be subject to proper appellate review as to its substance and any

decisions in the present two cases (*Treon* and *Tucker*) will not be blurred by an undecided issue in the prior class action (-1377)." *Id.* at 13-14.

No settlement was reached in *Treon* and *Tucker*, and those matters are currently stayed. On June 1, 2012, the Court, *sua sponte*, issued another Rule to Show and Order for Accounting ("Second RTSC"). *See* June 1, 2012 RTSC and Order for Accounting, attached as Exhibit 23. The Second RTSC is purportedly based on the First RTSC, but does not actually name any of the Former Class Representatives, instead presumably referring to them as "Original Class Representatives." The Second RTSC seeks "an accounting of all benefits received by the Original Class Representatives"[1] and "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. *Id.* at 11. The Former Class Representatives, who specifically reserve all objections to this Court's exercise of jurisdiction over them, filed a Return to the Second RTSC and Motion to Dismiss or in the alternative Motion to Quash.

LEGAL ARGUMENT

1. **This Court does not have jurisdiction over the Former Class Representatives or claims, as the Former Class Representatives were dismissed from the above-captioned matter and this Rule to Show Cause cannot be used to obtain jurisdiction over non-parties.**

Styled as a petition in equity for temporary relief under the court's power of contempt, the RTSC seeks, in fact, to pursue an action for the turnover of property, as in a proceeding for claim and delivery, conversion or detinue. The action clearly is intended to be a new cause of action, since it is not between the original parties to the proceeding, *Gompers v Buck's Stove &*

Range Co., 221 U.S. 418, 444-45 (1911)("[p]roceedings for civil contempt are between the original parties, and are instituted and tried as a part of the main cause"), and the Receiver has given it a new caption and has obtained a new civil action number.

The first three rules of civil procedure in this State provide that those rules govern the procedure in all South Carolina courts in all suits of a civil nature, whether legal or equitable, S.C.Rule Civ.P. 1, that "there shall be one form of action known as a 'civil action,'"S.C.Rule Civ.P. 2 (emphasis added), and that "[a] civil action is commenced by filing and service of a summons and complaint." S.C.Rule Civ. P. 3(a).

The practice in this State prior to the effective date of the rules of civil procedure on July 1, 1985, was to allow, in some instances, a complainant to initiate an action with a rule to show cause and an affidavit or a verified petition. That practice is no longer valid under our rules. Now, to file a remedial writ, including a rule to show cause, a party must serve the adverse party with notice of the motion, the motion for the writ and a summons and complaint. Rules 4, 5 and 65(f)(1), SCRCP. The Editor's Notes to Rule 65 explain:

> 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, unless the action has already been commenced by filing and service of the summons and complaint. **An action may no longer be commenced by the service of an order or "rule to show cause" only.** This Rule 65 makes clear that the various remedial writs are not causes of action but remedies or relief, the right to which must be supported by the law and the facts. (emphasis added).

A rule to show cause issued without a summons and complaint must be dismissed, since the filing of the rule alone does not give the court subject matter jurisdiction or jurisdiction over the person. *Jasper County Bd. of Ed. v Jasper County Grand Jury*, 303 S.C. 49, 398 S.E.2d 498 (S.C. 1990). In the *Jasper County* case, the Board of Education brought an action against the Jasper County Grand Jury to enjoin the Grand Jury from disclosing certain information. *Jasper*

County Bd. of Educ., 398 S.E.2d at 499. The Board ultimately obtained the injunction it sought. Id. The Board then obtained a rule to show cause, in the original case, seeking to restrain the local newspaper, not a party in the original case, from disclosing the same information that the Grand Jury was enjoined from disclosing. Id. The caption of that action was "Jasper County Board of Education v Jasper County Grand Jury. In re September Publishing Corp." *Jasper County Bd. of Educ.*, 398 S.E.2d at 498. The newspaper moved to dismiss for lack of jurisdiction. *Id.* at 499. The trial judge granted the motion, because no summons and complaint had been served as required under Rule 65(b), SCRCP, and no action therefore had been commenced under Rule 3(a), SCRCP. *Id.* This ruling was not disturbed on appeal.

In the present matter, no summons and complaint was issued with the Second RTSC. The Second RTSC does not even identify John and Sally Cardamone, Benjamin and Diane Clark, or Ramona Gianni. Consequently, it does not give this Court subject matter jurisdiction or jurisdiction over the Former Class Representatives.

This rule to show cause is not brought as a matter under the existing *Treon* and *Tucker* actions between the original parties, but is a new civil action against new parties. The Former Class Representatives have never been served with a summons and complaint in -1377, just a letter from -1377 counsel and a copy of the RTSC. Yet, the relief sought in the Second RTSC is the same relief being sought in *Treon* and *Tucker*, to which -1377 counsel and Intervening Class Representatives are not original parties. The court has not therefore acquired subject matter jurisdiction over any of the respondents. The petition must be dismissed and the temporary order to show cause must be dissolved.

Furthermore, in the present case, -1377 counsel has indicated that the motion for the rule to show cause is proper under Rule 60 of the South Carolina Rules of Civil Procedure.[5] This is an improper legal basis on which to grant the requested relief. "While a court may correct mistakes or clerical errors by its own process to make it conform to the record, it cannot change the scope of the judgment." *Dion v. Ravenel, Eiserhardt Assocs.*, 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct.App.1994); see also *Ex parte Strom*, 343 S.C. 257, 264, 539 S.E.2d 699, 702 (2000) (indicating Rule 60 cannot be used to expand the scope of a judgment). In addition, Rule 60 specifically provides for a party's relief from a judgment, not the enforcement of that judgment against non-parties. See Rule 60(a)-(b), SCRCP.

2. <u>The underlying motion on which the Rule to Show Cause was initiated is directed only toward Original Class Counsel and is not directed toward the Former Class Representatives. -1377 Counsel specifically elected not to include the Former Class Representatives in the Rule to Show Cause, recognizing the fact that they have been disqualified from prosecuting these claims against the Former Class Representatives.</u>

The Second RTSC states that it is "before the Court on Plaintiffs' Motion for and Accounting of attorney fees allegedly received by certain Class Counsels **and for benefits paid to prior Class Representatives which were never disclosed to or approved by this Court.**" Ex. 23, ¶ 1. (emphasis added). However, *the First RTSC was directed only towards Original Class Counsel and is in no way implicated or was directed to the Former Class Representatives. See* Ex. 20. With the knowledge that the impending Order from Judge Dukes was gong to disqualify them from *Treon* and *Tucker*, and also from seeking relief from the Former Class

[5] -1377 counsel indicated in communication to the undersigned that enforcement of a judgment or order in this case may be obtained, presumably due to some alleged fraud, misrepresentation, or other misconduct of an adverse party per SCRCP Rule 60(b)(3), but has not articulated this position any further.

Representatives, -1377 counsel intentionally, and properly, omitted the Former Class Representatives from the First RTSC. -1377 counsel recognized that not only were they prohibited from seeking this relief- whether in the *Treon* and *Tucker* cases or in -1377- but that the Court had no jurisdiction over the Former Class Representatives because they were properly dismissed from -1377 in 2005.

The First RTSC did not seek an accounting or disgorgement of any benefits paid to the Former Class Representatives from the settlements of their Individual Lawsuits. The First RTSC did not even mention the Former Class Representatives or benefits paid to them. Moreover, because the Former Class Representatives were properly dismissed from the case in 2005 and were no longer named parties in -1377, they were not given proper notice of the hearing on the First RTSC, nor were they afforded an opportunity to be heard. Subjecting the Former Class Representatives to a procedural vehicle that has long been underway without their participation is inequitable and denies them their most basic due process rights. The Court cannot attempt to assert jurisdiction over the Former Class Representatives based on a motion that did not seek any relief from them.

Regardless of the disconnect between the 2010 and 2012 RTSC and Accounting motions, Judge Dukes' February 1, 2010 is clear and unequivocal in that -1377 counsel has an unwaived conflict of interest that disqualified them from any further participation in any related actions seeking relief from the Former Class Representatives arising from the settlement of their Individual Lawsuits. It is axiomatic in South Carolina that a circuit judge has no power to review and revise or reverse the action of another circuit judge. *State v. Price*, 14 S.E. 490, (S.C., 1892); See also *Cook v. Taylor*, 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979) (finding when one circuit court judge vacates an order of reference by another circuit judge this amounts to a

review of the order of another circuit judge and the second judge does not have the power to set aside the order of another judge); *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 603, 340 S.E.2d 546, 547 (1986) (finding a circuit court judge cannot deny the use of an amended complaint in light of an order of another circuit court judge that permitted use of the amended complaint). -1377 counsel is not allowed to pursue any disgorgement of the Former Class Representatives per the order of another judge in this circuit. As a result, this Court must respect that order and dismiss or alternatively quash the Second RTSC.

Even if the Court were to attempt to circumvent Judge Dukes' Order by conducting all the inquiries and examination of the Former Class Representatives and not allow -1377 counsel to participate, the net result is still the same: it would allow for the relief in -1377 (to which the Former Class Representatives are not parties) that has been and continues to be sought in *Treon* and *Tucker*, but from which -1377 counsel has been disqualified from seeking. As a result, this Court must dismiss or alternatively quash the Second RTSC to abide by the previous Order Disqualifying -1377 counsel.

3. The relief demanded in the Rule to Show Cause is the subject of other pending litigation, and the determination of the same issues in this action would be inequitable and violate the constitutional and statutory right to a jury trial of the Former Class Representatives.

The rule to show cause in this matter emanates from the Court's equitable, inherent authority. This equitable power is designed, primarily, to ensure that no wrong goes without a remedy:

The foundation of equity jurisprudence is to fashion a remedy where one had not existed at law. Therefore, it logically follows that equity will always seek to provide a remedy where a right has been violated. This is a natural, logical principle of equity since equity jurisprudence evolved because of the inflexible system of writs in law cases. Equity would fashion a remedy for a wrong where, in the conscience of the court, natural justice demanded it. *See* 12 S.C. Jur., Equity §8. "[E]quity is generally **only available** when a party is without an adequate remedy at law." See *Nutt Corp. v. Howell Road, LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011) (emphasis added) (citing *EllisDon Constr., Inc. v. Clemson Univ.*, 391 S.C. 552, 555, 707 S.E.2d 399, 401 (2011)).

At the core, the equitable remedy the Court seeks to impose in the instant case is that of a constructive trust:

> "A constructive trust results when circumstances under which property was acquired make it inequitable that it be retained by the one holding legal title. These circumstances include fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002) (internal quotation marks omitted). In general, a constructive trust may be imposed when a party obtains a benefit which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty.
>
> *Straight v. Goss*, 383 S.C. 180, 210, 678 S.E.2d 443, 459 (Ct. App. 2009) (internal quotation marks omitted).

Gordon v. Busbee, 397 S.C. 119, 141-42, 723 S.E.2d 822, 834 (Ct. App. 2012).

As a matter of equity, the relief described in the Rule to Show cause is improper and unfair. Far from being an equitable attempt to provide a remedy for a wrong that is not remediable at law, the relief requested here is already the subject of lawsuits (*Treon* and *Tucker*) pending before this very Court against the Former Class Representatives. The Intervening Class

Representatives commenced those actions – on behalf of themselves and others similarly situated – against, *inter alia,* the Former Class Representatives alleging breaches of fiduciary duties in connection with the settlement of the Former Class Representatives' individual claims. The Intervening Class Representatives have a full and fair opportunity to prosecute those claims in those lawsuits. They can obtain full and adequate legal remedies in those lawsuits to compensate them, if a jury determines that fiduciary or other duties were breached. The Second RTSC is an improper attempt to impose equitable remedies where has not been a showing that the legal remedies are insufficient nor that the resort to equity in the form of a constructive trust (or other equitable relief) is necessary.

Importantly, in those lawsuits, the Former Class Representatives have the benefit of various legal protections, including the constitutional right to a jury trial, discovery, formal pleading and service, and full litigation of claims under the governing substantive law. S.C. Const. art. I, § 25 ("The right of trial by jury shall be preserved inviolate."). They have not waived their right to a jury trial. The instant Rule to Show Cause, in essence, grants the Intervening Class Representatives the relief they have requested in *Treon* and *Tucker* without proving entitlement thereto, while denying the Former Class Representatives their due process and the constitutional rights. Far from being an equitable relief to the Intervening Class Representatives, the instant Rule to Show Cause is unduly unfair and burdensome to the Former Class Representatives.

Notably, the relief at issue in the Rule to Show Cause has no bearing upon any issue in **this** (-1377) action. The Former Class Representatives' settlements of their Individual Lawsuits do not affect, in any way, the liability of the Defendants in this action or the Plaintiffs' damages herein. Those settlements have no bearing upon whether Dryvit EIFS is a defective product or

was properly installed on the Intervening Class Representatives' homes. Rather, those settlements – if they are subject to attack – are properly before the Court in the Intervening Class Representatives' other lawsuits- *Treon* and *Tucker*. To interject such claims into this case would undermine and complicate both this lawsuit and the other pending actions.

Moreover, the Intervening Class Representatives do not even occupy the position of parties even *conceivably* entitled to the imposition of a constructive trust. As set forth above, a constructive trust is a vehicle used to protect a claimant where another party has improperly obtained a financial benefit from him. For example, if Dryvit contended that it was falsely induced to enter into settlements with the Former Class Representatives, it could conceivably seek the imposition of a constructive trust. However, here, the Intervening Class Representatives did not confer any financial benefits upon the Former Class Representatives that they should not be permitted to retain. The imposition of a construct trust under these facts would be pounding a square peg into a round hole.

4. **The claims for the relief sought in the Rule to Show Cause are barred as to the Former Class Representatives by the applicable statute of limitations.**

In actions other than recovery of real property, the applicable statute of limitations for an action upon a contract, obligation, or liability, express or implied, is three years. S.C.Code Ann. § 15–3–530 (2005). Actions for breach of fiduciary duty are subject to a three-year statute of limitations. *Mazloom v. Mazloom*, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (Ct.App.2009).

The discovery rule applies to this action. See S.C.Code Ann. § 15–3–535 (2005) (applying the discovery rule to causes of action arising under section 15–3–530(5)); *Rumpf v. Massachusetts Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct.App.2004) (stating

"[i]n determining when a cause of action arose under section 15–3–530, we apply the 'discovery rule' "). Under the discovery rule, the statute of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence that a cause of action might exist. *Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct.App.1999). The date on which discovery of the cause of action should have been made is an objective question. *Joubert v. S.C. Dep't of Soc. Servs.*, 341 S.C. 176, 191, 534 S.E.2d 1, 9 (Ct.App.2000). In *Young v. South Carolina Department of Corrections*, the court stated:

> In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct.App.1999).

Without dispute, the Intervening Class Representatives had knowledge of a claim or potential claim against the Former Class Representatives that triggered the statute of limitations well before three years of the June 5, 2012 filing of the Second RTSC. The fact that the Former Class Representatives settled their Individual Lawsuits- the act that arguably was the breach of their fiduciary duty- was known and demonstrated on the record several times:

- In the Motion to Intervene and Substitute Class Representatives ("the presently named representatives, John Cardamone, Sally Cardamone, Benjamin T. Clark, Diane M. Clark, Ramona Gianni and Nathan W. Gordon, have settled their cases with Dryvit. The **personal settlements between Dryvit and the Representatives have essentially mooted their claims** so there can be no question that they are not adequate representatives of the unnamed class members whose claims are still outstanding, the current representatives simply do not possess the standing necessary to continue to prosecute this suit.'"") Ex. 14 at 5;
- In the December 5, 2005 hearing on the Motion to Intervene and Substitute Class Representatives, -1377 counsel Thomas Williams and Richard Gleissner, and Original Class Counsel Greg Mullen all expressly informed the court that the Former Class Representatives had settled their individual claims with Dryvit. Ex. XXX.;
- In the *Treon* Complaint filed March 7, 2008, alleging a breach of fiduciary duties "in **reaching lucrative individual settlements** which Dryvit conditioned on the

> dismissal of the Cardamone Action (-1377)" and refusing to give notice to the Court "because such settlements were conditioned on the abandonment and elimination of the Cardamone Action (-1377)." Ex. 15 at ¶ 43.

Whether the Court starts the clock on the statute of limitations on the September 21, 2005 filing of the Motion to Intervene and Substitute Class Representatives, the December 5, 2005 hearing on the Motion, or the March 7, 2008 filing of the *Treon* Complaint, the June 5, 2012 Second RTSC is well outside of the applicable three year term. As a result, the Second RTSC is untimely and should be dismissed and/or quashed.

Alternatively, the Second RTSC should be barred as untimely by the doctrine of laches. The Second RTSC involves both equitable and legal causes of action. Actions seeking corporate dissolution or an accounting are both actions in equity. *Keane*, 372 S.C. at 142, 641 S.E.2d at 57. "[The South Carolina Supreme Court] has held that the statute of limitations does not apply to actions in equity." *Dixon v. Dixon*, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005). Equitable causes of action may be barred as untimely, however, by the doctrine of laches. *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or to enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Id. "The party asserting laches has the burden of showing negligence, the opportunity to act sooner, and material prejudice." *Richey v. Dickinson*, 359 S.C. 609, 612, 598 S.E.2d 307, 309 (Ct.App.2004). This Court has wide discretion to determine what constitutes an unreasonable delay. Chambers of S.C., Inc., 315 S.C. at 421, 434 S.E.2d at 280. However, "[d]elay alone in the assertion of a right, without injury to the adversary, does not constitute laches." *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct.App.1993).

Laches is an equitable doctrine regarding delay, defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 359, 628 S.E.2d 902, 912 (Ct. App 2006). However, "[d]elay alone is not enough to constitute laches; it must be unreasonable and the party asserting laches must show prejudice." *Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (2001). As the party seeking to establish the defense of laches, it is the Defendants' burden to show (1) a delay, (2) that is unreasonable and (3) that causes prejudice. *Twelfth RMA Partners, L.P. v. National Safe Corp.*, 335 S.C. 635, 641, 518 S.E.2d 44, 47 (Ct. App. 1999). Generally, the question of whether the elements of laches have been established is one of fact. *Grossman v. Grossman*, 242 S.C. 298, 130 S.E.2d 850, 855 (1963).

The Second RTSC is barred under the doctrine of laches because an unreasonable amount of time has passed prior to it being issued. As a matter of course, the Intervening Class Representatives and -1377 have previously asserted these claims against the Former Class Representatives- **in *Treon* and *Tucker***. As discussed above, the use of a RTSC is an improper vehicle to seek relief against the Former Class Representatives in a case in which they are not party to (-1377) when the same legal claims are pending against them in two other matters. However, they have now unreasonably delayed asserting them via the Second RTSC without justification. This is particularly true in light of the First RTSC that did not include the Former Class Representatives. Moreover, there has been no new revelations since *Treon* was filed (on March 7, 2008) that changed the position of -1377 counsel and Intervening Class Representatives seeking a RTSC in -1377. The only thing that has changed is that -1377 counsel was disqualified from *Treon* and *Tucker*, and so they now seek to make an end-run around their conflict of

interest by seeking the relief sought in *Treon* and *Tucker* in -1377. That constitutes and unreasonable (and improper) delay.

In *Arceneaux v. Arrington*, 284 S.C. 500, 503, 327 S.E.2d 357, 358-59 (Ct. App. 1985), the Court of Appeals determined that two years was an unreasonable delay after hearing evidence on plaintiff's equitable claim for injunctive relief to enforce a restrictive covenant. At a minimum, the delay in the present matter is at least four years (from March 07, 2008, when the Intervening Class Representatives alleged a breach of fiduciary duty until June 05, 2012, when the Rule was filed). It is even more reasonable to believe that the Intervening Class Representatives first had notice at the time of the filing of the "Motion to Intervene" on September 21, 2005, nearly seven years prior to the Second RTSC. Either delay is unreasonable given the nature of the funds that the Rule seeks to disgorge.

This delay has caused and will continue to cause undue prejudice, burden, and expense to the Former Class Representatives. Disgorging settlement proceeds from the Individual Lawsuits will prejudice the Former Class Representatives because those funds were expended long ago to repair their homes. These funds were not obtained by settlements of or in -1377, were less than their actual damages, and left them with a shortfall that they had to make up with their own funds. Now they are having to incur great expense in legal costs associated with opposing and challenging the propriety of the Second RTSC, including having to travel to the other side of the state to object to the Second RTSC; and possibly again in October to participate in the proceeding- **all of this in a case in which they are not even parties.** The balance of equities clearly tips in favor of finding an unreasonable delay in asserting these claims by Intervening Class Representatives and -1377 counsel, and as such, should be barred untimely by the doctrine of laches.

5. **Even if This Court Determines That It Possesses Jurisdiction and with Regard to the Rule to Show Cause, It Is Undisputed That the Former Class Representatives Only Settled Their Individual Lawsuits, Not the Above-Captioned Class Action.**

It is beyond dispute that by settling their Individual Lawsuits in 2003, the Former Class Representatives did not settle, dismiss, or compromise the class claims -1377; indeed, they took no action that was in any way antagonistic to the interests of the other class members. The settlement documents demonstrate that the only lawsuits contemplated and settled by the Former Class Representatives were the respective, pre-existing individual cases:

- Civil Action No. 1999-CP-07-1237;
- Civil Action No. 01-CP-26-5153; and
- Civil Action No. 02-CP-07-905;

That this Court intends to contemporaneously consider this Return and Motion to Dismiss or Motion to Quash the Rule to Show Cause with Dryvit's Motion to Dismiss and Discharge Dryvit is proof enough that -1377 was not settled by the Former Class Representatives. Counsel for Dryvit submitted a proposed Order stating:

> This matter coming before the Court...**and it appearing that this Court approved a settlement agreement between Defendant and the Class** and reduced said settlement agreement to final judgment after full and adequate notice to the Class and opportunity to be heard provided to any and all class members who sought to be heard... **that all timely claims have been received and processed with all qualifying claims having been paid, that all disputes in the administration of claims have been resolved by agreement or by the Special Master, and that all time periods for submitting claims or contesting determinations made during the claims administration process have expired, that Defendant Dryvit has fulfilled its obligations under the settlement agreement and final judgment to the satisfaction of the Court, and there being no objection from Class Counsel or Plaintiffs hereto;**
>
> NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that **Defendant Dryvit Systems, Inc. has fully satisfied that final judgment in this**

> **action dated June 9, 2010 and Defendant and its counsel are therefore dismissed and discharged from any requirement that they participate further in these proceedings....**

Proposed Order Granting Dryvit's Motion to Dismiss, attached as Exhibit 24 (emphasis added). Obviously -1377 continued by the substitution of class representatives, as this Court oversaw and approved the settlement and resolution of that case, and now is being asked to discharge Dryvit.

Despite the fact that the Former Class Representatives did not compromise, discharge, or in any way impair -1377, the Former Class Representatives are accused of breaching their duty to the -1377 class by settling their individual claims. They now seek to disgorge the Former Class Representatives' individual settlement proceeds and place them into a constructive trust for the benefit of the class. The premise upon which the relief is sought against the Former Class Representatives is that they received money that belongs to the other members of the class. This premise is fundamentally flawed in that none of the settling defendants in the individual actions – including Dryvit – paid any money to or for the benefit of anyone other than the individuals with whom they settled. None of the defendants – including Dryvit – demanded any concession by or on behalf of the other class members as a condition to settlement. All of the settlement money belongs to the Cardamones, the Clarks, and Gianni because it was paid to them, for their sole benefit, because of their individual damage claims. In support of this attempt to take money from the Former Class Representatives and award it to people who have no right to it (and to counsel who has been disqualified from seeking it), the Intervening Class Representatives cite *Premium Inv. Corp. v. Green*, 283 S.C. 464, 324 S.E.2d 72 (S.C.App.,1984). However, that reliance is misplaced, as *Premium Investment* is inapposite.

The Former Class Representatives do not dispute that a class representative owes a fiduciary duty to absent class members: "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.** The class representative also surrenders the right to settle the action in return for individual gain, **alone.**" *Id.* at 470 (citations omitted)(emphasis added). In *Premium Investment*, a subdivision property owner commenced a class action to recover proceeds of a settlement of an alleged prior class action. The court held that the prior action was a proper class action (although not certified before settlement), and that the defendants were fiduciaries and violated the rights of the class by settlement and dismissal of the lawsuit without notice. *Id.*

The critical distinction between these cases is that, in *Premium Investment* the class representative **settled and dismissed the class action itself, to the detriment of the absent class members**. There was no individual suit accompanying the putative class action. Unlike the case at bar, the entire group action was compromised, and the entire benefit received by the settling class representative was for the benefit of the class (and subsequently disgorged). That is simply not the case here. Plaintiffs contend that the Former Class Representatives are responsible for delay in prosecuting the class action *after* the Former Class Representatives settled their individual claims. If there was prejudicial delay, it was in no way the doing of the Former Class Representatives. Their settlement of their individual claims did absolutely nothing to impede the progress of this litigation, as the law provides for seamless substitution of class representatives in situations like this.

The Fourth Circuit has also recognized the distinction between *Premium Investment* and the present situation. In *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1304–14 (4th Cir.1978), the Fourth Circuit held that Rule 23(e) does not apply to precertification dismissals. In *Shelton*, much like *Premium Investment*, the Fourth Circuit recognized that parties naming themselves as

class representatives of an alleged class voluntarily undertake a fiduciary obligation towards the other members of that proposed class. *Id.* at 1305. Shelton also drew the distinction of a class representative settling an individual claim, holding that class representatives may not abandon their duty by **dismissing or settling the action** if it would prejudice absent alleged class members or if they **improperly used class allegations to enhance their own, individual settlements.** *Id.* (emphasis added).

Here, the Former Class Representatives did not dismiss or settle the class action (-1377). The settlement of the Former Class Representatives' Individual Lawsuits obviously did not prejudice the absent class members, as they reached a settlement in -1377 that was better than the terms agreed to in the *Posey* Action. Also, there is no evidence that the Former Class Representatives improperly used the class allegations to enhance their individual settlements (as demonstrated by their net loss in the litigation).

Premium Investment does not support the position of -1377 counsel and *Treon* and *Tucker* counsel, and neither do the governing rules. The Notes to SCRCP Rule 23(c) state that "it is the language of current Federal Rule 23(e). It is necessary to protect the rights of all members of the class." By its explicit language, SCRCP Rule 23(c) and FRCP Rule 23(e) are both confined in operation to the settlement and dismissal of a "class action." In the case at bar, there was no such settlement, dismissal or compromise of the -1377 "class action". The Former Class Representatives only settled their respective individual claims, did not profit from them, and did not compromise -1377 in the process. As a result, any consideration for settlement of the individual claims of the Former Class Representatives is not money that the -1377 class has a right or claim to, nor is it subject to the requirement of court approval.

Because the Former Class Representatives did not compromise or settle the -1377 class action, but rather only their respective Individual Lawsuits and subsequently were substituted as class representatives in -1377, their actions do no fall within the purview of *Premium Investment.* Nor did the Former Class Representatives engage in any collusion, prejudice, or personal aggrandizement. Rather, despite their individual settlements, they incurred significant out-of-pocket expense to repair their damaged homes. As a result, the RTSC should be dismissed or the Court should grant an order quashing the motion should be granted.

CONCLUSION

For the foregoing reasons, the Former Class Representatives respectfully request this Court grant a Motion to Dismiss the Rule to Show Cause and Order for Accounting, or in the alternative, grant a Motion to Quash the Rule to Show Cause and Order for Accounting.

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By: _____

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ATTORNEYS FOR THE NON-PARTIES JOHN & SALLY CARDAMONE, BENJAMIN & DIANE CLARK, and RAMONA GIANNI

July 17, 2012
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BEAUFORT	)	
Timothy J. Treon and his wife, Jane Treon, and P. Jennings Scearce and Steven Christian individually, and on behalf of others similarly situated in the State of South Carolina,	)	Civil Action No.: 2002-CP-07-1377
Plaintiffs,	)	**RETURN TO RULE TO SHOW CAUSE and ORDER FOR ACCOUNTING by WILLIAM M. BOWEN**
v.	)	
Dryvit Systems, Inc.,	)	
Defendant.	)	

By way of a return to this Court's Rule to Show Cause and Order for Accounting dated June 1, 2012, William M. Bowen ("Bowen") responds and alleges the following:

1. The Court's Order recites that it was issued in response to the "Plaintiffs' Motion for an Accounting of attorney fees allegedly received by certain Class Counsels and for benefits paid to prior Class Representatives which were never disclosed to or approved by this Court". The Plaintiffs' Motion for Accounting was dated January 12, 2010 and addressed only fees allegedly received by former Class Counsel, not funds allegedly paid to former Class Representatives. Subsequently, Plaintiffs' counsel filed a Motion for the Issuance of an Order Requiring Former Class Counsel to Appear Before the Court. Again, the Motion was addressed only to former Class Counsel and not to former Class Representatives. Bowen contends that it is improper for the Court to attempt to assert jurisdiction over the former Class Representatives based upon Motions which sought no relief against the former Class Representatives.

2. Plaintiffs' attorneys were disqualified from representing class claimants against these former Class Representatives by the Honorable Marvin H. Dukes, Special Circuit Judge,

Order dated February 1, 2010. It is improper for Plaintiffs' counsel to prosecute their motion against former Class Representatives when they have been disqualified from suing these Class Representatives in related litigation.

3. By reason of those matters set forth in Paragraphs 1 and 2 above, Bowen contends that the Rule to Show Cause should be dismissed and withdrawn as to the former Class Representatives or, if it is not, Plaintiffs' counsel should be disqualified from prosecuting the motion against the Former Class Representatives.

4. This Court does not have subject matter or *in personam* jurisdiction to do what it proposes to do. In the Rule to Show Cause, the Court recognizes that an issue of fact exists concerning whether the fees that were paid to former Class Counsel were paid for work in this case, known as Cardamone, or in another case in Tennessee, known as Posey. The Court said:

> "One theory proffered by Original Class Counsel is that the monies were paid solely for the representation of Posey Objectors William and Allison Deloach. Another theory is that it was for work done for the Posey class. However, from the documents in the record in this case, one can reasonably conclude that the payments were based on Original Class Counsel's status as being named "Class Counsel" and the agreement to compromise and ultimately dismiss this case; ..." (See Rule to Show Cause, Page 8 of 11)

5. Thus, the Court recognizes that a question of fact exists about the source of any fees received – legal work in the Posey case or in this case. However, the Court has erroneously and improperly decided that question of fact when it makes its own "reasonable conclusion" from the documents in the case.

6. This Court does not have the authority under Rule 23 to decide the question of the source of those fees – the Posey case or the Cardamone case. This underlying question of fact is for a jury to decide in another pending related proceeding - not for the Court to decide in this case. By deciding that question on its own, the Court is committing reversible error.

7. If

a.) a jury in another proceeding decided that the $600,000 in fees paid to the former Class Counsel were not earned in Posey but rather were earned as class counsel in the Cardamone case, or

b.) if former Class Counsel were to stipulate or agree that $600,000 in fees paid to the former Class Counsel were not earned in Posey but rather were earned as class counsel in the Cardamone case, then this Court's jurisdiction under Rule 23 to issue the Rule to Show Cause would not be in question.

8. However, neither of those situations is present here. By issuing its Rule to Show Cause, the Court has

a.) improperly placed the burden of proving that the fees were not earned in the Cardamone case on former Class Counsel rather than upon the accusing parties seeking the relief;

b.) improperly denied former Class Counsel a trial before a jury for that issue of fact to be decided;

c.) improperly denied former Class Counsel due process in that factual determination; and

d.) improperly attempted to assert *in personam* and subject matter jurisdiction over former Class Counsel over this disputed factual issue.

9. The Court should dismiss and withdraw the Rule to Show Cause and deny the Plaintiffs' motion until a jury in another proceeding has made the necessary factual finding for it to proceed.

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July 17, 2012

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE CIRCUIT COURT
Timothy J. Treon and his wife, Jane Treon, and P. Jennings Scearce and Steven Christian individually, and on behalf of other similarly situated in the State of South Carolina, Plaintiffs, vs. Dryvit Systems, Inc., Defendant.	Case No. 2002-CP-07-1377 **WILLIAM DIXON ROBERTSON III and WILLIAM M. BOWEN'S MOTION TO RECONSIDER ORDER DATED SEPTEMBER 28, 2012**

William Dixon Robertson III ("Robertson") and William M. Bowen ("Bowen") respectfully move the Court, pursuant to Rule 59(e), SCRCP, to alter or amend the Court's Order dated September 27, 2012 (hereinafter "the Court's Order") which denied the motions to dismiss or quash the June 5, 2012 Rule to Show Cause (hereinafter "RTSC"), on the following grounds:

1. The Court's Order ignores the fact that this action was dismissed with prejudice by an Order of this Court that predated the RTSC by almost two years, with the only jurisdiction specifically retained being for a limited and discreet purpose unrelated to the action that is being attempted against Robertson and Bowen and other Respondents. Robertson and Bowen request that the Order be altered or amended to acknowledge the fact that no action can be taken in a dismissed action and, accordingly, to grant the motion to dismiss.

2. The Court's Order, at # 11 on page 2, mischaracterizes one of the stated objections asserted in Robertson's and Bowen's respective motions to dismiss the RTSC, that being that the Court identified factual issues to be decided (whether the fees that were paid to former Class Counsel were paid for work in *Posey* or in *Cardamone*). While the Order discusses

at length the factual "documentation" and "information" with which it has been presented (in this action, to which neither Robertson nor Bowen is a party), the Court fails to specifically rule on these asserted objections that such factual issues should be decided by the triers of fact; rather, the Court's Order states that "[t]his Court's opinion is that it would be a dereliction of its Rule 23 duties not to issue the RTSC based on the factual information before it." (Court's Order, p. 11).

3. On page 13 of its Order, this Court bases its personal jurisdiction over Robertson and Bowen on "the inherent contempt power of a South Carolina circuit court." At the oral argument on the motions, this Court disagreed with Mr. Phillips' characterization of this proceeding as one for contempt, and indeed, indicated that it did not consider it as such. Under those circumstances, Robertson and Bowen request the Court to alter or amend its Order to withdraw that as a basis for jurisdiction and to grant the motion to dismiss accordingly.

4. The Court's Order is premised on a misapplication of the case of *Premium Inv. Corp. v. Green*, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984) ("the *Premium Investment* case"). In *Premium Investment*, a subdivision property owner commenced a class action to recover proceeds of a settlement of an alleged prior class action. The court held that the prior action was a proper class action (although not certified before settlement), and that the defendants were fiduciaries and violated the rights of the class by settlement and dismissal of the lawsuit without notice. *Id.* The critical distinction between these cases is that, in *Premium Investment*, the class representative settled and dismissed the class action itself, to the detriment of the absent class members. There was no individual suit accompanying the putative class action. Here, it is not disputed that the individual claims of the original class representatives and the clients of Robertson, Bowen, and the other original class counsel, all of which were settled at some point in 2003, did not compromise the class claims in this case, which have now been settled, with the

express approval of this Court. Unlike the case at bar, the entire group action in *Premium Investment* was compromised, and the entire benefit received by the settling class representative was for the benefit of the class (and subsequently, rightly, disgorged). That is simply not the case here. Accordingly, to the extent that this Court's Order relies upon the *Premium Investment* case for its authority to issue the RTSC, such reliance is misplaced.

5. In its recitation of the grounds asserted in Robertson's motion to dismiss the RTSC, page 2 of its order, the Court omitted Robertson's third stated objection to this Court proceeding with the Rule to Show Cause, that being that the Court had "already decided one or more factual issues to be determined by the triers of fact, not this Court." Robertson respectfully submits that the Court's Order fails to address Robertson's argument that, in addition to objecting to holding any hearing pursuant to the RTSC at all, this Court should recuse itself from any hearing pursuant to the RTSC.

6. The Court's Order, specifically in footnote 2, p. 3, for the first time apprised Robertson and Bowen that it was relying upon and incorporating a January 7, 2009 Order *denying* a motion for summary judgment filed by defendant Dryvit Systems, Inc. ("Dryvit") in this case. Robertson and Bowen submit that it is improper to base the Court's decision to issue a Rule to Show Cause in this case based on an order entered in a case to which they are not parties. Robertson and Bowen had (and could have had) no notice of either Dryvit's motion for summary judgment or the plaintiffs' opposition to same. Presumably these filings formed the basis of the Court's decision to deny Dryvit's motion for summary judgment, yet it was only after the issuance of the Court's January 7, 2009 Order denying summary judgment that Robertson and Bowen had notice of the same. As the Court is well aware, an order denying a motion for summary judgment is not a final order and contains no "findings of fact." In fact, a review of the

January 7, 2009 Order referenced in footnote 2 shows that there are no findings of fact in it. Accordingly, Robertson and Bowen respectfully submit that the Court's Order improperly relies upon this January 7, 2009 Order and any pleadings or other documents presented to the Court in connection with the underlying motion for summary judgment, in response to which Robertson and Bowen have had no opportunity to respond.

7. Furthermore, the Court's Order relies upon an Order entered "on or about November 26, 2006" in which the Court states that it "reserved the option of revisiting any compensation paid to Cardamone Counsel in connection with this matter." In doing so, the Court ignores the facts that (1) Robertson and Bowen and all other Class Counsel who are Respondents to the RTSC had been relieved from the case more than 10 months before that second Order was entered, and (2) the only reservation in the second Order was that Intervenors' Counsel might be permitted to "share in any compensation paid to any Current Class Counsel or to be paid to Current Class Counsel for the services that they rendered prior to the entry of this Order". As of the date of that Order, however, and because of the previous Order dated January 18, 2006, none of the Respondents was "Current Class Counsel" and, even if they were, the RTSC does not involve an action by Intervening Counsel to "share" in fees. By reason of these things, Robertson and Bowen request that the Order be altered or amended to acknowledge the fact that this Court had no continuing jurisdiction over them that would allow it to issue a RTCS, requiring them to appear in the manner, and for the purposes, set forth in the RTSC and, accordingly, to grant the motion to dismiss.

8. As additional support for Robertson and Bowen's argument that the Court's Order improperly relies upon the Court's "findings" in connection with Dryvit's motion for summary judgment is an insufficient basis on which to deny their motions to dismiss, Robertson and

Bowen submit for the Court's consideration three letters, attached hereto respectively as **Exhibit A** (December 30, 2005 letter from Robertson to Richard R. Gleissner, Esquire ("Gleissner")), **Exhibit B** (December 30, 2005 letter from Gleissner to Robertson), and **Exhibit C** (January 3, 2006 letter from Robertson to Gleissner), all of which ***predate*** this Court's entry of its January 18, 2006 Order relieving Robertson and Bowen, along with Leath Bouch & Crawford and Mike Seekings, as original class counsel. More importantly, this Court was copied ***on all three letters***, and therefore was on notice of the payment to original class counsel of a portion of the attorney's fees that were approved by the Court in *Posey* for the work performed by the original class counsel in improving the settlement for class members in *Posey*.

9. While the Court's Order mentions the issue of the safeguards of due process in connection with the testimony to be elicited from Robertson and Bowen (and other Original Class Counsel) as a basis for their motions to dismiss the RTSC (see Court's Order at page 14), it dismisses those concerns by characterizing the RTSC as an action for an accounting which is equitable. The Court's Order further states: "Additionally, this Court has received no request to conduct a jury trial as part of this RTSC." (*Id.*). By this language, the Court's Order fails to recognize that the procedural safeguards of the South Carolina Rules of Civil Procedure afforded parties to litigation apply whether the action includes equitable or legal claims (or both). Furthermore, the Court's Order avoids ruling on Robertson and Bowen's argument that the RTSC deprives them of their right to a jury trial in the matter in which they are a party, the *Tucker* case, but merely suggests that they had not requested a jury trial in connection with the RTSC issued in this case, in which they are not parties and have no standing to assert pleadings (indeed, this case has been settled and dismissed).

10. The Court's Order also fails in any way to substantively address the arguments of former class counsel and former class representatives that the RTSC deprives them of due process and fails to set forth any process that the Court intends to afford those defending the Rule. For example, the Court's Order makes no provision for participation by any counsel for Robertson or Bowen, or for the calling of any witnesses or introduction of evidence by Robertson or Bowen. Further, Robertson and Bowen, as non-parties to this litigation, have been deprived of the discovery developed by the plaintiffs and Dryvit in this action, and thus likewise deprived of the ability to prepare adequately and appropriately for any hearing on the RTSC. By stark contrast, the plaintiffs have had years of discovery exchanged with Dryvit. Furthermore, unlike Robertson and Bowen, the plaintiffs were entitled to and did issue a subpoena for a witness to appear and testify at the RTSC (**attached as Exhibit D**). Robertson and Bowen submit that the Court should amend its Order to revoke and cancel the RTSC. Failing that, the Court should amend its Order to set forth specific procedures that safeguard the due process rights of Robertson, Bowen, the other Class Counsel, and the Class Representatives.

11. The Court's Order fails to address the objection raised by Robertson and Bowen that the RTSC improperly places the burden of proving that the fees were not earned in the *Cardamone* case on former Class Counsel rather than upon the accusing parties seeking the relief. In fact, the Court's Order does not rule one way or the other who bears the burden of proof. Robertson and Bowen respectfully submit that to the extent this Court has concluded (although its Order is silent on this point) that the burden of proof is on them to prove that any fees received from counsel for the *Posey* class were properly received, such burden is misplaced and further heightens the jeopardy to their right to a jury trial.

12. The Court's Order improperly characterizes the underlying actions against the Class Representatives ("the *Treon* case") and the legal malpractice action against Robertson and Bowen and the other Class Counsel ("the *Tucker* case") as "collateral lawsuits [that] are civil actions wherein the unnamed plaintiffs in this action [*Treon v. Dryvit*] seek a jury trial against the Respondents for damages they sustained based on allegations of breach of fiduciary duty, legal malpractice, etc." (Court's Order, p. 12). In point of fact, these two underlying actions are also class actions and this Court has been assigned to them as well. Accordingly, the perceived "duties" of the Court as a judge overseeing a class action apply equally to these two actions. Yet this Court has overlooked or ignored that the fees sought by virtue of the RTSC were ***first*** sought in these two actions, in which Robertson and Bowen would have received all of the procedural safeguards afforded parties and, furthermore, where they would have received a jury trial as to all factual disputes in connection with these fees. It was only by virtue of a unilateral withdrawal of the claims for those fees in the *Tucker* case by plaintiffs' counsel, Thomas Pendarvis (with no prior notice or court approval), that this Court now has determined that it may seek to make factual determinations regarding the fees at issue in the RTSC. Accordingly, this Court should amend its Order, at the least, to address the lack of procedural safeguards and due process by virtue of the RTSC.

13. Robertson and Bowen adopt and incorporate any additional bases for a motion to reconsider under Rule 59(e) that may be asserted by any other Respondent.

Respectfully submitted,

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October 9, 2012

Columbia, South Carolina

EXHIBIT A

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December 30, 2005

Mr. Richard R. Gleissner
Finkel & Altman, LLC
Post Office Box 1799
Columbia, SC 29202-1799

RE: Cardamone v. Dryvit Systems, Civil Action No. 02-CP-07-1377

Dear Rick:

Thank you for taking the lead with circulating the order(s) following Judge Hayes' rulings earlier this month. I understand that you will incorporate the language Jeff Leath suggested, relieving those of us who no longer have much of a stake in the case, as counsel for the class.

As you recognized in one of your early draft orders, original counsel for the plaintiffs in this case also performed significant work in the *Posey* action. I accompanied other South Carolina counsel to prepare for and attend the fairness hearing in Jefferson, Tennessee. Speaking as counsel for objectors, Frank Grimball challenged the fairness of the original settlement agreement. Mike Seekings and Jeff Leath subsequently negotiated substantial improvements in the settlement bargain for *Posey* class members, including an increase in the potential cash payment from four dollars to seven dollars per square foot of EIFS. Those efforts, and the final approved class settlement agreement, earned praise for South Carolina counsel from the Tennessee trial judge. In his order approving the settlement and the attorney's fee for class counsel, Judge Slone recognized:

> Class Counsel, together with counsel for certain objectors, including those representing a litigation class in South Carolina have been engaged in numerous substantial discussions and negotiations since the Fairness Hearing with Counsel for the Settling Defendant and persons who will be responsible for overseeing inspection, repair, and warranties under the Settlement Agreement. These negotiations and discussions have resulted in 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.

January 14, 2003, Order, *Posey v. Dryvit Systems,* Case No. 17,715-IV (Jefferson County, TN, Circuit Court) at 5. Because of the contributions South Carolina made in the Posey case, class counsel there agreed to pay a portion of their attorney fees to us, in recognition of work we did as counsel for objectors in *Posey*. To avoid even the appearance of impropriety, I wanted to make sure that you knew about them.

Thank you again for shepherding the order, and good luck in your representation of the *Cardamone* class. Please call me with any questions.

Best regards,

Sincerely yours,

William Dixon Robertson III

cc: Honorable J. Mark Hayes II
Mr. Thomas J. Finn
Mr. Donald E. Jonas
Mr. Gregory M. Alford
Mr. W. Jefferson Leath, Jr.
Mr. William M. Bowen
Mr. Michael S. Seekings
Mr. George E. Mullen
Mr. Francis E. Grimball
Mr. J. J. Anderson
Mr. Ralph E. Tupper
Ms. Hada Hulsee

EXHIBIT B

FINKEL & ALTMAN LLC
ATTORNEYS AT LAW

RICHARD R. GLEISSNER, ESQUIRE
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Reply to Columbia Office

December 30, 2005

William Dixon Robertson, III, Esquire
Suite 620, 1122 Lady Street
Post Office Box 11401
Columbia, South Carolina 29211-1401

Re: Cardamone et al v. Dryvit Systems, Inc., et al
Civil Action Number: 2002-CP-07-1377
Our Clients and Proposed Intervenors:
P. Jennings Scearce and Thomothy and Jane Treon
Our File Number: 48710-18234

Dear Dixon:

I appreciate your comments included in your letter to me of this date and I hope this holiday season finds you and your family well and happy. I am attempting to complete the negotiations relating to the proposed Orders and hope to get them to counsel for Dryvit Systems, Inc. ("Dryvit") and then to the Honorable J. Mark Hayes, II early in the new year. As it relates to Jeff's comments, we had no difficulty with Jeff's requests and will get them incorporated into the proposed Order before sending them to counsel for Dryvit for their comments. As it relates to second paragraph of your letter, I am a bit confused and hope that you can clarify some of issues raised in that paragraph.

I was under the impression that you and several other attorneys from various parts of South Carolina had formed a litigation team. This litigation team brought a litigation class action in South Carolina (the "Original Class Counsel") in the above-captioned matter (the "SC Class Action"). As Original Class Counsel, you and these other attorneys represented the class representatives in South Carolina and the putative class members in South Carolina.

My understanding has been that either all of the Original Class Counsel or a subset of the Original Class Counsel or all of these attorneys plus additional attorneys (the "SC Counsel in Tennessee") also represented some individuals that specifically elected to opt into and object to *Posey v. Dryvit Systems, Inc.*, Case No. 17,715-IV (Jefferson County, TN, Circuit Court) (the "Tennessee Class Action"). My understanding has been that SC Counsel in Tennessee provided a service to the plaintiffs in the Tennessee Class Action by showing how extremely unfair that proposed settlement was on a national basis. I had heard rumors that for the services rendered to the

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Tennessee Class Action, the SC Counsel in Tennessee were to receive some compensation, but frankly, I never really cared about this issue or sought to verify this rumor.

The reason I never really cared about the compensation of SC Counsel in Tennessee is that I was under the impression that SC Counsel in Tennessee were not negotiating for the citizens of South Carolina, were not settling the SC Class Action in their negotiations in Tennessee and were representing a very limited number of individuals from South Carolina that had specifically decided to opt into the Tennessee Class Action.

You will recall that my firm also represented an individual objecting to the Tennessee Class Action. You may also recall that on behalf of this individual, my firm previously sought to intervene in the SC Class Action. You may also recall that Judge Kimmerlin denied my client's motion to intervene based upon the fact that he had opted into the Tennessee Class Action. Thus, I have always been under the impression that it was completely irrelevant to the SC Class Action that the SC Counsel in Tennessee performed services and were to be paid in the Tennessee Class Action because that action only related to South Carolina Citizens that specifically opted into the Tennessee Class Action.

Your letter confuses me for the following reasons:

1. You stated that one of my early draft orders recognized that Original Class Counsel performed work in the Tennessee Class Action. I do not know to what you are referring. Nothing in the draft orders that I have prepared suggested such a thing.

2. You quote an Order in the Tennessee Class Action that refers to "a litigation class in South Carolina" and "negotiations" toward the settlement of the Tennessee Class Action. Prior to your letter, I had always read that paragraph as a recognition by the Tennessee Class Action of the existence of a litigation class in South Carolina and an intent by the Tennessee Class Action to make sure that none of its Orders or Judgments would ever effect the litigation class in South Carolina. Your letter suggests a different reading of that paragraph.

Specifically, your letter confuses me because it could be read to suggest that you attempted to settle the SC Class Action by negotiating in the Tennessee Class Action and that you are going to be compensated for those efforts. Please, please, please tell me that this interpretation of your letter is incorrect and a misunderstanding on my part.

If you are confused as to why I am begging you to clarify your letter, please call me and we can talk about it.

If you have any questions or need additional information, please feel free to contact us. Thank you for your consideration and assistance in this matter.

Sincerely,

Richard R. Gleissner

RG/abm

cc: Intevenors Counsel: Thomas J. Finn, Esquire; Donald E. Jonas, Esquire; Gregory M. Alford, Esquire;
Plaintiff's Counsel: Michael S. Seekings, Esquire; George E. Mullen, Esquire; W. Jefferson Leath, Jr., Esquire; Timothy W. Bouch, Esquire; Francis E. Grimball, Esquire; William Dixon Robertson, Esquire; William M. Bowen, Esquire; Jonathan J. Anderson, Esquire;
Defendants Counsel: Ralph E. Tupper, Esquire; Erin D. Dean, Esquire; Hugh Claytor, Esquire.
The Honorable J. Mark Hayes, II

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January 3, 2006

Mr. Richard R. Gleissner
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RE: Cardamone v. Dryvit Systems, Civil Action No. 02-CP-07-1377

Dear Rick:

Thank you for your December 30 letter. I apologize for creating any confusion. Your understanding, stated in the first five paragraphs of your letter, is correct. I misread the reference at page eight of *Dryvit's* September 23, 2005, memorandum of law, as your language. I beg your pardon. Your interpretation of Judge Slone's order, stated in your second numbered paragraph, is the same as mine. Although I was not directly involved in negotiations with Dryvit or with *Posey* class counsel, my understanding was and remains that the improvement to the *Posey* settlement agreement was for the benefit of only those South Carolinians who elected to take advantage of that settlement. As I said in my letter to you, 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.

Best regards,

Sincerely yours,

William Dixon Robertson III

cc: Honorable J. Mark Hayes II
Mr. Thomas J. Finn
Mr. Donald E. Jonas
Mr. Gregory M. Alford
Mr. W. Jefferson Leath, Jr.
Mr. William M. Bowen
Mr. Michael S. Seekings
Mr. George E. Mullen
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EXHIBIT D

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**Also member Virginia Bar
† Of Counsel

September 25, 2012

Via E-Mail and U.S. Mail
Thomas Pendarvis, Esq.
Pendarvis Law Firm
500 Carteret St., Ste A
Beaufort, SC 29902

Re: Timothy Treon et al v. Dryvit Systems, Inc. et al
Civil Action No.: 2002-CP-07-1377

Dear Mr. Pendarvis:

Enclosed please find a subpoena for Allison Deloach to appear in front of Judge Mark Hayes on October 3, 2012 at 2:00 pm in Spartanburg. The hearings in this case begin on October 1, 2012 however Mr. Alford expects that he would not need Ms. Deloach's testimony until the 3rd. Also enclosed is her check for the witness fee and mileage. Should you have any questions or concerns, please do not hesitate to contact me. With kindest regards, I am,

Sincerely,
ALFORD, WILKINS & COLTRANE, LLC

Amanda DuBose
Paralegal

Enclosure
Cc: All counsel of record via email only

STATE OF SOUTH CAROLINA

IN THE COMMON PLEAS COURT — COUNTY OF BEAUFORT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	Civil Action No.: 2002-CP-07-1377
Timothy J. Treon and his wife, Jane Treon, and P. Jennings Scearce, individually, and on behalf of others similarly situated in the State of South Carolina, Plaintiffs,	)	SUBPOENA IN A CIVIL CASE
vs.	)	
Dryvit Systems, Inc., Estate Builders, Inc., and American Way Applicators of South Carolina, Inc.,	)	
Defendants.	)	

TO: Allison DeLoach
c/o Thomas Pendarvis, Esq.
Pendarvis Law Offices, P.C.
500 Carteret St., Ste A
Beaufort, SC 29902

X YOU ARE COMMANDED to appear in the above-named court at the place, date and time specified below to testify in the above case.

Wednesday October 3, 2012 2:00 P.M.
Hearing Before Hon. J. Mark Hayes, II
180 Magnolia Street
Spartanburg, SC 29303

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case at the place, date and time specified below. The deposition will be recorded by videotape and stenographic means.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects):

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below

ANY ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30(B)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) — DATE AND TIME

, Attorney for the Intervenor — September 25, 2012

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Gregory M. Alford,
Alford and Wilkins, PC
Post Office Drawer 8008
Hilton Head Island, SC 29928 (843) 842-5500

RULE 45, South Carolina Rules of Civil Procedure, Parts (c and (d):

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without adoposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(2)(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On a timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent or a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or otherwise protected mater and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(3)(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in disputo and resulting from the expert's study made not at the request of any party, or

(tii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection astrial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

PROOF OF SERVICE		
SERVED	DATE	PLACE
SERVED ON (PRINT NAME)		MANNER OF SERVICE
SERVED BY (PRINT NAME)		TITLE

DECLARATION OF SERVER

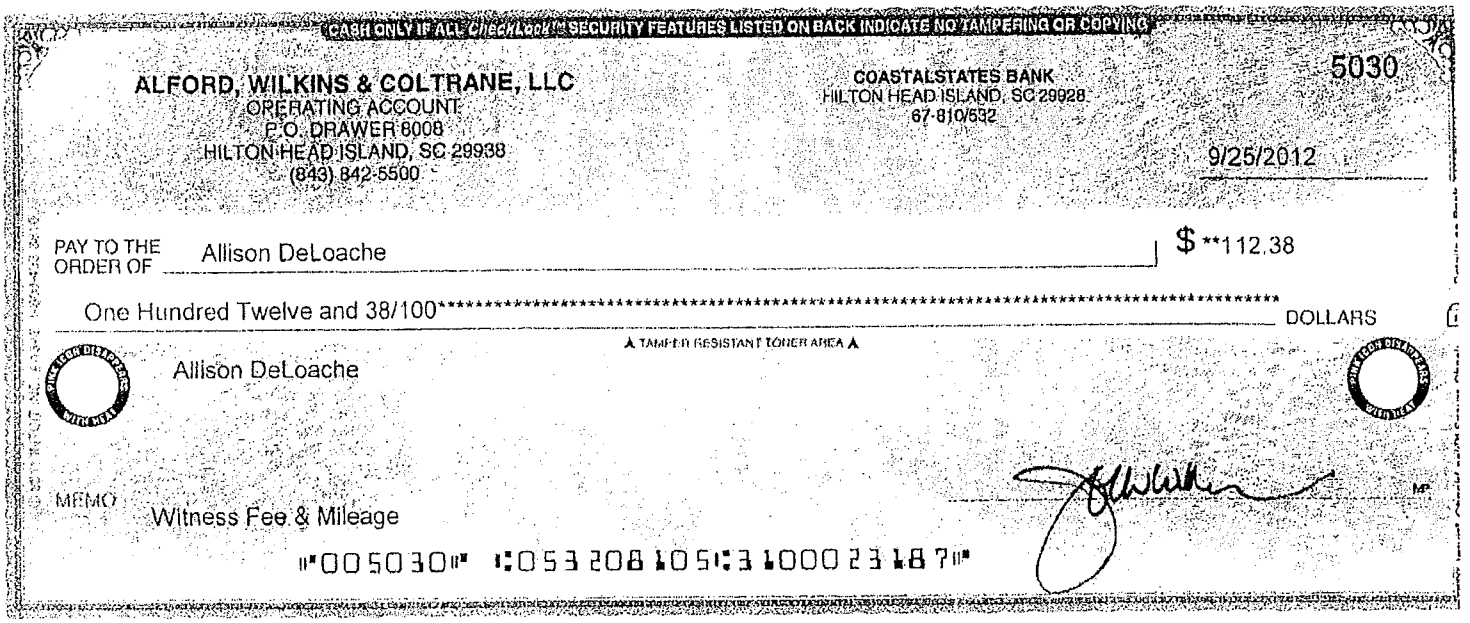
I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____



CASH ONLY IF ALL CHECK LOOK-UP SECURITY FEATURES LISTED ON BACK INDICATE NO TAMPERING OR COPYING

ALFORD, WILKINS & COLTRANE, LLC
OPERATING ACCOUNT
P.O. DRAWER 6008
HILTON HEAD ISLAND, SC 29938
(843) 842-5500

COASTALSTATES BANK
HILTON HEAD ISLAND, SC 29928
67-810/632

5030

9/25/2012

PAY TO THE ORDER OF Allison DeLoache $ **112.38

One Hundred Twelve and 38/100********** DOLLARS

A TAMPER RESISTANT TONER AREA A

Allison DeLoache

MEMO Witness Fee & Mileage

⑈005030⑈ ⑆053208105⑆31000231487⑈

ALFORD, WILKINS & COLTRANE, LLC / OPERATING ACCOUNT 5030

Allison DeLoache		9/25/2012	
51700 · Client Reimbursables	Witness Fee & Mileage		112.38

Operating Account	Witness Fee & Mileage	112.38

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2002-CP-07-1377
	)	
TIMOTHY TREON, AND HIS WIFE, JANIE TREON, P. JENNINGS SCEARCE, AND STEVEN CHRISTAIN, individually and on behalf of others similarly situated in the State of South Carolina,	)	TIMOTHY W. BOUCH, W. JEFFERSON LEATH, JR., AND MICHAEL S. SEEKINGS MOTION TO RECONSIDER ORDER DATED SEPTEMBER 28,2012
Plaintiffs,	)	
vs.	)	
DRYVIT SYSTEMS, INC.,	)	
Defendant.	)	

Timothy W. Bouch, W. Jefferson Leath, Jr., and Michael S. Seekings (herein collectively "Movants") move the Court, pursuant to Rule 59(e), SCRCP, to alter or amend the Court's Order dated September 27, 2012 (hereinafter "the Court's Order") denying the motions to dismiss or quash the June 5, 2012 Rule to Show Cause (hereinafter "RTSC") issued by the Court, on the following grounds:

1. The Court's Order fails to deal, in any way, with the fact that this Action was dismissed with prejudice by an Order of this Court that predated the Rule to Show Cause by almost two years, with the only jurisdiction specifically retained for a limited and discreet purpose that is entirely unrelated to the action that is being attempted against the Movants and other Respondents. These Movants request that the Order be altered or amended to acknowledge the fact that no action can be taken in a dismissed Action and, accordingly, to grant the motion to dismiss.

2. On page 13 of its Order, this Court bases its personal jurisdiction over Movants and the other Respondents on the inherent contempt power of a South Carolina circuit court. At the oral argument on the motions, this Court disagreed with Mr. Phillips' characterization of this proceeding as one for contempt, and indeed, indicated that it did not consider it as such. As a result, the Movants request the Court to alter or amend its Order to withdraw that as a basis for jurisdiction and to grant the motion to dismiss.

3. The Court's Order relies upon an Order entered "on or about November 26, 2006" in which the Court states that it "reserved the option of revisiting any compensation paid to Cardamone Counsel in connection with this matter." In doing so, the Court ignores the facts that (1) the Movants (and all other Class Counsel who are Respondents to the RTSC) had been relieved from the case more than ten months before that second Order was entered, and (2) the only reservation in the second Order was that Intervenors' Counsel might be permitted to "share in any compensation paid to any Current Class Counsel or to be paid to Current Class Counsel for the services that they rendered prior to the entry of this Order". As of the date of that Order, however, and because of the previous Order dated January 18, 2006, none of the Movants or other Respondents were "Current Class Counsel." Moreover, even if they were, the RTSC does not involve an action by Intervening Counsel to "share" in fees. Therefore, Movants request that the Order be altered or amended to acknowledge the fact that this Court had no continuing jurisdiction over the Movants such that it had the ability to issue a RTCS, requiring them to appear in the manner (and for the purposes) set forth in the RTSC and, accordingly, to grant the motion to dismiss.

4. On page six of the Order, the Court states that "those individual settlements were not disclosed to this Court until 2006...." That statement erroneously overlooks the fact that the

Court was informed of those settlements on the first occasion of its participation in this case. Specifically, the November 26, 2006 Order states: "At the (12/5/05) hearing, Current Class Counsel informed this Court that the current class representatives have resolved their claims against Dryvit (and) Therefore, the current class representatives do not have a personal stake in this litigation ....". After being informed of those facts on December 5, 2005, and without any further inquiry, this Court issued Orders relieving both Class Counsel and those Class Representatives from the case. By reason of these things, these Movants request that the Order be altered or amended to acknowledge the correctly stated facts and that based on those and other related facts, issue an Order granting the Motion to Dismiss.

5. In its Order, the Court refers to "an agreement with Posey class counsel and Dryvit's counsel on April 22, 2004 wherein Counsel was to receive a total of $825,000 in attorneys fees for the "SC Class" upon the dismissal of the Cardamone action in South Carolina"[1] and "the attorney fee agreement that Cardamone reached with Dryvit in April of 2004."[2] The fact that this Court would announce "findings" of that nature *at this stage of this proceeding* provides additional, if not conclusive reasons why this Court should be recused. Beyond that, however, the Court's "findings" totally ignore the direct testimony offered through the affidavit of Evertte Doffermyre that the $600,000 that has been paid was paid for work done in the Posey case and for the Posey Class (Mr. Doffermyre's Affidavit attached as Exhibit A). Those findings also ignore the fact that such payments were obviously not conditioned upon the dismissal of anything - since those payments *were* made and the case was *never* dismissed (until done so by the Order of this Court after it approved, as "fair", the settlement reached between the Plaintiff Class and Dryvit). The Movants request the Court to acknowledge the uncontradicted testimony

[1] See p. 5 of Order.
[2] Id. at p. 6.

of Mr. Doffermyre, and alter or amend the Order to reflect the fact that the only money paid to Movants and the other Respondents was for services provided by them in another case, for another Class, approved by that other Judge, and, accordingly, grant the motion to dismiss.

6. The Court's discussion of "venue" totally fails to address Movants' well-founded arguments on the point and, instead, justifies requiring people to appear in a far away place, where venue could not conceivably exist, because of an Order appointing this Judge to handle this case. The RTSC involves an action for the forfeiture of money, and no such action should take place in a venue that is not recognized by any standard of law. Accordingly, these Movants request that the Order be altered or amended to acknowledge that venue does not, and cannot, exist in Spartanburg County and, accordingly, to grant the Motion to Dismiss.

7. On page 13 of the Order, the Court bases personal jurisdiction over the Movants on an assumption that there was "service of the Rule to Show Cause," without addressing, in any way, the detailed objections Movants raised to the validity of the purported service. Movants request that their arguments and affidavits on that issue[3] be addressed and that the Order be altered or amended to reflect the absence of service and the dismissal of the RTSC.

8. The Court's Order failed to address the objection raised by Movants that the RTSC improperly places the burden of proving that the fees were not earned in the *Cardamone* case on former Class Counsel rather than upon the accusing parties seeking the relief. In fact, the Court's Order does not rule one way or the other who bears the burden of proof. Movants respectfully submit that to the extent this Court has concluded (although its Order is silent on this point) that the burden of proof is on them to prove that any fees received from counsel for the *Posey* class were properly received, such burden is misplaced and further heightens the jeopardy to their right to a jury trial.

[3] See pages 5-7, and Exhibit C of their Return and Motion.

9. The Court's Order is premised on a misapplication of the case of *Premium Inv. Corp. v. Green*, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984)("the *Premium Investment* case"). In *Premium Investment*, a subdivision property owner commenced a class action to recover proceeds of a settlement of an alleged prior class action. The court held that the prior action was a proper class action (although not certified before settlement), and that the defendants were fiduciaries and violated the rights of the class by settlement and dismissal of the lawsuit without notice. *Id.* The critical distinction between these cases is that, in *Premium Investment*, the class representative settled and dismissed the class action itself, to the detriment of the absent class members. There was no individual suit accompanying the putative class action. Here, it is not disputed that the individual claims of the original class representatives and the clients of Robertson, Bowen, and the other original class counsel, all of which were settled at some point in 2003, did not compromise the class claims in this case, which have now been settled, with the express approval of this Court. Unlike the case at bar, the entire group action in *Premium Investment* was compromised, and the entire benefit received by the settling class representative was for the benefit of the class (and subsequently, rightly, disgorged). That is simply not the case here. Accordingly, to the extent that this Court's Order relies upon the *Premium Investment* case for its authority to issue the RTSC, such reliance is misplaced.

10. The Order did not deal, in any way, with Movants' argument that if this Court is going to use the Premium Investment case as the standard for action (a reliance which Movants vigorously contend to be misplaced), then any action in the pursuit of such a claim should follow the process in that case. As stated on page nine of Movants' Return and Motion, but totally disregarded by the Court in its Order: "Simply stated, the Premium Investment case involved a new and separate civil action, instituted by an allegedly injured party, in which the defendants

were made parties to the action and were give all of the rights afforded by Due Process. That is, quite clearly, distinguishable greatly from the current action...". Instead of such an action, the Movants and other Respondents in this RTSC would be called into a proceeding: (1) with no established rules, (2) without having had any right to discovery, (3) to bear the burden of convincing a Judge, sitting as fact finder, why he should not take their money, (4) without knowing what the Judge has heard - on and off the record - for seven years in their absence, and (5) to do all of that before a Judge who has previously given various indications of his deeply negative feelings about the alleged conduct of the Respondents. The Movants request that these arguments be addressed by the Court and that the Order be altered or amended to acknowledge that the process that lies ahead in this case, if not abated through a granting of the motions to dismiss, will violate the Due Process and other civil rights to which all citizens must be afforded before their property is taken.

11. In summarily dismissing the Movants' and other Respondents' arguments concerning the statute of limitations, the Court failed to consider its own Orders in this matter. This Court's Order denying Dryvits' Motion for Summary Judgment, dated January 7, 2009, clearly lays out the case that the Plaintiffs are attempting to use to recover money from these Movants and other Respondents. While those various arguments are adamantly denied, the fact that they were memorialized by this Court in a case involving these Plaintiffs more than three years before the Rule to Show Cause was issued should bar the pursuit of those claims under any proper interpretation of the statute of limitations. The Movants request that the Court address those arguments, and alter and amend the Order by dismissing the Plaintiffs' claims on that basis.

12. Concerning the Movants' argument under Rule 12(b)(8), the Court did not address the fact that the same claim for the same money had been made previously in the *Tucker* case. To

the extent that was addressed at the oral argument, the Court found apparent comfort in the fact that those claims had been dismissed by the Tucker plaintiffs and the Court in this case was, therefore, free to pursue them here. As was noted by Movants' counsel at the hearing, however, that purported "dismissal" occurred without notice to the Tucker Class and actually resulted from the effort of Plaintiffs' counsel in that case to avoid a conflicts charge. Specifically on that latter point, the second day of the hearing for class certification in the Tucker case began by the Plaintiffs' lawyer stating:

> MR. ROBERTS: ...I'm hear to respond to what Mr. Stair had to say yesterday....[W]e are moving to withdraw our request for disgorgement of fees obtained by these attorneys and the settlements of the class representatives as part of the relief that has been requested in this case and our prayer for relief which is in the first amended complaint.
>
> ...
>
> MR. ROBERTS: The $825,000 which Mr. Stair said there was some type of conflict---...because numerous parties are seeking it. We don't think that was a conflict but to remove that issue from the place -- from this case we withdraw it....
>
> ...
>
> MR. ROBERTS: ...The issue that they raised about Mr. Pendarvis having some type of conflict because as an attorney in this case seeking 825, as an attorney for Mr. Mote (sic) seeking that same sum, that issue is gone as a result of our withdraw of the disgorgement remedy in this case.[4]

Given that reason for the withdrawal of the claim and without there being any subsequent notice to the putative class, combined with the conflicting fiduciary duties that this Court owed to the separate classes in that case and this case, Movants' request this Court to address the question of whether that dismissal has been validly undertaken and successfully accomplished, and if that has not occurred, to dismiss the RTSC under the requirements of Rule 12(b)(8).

[4] See Hearing transcript attached as Exhibit B.

13. The Court's Order, on page 2, itemizes certain of the arguments made by Movants, but fails to acknowledge their adoption and incorporation of the arguments of all other parties[5] including, but not limited to grounds 10 and 11. The Order should be amended or altered to reflect Movants' assertion of those arguments and the Court should enter its ruling on those arguments as they relate to Movants, granting the motion on those and other grounds.

14. The Court's Order at # 11 on page 2, mischaracterizes one of the stated objections asserted by the parties in their motions to dismiss the RTSC, that being that the Court identified factual issues to be decided (whether the fees that were paid to former Class Counsel were paid for work in *Posey* or in *Cardamone).* While the Order discusses some of the factual "documentation" and "information" with which it has been presented (in this action, to which none of the Movants is a party), the Court fails to specifically rule on these asserted objections that such factual issues should be decided by the triers of fact; rather, the Court's Order states that "[t]his Court's opinion is that it would be a dereliction of its Rule 23 duties not to issue the RTSC based on the factual information before it."[6]

15. In its recitation of the grounds asserted in the motion to dismiss the RTSC, page 2 of its Order, the Court omitted Mr. Robertson's third stated objection (adopted and incorporated by these Movants) to this Court proceeding with the Rule to Show Cause, that being that the Court had "already decided one or more factual issues to be determined by the triers of fact, not this Court." The Movants respectfully submit that the Court's Order fails to address this argument that, in addition to objecting to holding any hearing pursuant to the RTSC at all, this Court should recuse itself from any hearing pursuant to the RTSC.

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[5] See p. 11 of Movants' Return and Motion.
[6] See Order, p. 11.

16. The Court's Order, specifically in footnote 2, p. 3, for the first time apprised Movants that it was relying upon and incorporating a January 7, 2009 Order *denying* a motion for summary judgment filed by defendant Dryvit Systems, Inc. ("Dryvit") in this case. Movants submit that it is improper to base the Court's decision to issue a Rule to Show Cause in this case based on an order entered in a case to which they were not parties. Movants had (and could have had) no notice of either Dryvit's motion for summary judgment or the plaintiffs' opposition to same. Presumably these filings formed the basis of the Court's decision to deny Dryvit's motion for summary judgment, yet it was only after the issuance of the Court's January 7, 2009 Order denying summary judgment that Movants had notice of same. As the Court is well aware, an order denying a motion for summary judgment is not a final order and contains no "findings of fact." In fact, a review of the January 7, 2009 Order referenced in footnote 2 shows that there are no findings of fact in it. Accordingly, Movants respectfully submit that the Court's Order improperly relies upon this January 7, 2009 Order and any pleadings or other documents presented to the Court in connection with the underlying motion for summary judgment, in response to which Movants have had no opportunity to respond. By way of example as to why the Court's one-sided reliance on its "findings" in connection with Dryvit's motion for summary judgment is an insufficient basis on which to deny their motion to dismiss, Movants submit for the Court's consideration three letters, attached hereto as Exhibit C (December 30, 2005 letter from Mr. Robertson to Richard R. Gleissner), Exhibit D (December 30, 2005 letter from Gleissner to Robertson), and Exhibit E (January 3, 2006 letter from Robertson to Gleissner), all of which predate this Court's entry of its January 18, 2006 Order relieving, among others, Movants, as original class counsel. Significantly, this Court was copied on all three letters, and therefore was on notice of the payment to original class counsel of a portion of the attorney's fees

that were approved by the Court in *Posey* for the work performed by the original class counsel in improving the settlement for class members in *Posey*.

17. While the Court's Order mentions as a basis for their motions to dismiss the RTSC the issue of the safeguards of due process in connection with the testimony to be elicited from Movants,[7] it dismisses those concerns by characterizing the RTSC as an action for an accounting which is equitable. The Court's Order further states: "Additionally, this Court has received no request to conduct a jury trial as part of this RTSC."[8] By this language, the Court's Order fails to recognize that the procedural safeguards of the South Carolina Rules of Civil Procedure afforded parties to litigation apply whether the action includes equitable or legal claims (or both). Furthermore, the Court avoids ruling on Movants' argument that the RTSC deprives them of their right to a jury trial in the matter in which they are a party, the *Tucker* case, but merely suggests that they had not requested a jury trial in connection with the RTSC issued in this case, in which they are not parties and have no standing to assert pleadings. Indeed, this case has been settled and dismissed with prejudice.

18. The Court's Order also fails in any way to substantively address the lack of due process to the Class Counsel and Class Representatives. For example, the Court's Order makes no provision for participation by any counsel for Movants, or for the calling of any witnesses or introduction of evidence by Movants. Further, Movants, as non-parties to this litigation, have been deprived of the discovery developed by the plaintiffs and Dryvit in this action, and thus likewise deprived of the ability to prepare adequately and appropriately for any hearing on the RTSC. By stark contrast, the plaintiffs have had years of discovery exchanged with Dryvit. Furthermore, unlike Movants, the plaintiffs were entitled to and did issue a subpoena for a

[7] See Order at page 14.
[8] Id.

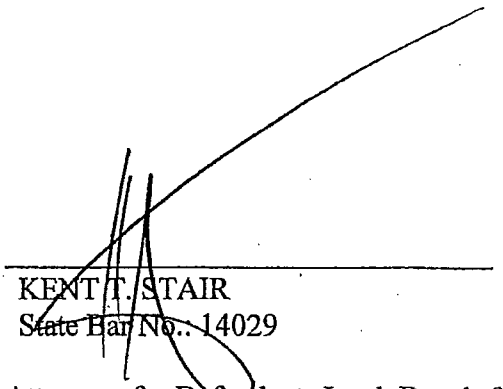
witness to appear and testify at the RTSC (attached as Exhibit F). Given these inherent inequities, Movants submit that the Court should amend its Order to revoke and cancel the RTSC. Failing that, the Court should amend its Order to set forth specific procedures that safeguard the due process rights of Movants, the other Class Counsel, and the Class Representatives.

19. The Court's Order improperly characterizes the underlying actions against the Class Representatives ("the Treon case") and the legal malpractice action against Movants ("the *Tucker* case") as "collateral lawsuits [that] are civil actions where in the unnamed plaintiffs in this action [*Treon v. Dryvit*] seek a jury trial against the Respondents for damages they sustained based on allegations of breach of fiduciary duty, legal malpractice, etc."[9] In point of fact, these two underlying actions are also class actions and this Court has been assigned to them as well. Accordingly, the perceived "duties" of the Court as a judge overseeing a class action apply equally to these two actions. Yet this Court has overlooked or ignored that the fees sought by virtue of the RTSC were first sought in these two actions, in which Movants would have received all of the procedural safeguards afforded parties and, furthermore, where they would have received a jury trial as to all factual disputes in connection with these fees. It was only by virtue of a unilateral withdrawal of the claims for those fees in the *Tucker* case by plaintiffs' counsel, Thomas Pendarvis (with no prior notice or court approval), that this Court now has determined that it may seek to make factual determinations regarding the fees at issue in the RTSC. As a result, this Court should amend its Order, at least, to address the lack of procedural safeguards and due process by virtue of the RTSC.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

[9] See Order, p. 12.

By: 

KENT T. STAIR
State Bar No.: 14029

Attorneys for Defendants Leath Bouch & Crawford, LLP, W. Jefferson Leath, Jr., and Michael S. Seekings

40 Calhoun Street, Suite 400
Charleston, SC 29401-3531
.....
843.727.0307

EXHIBIT "A"

County of Fulton
State of Georgia

AFFIDAVIT OF EVERETTE L. DOFFEMYRE

The undersigned, being duly sworn, hereby swears and deposes as follows:

1. My name is Everette L. Doffemyre; I am over 21 years of age; and am otherwise competent to give this affidavit.

2. I am now, and have been since 1973, licensed to practice law in the State of Georgia. I am now, and have been since my admission, a member in good standing of the bar of the State of Georgia. I have also been admitted to practice in various trial and appellate divisions of the Federal Court system, as well as in various states, on a pro hac vice basis. Included in that last group of admissions was the order of the Tennessee court authorizing my participation in the case filed in the Circuit Court for Jefferson County, Tennessee, known as *Bobby R. Posey, et al v. Dryvit Systems, Inc.*, Case No. 17, 715-IV (hereinafter referred to as "Posey" or "Posey Case").

3. I graduated from the University of Virginia with a B.A. in Economics in 1970 and with a J.D. degree in 1973. Over the last fifteen years I have been deeply involved with various aspects of the University of Virginia, including serving as president of the Board of Mangers of its Alumni Association and

serving on the Board of Trustees of its College of Arts & Sciences. I currently serve as the Vice-Chair of the University's Capital Campaign.

4. After graduating from law school, I began my practice with the Atlanta firm of Kilpatrick Cody, Rogers McClatchy and Regenstein (now known as Kilpatrick Stockton LLP). I was elected to partnership in December, 1979, effective February 1, 1980.

5. In 1988 I withdrew from the Kilpatrick firm and established the Law Offices of Everette L. Doffermyre. In 1990, two of my colleagues from the Kilpatrick firm and I formed the firm now known as Doffermyre Shields Canfield & Knowles, LLC. I am proud of the fact that despite our small size (only 10 attorneys), the Firm has for the past number of years been ranked by *Chambers USA* as one of the seven best litigation firms in Georgia.

6. I have practiced with my Firm since it was formed and currently serve as the Manager, akin to "managing partner", of the Firm. I practice full-time. Currently, my practice is focused on business litigation. However, I have practiced extensively in past years in consumer class actions. I have served as lead or co-lead counsel on behalf of consumers in a number of nationwide and statewide class action cases. I am experienced in the conduct of class action cases and familiar with the manner in which counsel are compensated in such actions.

7. I have been fortunate to receive recognition from various entities that evaluate the competency of attorneys. I hold (and have held for many years) the highest rating given by Martindale-Hubbell. Other distinctions of note include selection by *James Magazine* as one of the "100 Best Lawyers in Georgia;" as one of "Georgia's Elite" by *Georgia Trend* magazine; and as one of Atlanta's "litigation stars" by *Benchmark*. I have been designated as a "Best Lawyer" and as a "Super Lawyer" by those respective rating services.

8. Among my professional speaking experiences, I have twice had the privilege of being a presenter at seminars for state judges dealing with issues involving class actions. When the American Bar Association met in Atlanta in August 2005, I was invited by Judge Ben Tennille, of the North Carolina Business Court, to speak to the judges on state class actions. In 2005 I was invited by the Brookings Institute in Washington, D.C. to participate in a conference it was hosting for state court judges, also dealing with state class actions. In 2007 and 2008, I served on the ABA's Task Force on the Quality of mediations and Arbitrations.

9. During the early part of the last decade, Gary Mason, a Washington D.C. attorney, and I (and our respective firms) served as Co-Lead Counsel for the plaintiffs in the Posey Case.

10. The Posey Case was filed on November 14, 2000 as a class action against Dryvit Systems, Inc. ("Dryvit"). As certified, and with certain exceptions set forth within the definition established by the court, the Class included all persons who, as of June 5, 2002, owned homes, in any State other than North Carolina, on which Dryvit EIFS had been installed after January 1, 1989. The Class thus included residents of the State of South Carolina who owned homes on which EIFS had been installed during the Class Period.

11. Prior to the Posey Case, Mr. Mason and I (and a number of other counsel) had fought for four years against Dryvit in the North Carolina class action that was litigated in the North Carolina Business Court. That litigation was intense and frequently contentious; involved a tremendous amount of discovery; and was settled only on the eve of trial.

12. The Posey Case also resulted, ultimately, in a class-wide settlement. The settlement was reached after extensive and extended negotiations with Dryvit's counsel. The settlement was of course subject to court approval. Mr. Mason and I took the lead in the negotiations.

13. The settlement was preliminarily approved by Judge O. Duane Sloane on April 21, 2002. Finding the Settlement Agreement to be the result of good faith, arm's length settlement negotiations between competent and experienced

counsel for both sides, he preliminarily approved the terms of the Settlement Agreement, subject to consideration of objections, arguments and evidence presented before or at a Fairness Hearing that he set for October 1, 2002.

14. At the Fairness Hearing, lawyers from South Carolina raised certain objections to the Settlement Agreement and presented strong arguments as to why the terms of the Settlement Agreement, as previously negotiated and preliminarily approved, should be revised to make the proposed settlement more favorable to the members of the Class. As a result of those and other objections and arguments presented at the hearing, Judge Sloane withheld his approval of the Settlement Agreement, pending further negotiations between Class Counsel and Dryvit.

15. A group of the South Carolina attorneys, led by Jeff Leath, participated actively and effectively in the negotiations with Dryvit that followed the initial October 1 Fairness Hearing. The South Carolina attorneys were knowledgeable about the issues and very effective advocates for specific enhancements to the proposed settlement. As a result of their efforts, working in conjunction with Mr. Mason and me, substantial enhancements to the settlement were achieved. These included, as I recall, increasing the "cash out" recovery from $6.00 to $7.00 per square foot for eligible recipients; adding provisions to deal with the emerging issue of mold; making it easier for Class Members to obtain a "cash out" if they preferred rather than repairs and a warranty. These are some but not all of the

issues with respect to which the involvement of South Carolina counsel made material and highly beneficial enhancements to the settlement ultimately approved by Judge Sloane.

16. The Settlement Agreement, as revised, was presented to Judge Sloane and after due consideration and a further hearing, he entered an Order and Judgment Granting Final Approval of Settlement on January 14, 2003. In his Order, Judge Sloan awarded attorneys' fees and expenses to Co-Lead Counsel and Counsel for the Class in the amount of $11,600,000.

17. In Paragraph 15 of his Order, a copy of which is attached as Exhibit "A", Judge Sloane acknowledged the efforts of those attorneys who worked diligently following the October 1, 2002 hearing. Judge Sloane stated:

> These negotiations and discussions have resulted in 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.

While Judge Sloane did not refer by name to the South Carolina counsel who worked with Mr. Mason and me to secure these enhancements, I can state without qualification that the attorneys most responsible for securing the enhancements were the South Carolina counsel.

18. In recognition of their very substantial contributions to improving the Settlement Agreement, Mr. Mason and I agreed to share with the South Carolina counsel led by Mr. Leath $600,000 from the attorneys' fees awarded to Class

Counsel. In my opinion, their contributions to the Settlement Agreement fully merited this amount.

19. In summary, the South Carolina attorneys lead by Jeff Leath provided extremely valuable professional services to the Posey Class, which resulted in significant enhancements to the terms of the Settlement Agreement. Their efforts directly and significantly benefitted the Class and justified their receiving $600,000 from the court-awarded attorneys' fees.

FURTHER AFFIANT SAYETH NOT!

Everette L. Doffemyre

Sworn to and subscribed before
me this 23rd day of March 2010

Notary Public for the State of Georgia
My Commission Expires:

(AFFIX NOTARY SEAL)

DEBORA K. WINDISH
NOTARY PUBLIC
DEKALB COUNTY
GEORGIA
EXPIRES
JULY 18, 2011

2559358v.1

EXHIBIT "B"

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)	
Stephen and Jeaneen)	
Tucker, et al.,)	TRANSCRIPT OF RECORD
)	2008-CP-07-3145
Plaintiffs,)	
-vs-)	
)	
Leath, Bouch & Crawford,)	
LLP, et al.,)	
)	July 21 and 22, 2011
Defendants.)	Spartanburg, South Carolina
Timothy Treon and P.)	
Jennings Scearce)	TRANSCRIPT OF RECORD
individually and on behalf)	2008-CP-07-0774
of Others similarly)	
situated in the State of)	
South Carolina,)	
)	
Plaintiffs,)	ORIGINAL
)	
-vs-)	
)	
Dryvit Systems, Inc., et)	
al.)	
)	JULY 21 and 22, 2011
Defendants.)	Spartanburg, South Carolina

B E F O R E:

HONORABLE J. MARK HAYES, II, JUDGE

A P P E A R A N C E S:

I. GREGORY HODGES, ESQ.
WILLIAM J. HUNTER, ESQ.
CHARLES A. KRAWCZYK, ESQ.
THOMAS A. PENDARVIS, ESQ.
TIMOTHY D. ROBERTS, ESQ.
THOMAS E. WILLIAMS, ESQ.
Attorneys for the Plaintiffs

KENNETH C. ANTHONY, JR, ESQ.
JAMES L. BRUNER, ESQ.
ROBERT E. FIELDS, ESQ.
JAY JONES, ESQ.
DANIEL C. LEONARDI, ESQ.
KENT TAYLOR STAIR, ESQ.
SUSAN TAYLOR WALL, ESQ.
TYLER P. WINTON, ESQ.
Attorneys for the Defendants

Margaret A. Woods
Circuit Court Reporter

it.

MR. HODGES: Yes.

MR. ROBERTS: Good morning, Your Honor, my name's Tim Roberts, I'm hear to respond to what Mr. Stair had to say yesterday. Before I do that I wanna bring a a couple of matters to the Court. First, we are and have authority from Mr. Timothy Treon and his wife Janie Treon and P. J. Scearce to ask to withdraw them as class representatives in this case number one. Number two, we are moving to withdraw our request for disgorgement of fees obtained by these attorneys and the settlements of the class representatives as part of the relief that has been requested in this case and our prayer for relief which is in the first amended complaint.

THE COURT: Alright, wi -- I'm trying to write this down as you go, withdraw Treon and Scearce ---

MR. ROBERTS: Right.

THE COURT: --- as class representatives and then would would your request for dis ---

MR. ROBERTS: The $825,000 which Mr. Stair said there was some type of conflict ---

THE COURT: Right.

MR. ROBERTS: --- because numerous parties are seeking it. We don't think that was a conflict but to remove that issue from the place -- from this case we withdraw it. We don't think there's a conflict with the Treons or Mr. Scearce

from serving as class representatives in this case and 1377 but to remove that issue from the consideration of this motion we withdraw them as class representatives in this case.

THE COURT: Okay.

MR. ROBERTS: We have the remaining class representatives in this case the Davises and Mr. Tucker and Mrs. Tucker; you didn't hear their names mentioned yesterday by Mr. Stair. There's no contention that those individuals are not adequate class representatives in this case and so just to go to adequacy, that issue -- those issues are resolved. The issue that they raised about Mr. Pendarvis having some type of conflict because as an attorney in this case seeking 825, as an attorney for Mr. Mote seeking that that sum, that issue is gone as a result of our withdraw of the disgorgement remedy in this case.

THE COURT: Alright, let me ask th -- ya'll don't have any objection to removing the two class representatives or their withdrawing their request for the 825?

MR. STAIR: No, sir, other than by doing so they will eliminate two of the subclasses I think but if that's recognized I don't have an objection to that.

THE COURT: Okay.

MR. ROBERTS: Well and just to address that for a moment. As Mr. Stair pointed out if you look at our amended complaint there are no subclasses in the amended complaint and frankly,

EXHIBIT "C"

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WILLIAM DIXON ROBERTSON III
DIXON.ROBERTSON@WDRLAW.COM

December 30, 2005

Mr. Richard R. Gleissner
Finkel & Altman, LLC
Post Office Box 1799
Columbia, SC 29202-1799

RE: Cardamone v. Dryvit Systems, Civil Action No. 02-CP-07-1377

Dear Rick:

Thank you for taking the lead with circulating the order(s) following Judge Hayes' rulings earlier this month. I understand that you will incorporate the language Jeff Leath suggested, relieving those of us who no longer have much of a stake in the case, as counsel for the class.

As you recognized in one of your early draft orders, original counsel for the plaintiffs in this case also performed significant work in the *Posey* action. I accompanied other South Carolina counsel to prepare for and attend the fairness hearing in Jefferson, Tennessee. Speaking as counsel for objectors, Frank Grimball challenged the fairness of the original settlement agreement. Mike Seekings and Jeff Leath subsequently negotiated substantial improvements in the settlement bargain for *Posey* class members, including an increase in the potential cash payment from four dollars to seven dollars per square foot of EIFS. Those efforts, and the final approved class settlement agreement, earned praise for South Carolina counsel from the Tennessee trial judge. In his order approving the settlement and the attorney's fee for class counsel, Judge Slone recognized:

> Class Counsel, together with counsel for certain objectors, including those representing a litigation class in South Carolina have been engaged in numerous substantial discussions and negotiations since the Fairness Hearing with Counsel for the Settling Defendant and persons who will be responsible for overseeing inspection, repair, and warranties under the Settlement Agreement. These negotiations and discussions have resulted in 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.

January 14, 2003, Order, *Posey v. Dryvit Systems,* Case No. 17,715-IV (Jefferson County, TN, Circuit Court) at 5. Because of the contributions South Carolina made in the Posey case, class counsel there agreed to pay a portion of their attorney fees to us, in recognition of work we did as counsel for objectors in *Posey*. To avoid even the appearance of impropriety, I wanted to make sure that you knew about them.

Thank you again for shepherding the order, and good luck in your representation of the *Cardamone* class. Please call me with any questions.

Best regards,

Sincerely yours,

William Dixon Robertson III

cc: Honorable J. Mark Hayes II
Mr. Thomas J. Finn
Mr. Donald E. Jonas
Mr. Gregory M. Alford
Mr. W. Jefferson Leath, Jr.
Mr. William M. Bowen
Mr. Michael S. Seekings
Mr. George E. Mullen
Mr. Francis E. Grimball
Mr. J. J. Anderson
Mr. Ralph E. Tupper
Ms. Hada Hulsee

EXHIBIT "D"

FINKEL&ALTMAN LLC
ATTORNEYS AT LAW

RICHARD R. GLEISSNER, ESQUIRE
Certified Specialist in Bankruptcy and Debtor-Creditor Law
www.finkellaw.com
rgleissner@finkellaw.com

Reply to Columbia Office

December 30, 2005

William Dixon Robertson, III, Esquire
Suite 620, 1122 Lady Street
Post Office Box 11401
Columbia, South Carolina 29211-1401

Re: Cardamone et al v. Dryvit Systems, Inc., et al
Civil Action Number: 2002-CP-07-1377
Our Clients and Proposed Intervenors:
P. Jennings Scearce and Thomothy and Jane Treon
Our File Number: 48710-18234

Dear Dixon:

I appreciate your comments included in your letter to me of this date and I hope this holiday season finds you and your family well and happy. I am attempting to complete the negotiations relating to the proposed Orders and hope to get them to counsel for Dryvit Systems, Inc. ("Dryvit") and then to the Honorable J. Mark Hayes, II early in the new year. As it relates to Jeff's comments, we had no difficulty with Jeff's requests and will get them incorporated into the proposed Order before sending them to counsel for Dryvit for their comments. As it relates to second paragraph of your letter, I am a bit confused and hope that you can clarify some of issues raised in that paragraph.

I was under the impression that you and several other attorneys from various parts of South Carolina had formed a litigation team. This litigation team brought a litigation class action in South Carolina (the "Original Class Counsel") in the above-captioned matter (the "SC Class Action"). As Original Class Counsel, you and these other attorneys represented the class representatives in South Carolina and the putative class members in South Carolina.

My understanding has been that either all of the Original Class Counsel or a subset of the Original Class Counsel or all of these attorneys plus additional attorneys (the "SC Counsel in Tennessee") also represented some individuals that specifically elected to opt into and object to *Posey v. Dryvit Systems, Inc.*, Case No. 17,715-IV (Jefferson County, TN, Circuit Court) (the "Tennessee Class Action"). My understanding has been that SC Counsel in Tennessee provided a service to the plaintiffs in the Tennessee Class Action by showing how extremely unfair that proposed settlement was on a national basis. I had heard rumors that for the services rendered to the

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RE/REO Fax: (843) 554-9888

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Fax: (843) 725-0015

GEORGETOWN
717 C Front Street
Georgetown, SC 29442
Tel: (843) 527-3281
Fax: (843) 546-3558

Tennessee Class Action, the SC Counsel in Tennessee were to receive some compensation, but frankly, I never really cared about this issue or sought to verify this rumor.

The reason I never really cared about the compensation of SC Counsel in Tennessee is that I was under the impression that SC Counsel in Tennessee were not negotiating for the citizens of South Carolina, were not settling the SC Class Action in their negotiations in Tennessee and were representing a very limited number of individuals from South Carolina that had specifically decided to opt into the Tennessee Class Action.

You will recall that my firm also represented an individual objecting to the Tennessee Class Action. You may also recall that on behalf of this individual, my firm previously sought to intervene in the SC Class Action. You may also recall that Judge Kimmerlin denied my client's motion to intervene based upon the fact that he had opted into the Tennessee Class Action. Thus, I have always been under the impression that it was completely irrelevant to the SC Class Action that the SC Counsel in Tennessee performed services and were to be paid in the Tennessee Class Action because that action only related to South Carolina Citizens that specifically opted into the Tennessee Class Action.

Your letter confuses me for the following reasons:

1. You stated that one of my early draft orders recognized that Original Class Counsel performed work in the Tennessee Class Action. I do not know to what you are referring. Nothing in the draft orders that I have prepared suggested such a thing.

2. You quote an Order in the Tennessee Class Action that refers to "a litigation class in South Carolina" and "negotiations" toward the settlement of the Tennessee Class Action. Prior to your letter, I had always read that paragraph as a recognition by the Tennessee Class Action of the existence of a litigation class in South Carolina and an intent by the Tennessee Class Action to make sure that none of its Orders or Judgments would ever effect the litigation class in South Carolina. Your letter suggests a different reading of that paragraph.

Specifically, your letter confuses me because it could be read to suggest that you attempted to settle the SC Class Action by negotiating in the Tennessee Class Action and that you are going to be compensated for those efforts. Please, please, please tell me that this interpretation of your letter is incorrect and a misunderstanding on my part.

If you are confused as to why I am begging you to clarify your letter, please call me and we can talk about it.

If you have any questions or need additional information, please feel free to contact us. Thank you for your consideration and assistance in this matter.

Sincerely,

Richard R. Gleissner

RG/abm

cc: Intevenors Counsel: Thomas J. Finn, Esquire; Donald E. Jonas, Esquire; Gregory M. Alford, Esquire;
Plaintiff's Counsel: Michael S. Seekings, Esquire; George E. Mullen, Esquire; W. Jefferson Leath, Jr., Esquire; Timothy W. Bouch, Esquire; Francis E. Grimball, Esquire; William Dixon Robertson, Esquire; William M. Bowen, Esquire; Jonathan J. Anderson, Esquire;
Defendants Counsel: Ralph E. Tupper, Esquire; Erin D. Dean, Esquire; Hugh Claytor, Esquire.
The Honorable J. Mark Hayes, II

EXHIBIT "E"

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January 3, 2006

Mr. Richard R. Gleissner
Finkel & Altman, LLC
Post Office Box 1799
Columbia, SC 29202-1799

RE: Cardamone v. Dryvit Systems, Civil Action No. 02-CP-07-1377

Dear Rick:

Thank you for your December 30 letter. I apologize for creating any confusion. Your understanding, stated in the first five paragraphs of your letter, is correct. I misread the reference at page eight of *Dryvit's* September 23, 2005, memorandum of law, as your language. I beg your pardon. Your interpretation of Judge Slone's order, stated in your second numbered paragraph, is the same as mine. Although I was not directly involved in negotiations with Dryvit or with *Posey* class counsel, my understanding was and remains that the improvement to the *Posey* settlement agreement was for the benefit of only those South Carolinians who elected to take advantage of that settlement. As I said in my letter to you, 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.

Best regards,

Sincerely yours,

William Dixon Robertson III

cc: Honorable J. Mark Hayes II
Mr. Thomas J. Finn
Mr. Donald E. Jonas
Mr. Gregory M. Alford
Mr. W. Jefferson Leath, Jr.
Mr. William M. Bowen
Mr. Michael S. Seekings
Mr. George E. Mullen
Mr. Francis E. Grimball
Mr. J. J. Anderson
Mr. Ralph E. Tupper
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EXHIBIT "F"

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(NOT FOR CONFIDENTIAL COMMUNICATIONS)

GREGORY M. ALFORD*
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CURTIS L. COLTRANE**
MITCHELL J. THORESON
SCOTT M. WILD
THOMAS E. WILLIAMS†
*Also member Georgia Bar
**Also member Virginia Bar
† Of Counsel

September 25, 2012

Via E-Mail and U.S. Mail
Thomas Pendarvis, Esq.
Pendarvis Law Firm
500 Carteret St., Ste A
Beaufort, SC 29902

Re: Timothy Treon et al v. Dryvit Systems, Inc. et al
Civil Action No.: 2002-CP-07-1377

Dear Mr. Pendarvis:

Enclosed please find a subpoena for Allison Deloach to appear in front of Judge Mark Hayes on October 3, 2012 at 2:00 pm in Spartanburg. The hearings in this case begin on October 1, 2012 however Mr. Alford expects that he would not need Ms. Deloach's testimony until the 3rd. Also enclosed is her check for the witness fee and mileage. Should you have any questions or concerns, please do not hesitate to contact me. With kindest regards, I am,

Sincerely,
ALFORD, WILKINS & COLTRANE, LLC

Amanda DuBose
Paralegal

Enclosure
Cc: All counsel of record via email only

STATE OF SOUTH CAROLINA

IN THE COMMON PLEAS COURT — COUNTY OF BEAUFORT

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT)	Civil Action No.: 2002-CP-07-1377
Timothy J. Treon and his wife, Jane Treon, and P. Jennings Scearce, individually, and on behalf of others similarly situated in the State of South Carolina, Plaintiffs,	SUBPOENA IN A CIVIL CASE
vs.	
Dryvit Systems, Inc., Estate Builders, Inc., and American Way Applicators of South Carolina, Inc.,	
Defendants.	

TO: Allison DeLoach
c/o Thomas Pendarvis, Esq.
Pendarvis Law Offices, P.C.
500 Carteret St., Ste A
Beaufort, SC 29902

X YOU ARE COMMANDED to appear in the above-named court at the place, date and time specified below to testify in the above case.

Wednesday October 3, 2012 2:00 P.M.
Hearing Before Hon. J. Mark Hayes, II
180 Magnolia Street
Spartanburg, SC 29303

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case at the place, date and time specified below. The deposition will be recorded by videotape and stenographic means.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date and time specified below (list documents or objects):

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below

ANY ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30(B)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION.

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) — DATE AND TIME

_____, Attorney for the Intervenor — September 25, 2012

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Gregory M. Alford,
Alford and Wilkins, PC
Post Office Drawer 8008
Hilton Head Island, SC 29928 (843) 842-5500

RULE 45, South Carolina Rules of Civil Procedure. Parts (c and (d):

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without adeposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(2)(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On a timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent or a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or otherwise protected mater and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(3)(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

PROOF OF SERVICE		
SERVED	DATE	PLACE
SERVED ON (PRINT NAME)		MANNER OF SERVICE
SERVED BY (PRINT NAME)		TITLE

DECLARATION OF SERVER

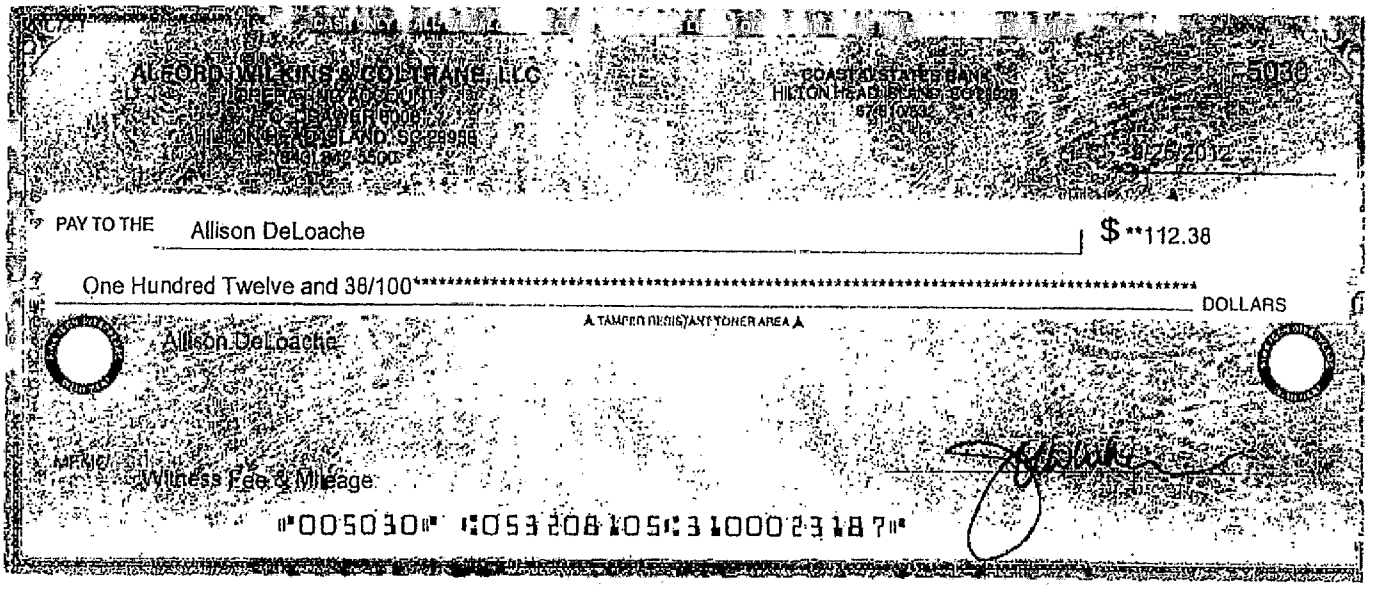
I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____



ALFORD, WILKINS & COLTRANE, LLC / OPERATING ACCOUNT 5030

Allison DeLoache		9/25/2012	
51700 · Client Reimbursables	Witness Fee & Mileage		112.38

Operating Account	Witness Fee & Mileage	112.38

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT TIMOTHY TREON, JANIE TREON, P. JENNINGS SCEARCE, STEVE CHRISTAIN individually and on behalf Of those similarly situated in the State of South Carolina, Plaintiffs, vs. DRYVIT SYSTEMS, INC. Defendant(s)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2002-CP-07-1377 PLAINTIFFS' NOTICE OF MOTION AND 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

TO: Samuel W. Outten, attorney for Dryvit Systems, Jefferson Leath, Esq., Timothy Bouche Esq., George Mullen, Esq., Frank Grimball, Esq., William Bowen, Esq., Dixon Robertson, Esq., and Michael Seekings, Esq.,

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs, by and through their undersigned counsel, shall move before the Honorable J. Mark Hayes, II in Spartanburg, South Carolina at 10:00 a.m., on the 10th day following the service hereof, or at such other time and place as set by the Court, for an Order requiring an accounting of all funds and/or other benefits promised and/or actually paid by or through Defendant Dryvit Systems, Inc. or anyone else to an attorney who currently represents, or who has represented in the past, the Class created by the instant action. Such an accounting includes, but is not limited to, funds and/or benefits associated with the agreement memorialized by the emails sent by class counsel Jefferson Leath to Dryvit counsel Peter Morgan dated January 7, 2003 and April 22, 2004 attached hereto as Exhibits A & B respectively.

This motion is based on Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Premium Investment Corp. v. Green, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct.App. 1984), the circuit court's inherent powers to administer class actions and on such other law as is applicable.

Background

This class action was commenced with the filing of a Summons and Complaint on August 2, 2002. A Class of South Carolina stucco homeowners was certified by Order filed on September 3, 2002. Certain lawyers who originally represented the Class sought and received the Courts permission to withdraw as class counsel by Order dated January 18, 2006. The Order is attached hereto as Exhibit C. In pertinent part, the January 18th Order reserves withdrawing counsel's right and obligation to further participate in this action with regard to any claim for attorneys fees by class counsel:

> **This Order is without prejudice to any claim for attorneys fees, if any be awarded in this case, based on services rendered by them prior to this order.**

Order filed January 18, 2006 at p.2 (emphasis added). After prolonged litigation and negotiations, a preliminary settlement of this matter was approved by Order dated November 13, 2009.

During the pendency of this Action, Plaintiffs discovered that original class counsel received fees totaling $600,000, a portion of which was actually paid after they withdrew on January 18, 2006. See Exhibits D & E. Additionally, original class counsel were apparently entitled to an additional $225,000 upon the dismissal of this Action. See Exhibit E. The record contains no indication that the aforementioned class counsel fee was approved by a court of

competent jurisdiction as required by Rule 23 of the South Carolina Rules of Civil Procedure and applicable law.[1]

In addition to the payment of the $600,000.00 fee and the promise for an additional $225,000.00 fee after the action was dismissed, it appears certain counsel who originally represented the Class received additional consideration from Dryvit to include:

1. Preferred treatment and settlements of original class counsels' "inventory clients." See Document DRY 0379 attached as Exhibit F.

2. Settlement outside of the Class of the claims of fifteen (15) class members who were individually represented by original class counsel who, upon information and belief, received a fee for those settlements. See Mullen Wylie's Answers to Interrogatories attached as Exhibit D.

The payment of these attorneys' fees was directly tied to an attempt to compromise this Action. In an e-mail regarding the "SC CLASS," Dryvit and one of the lawyers representing the Class memorialized an agreement whereby original class counsel was to receive a total of $825, 000 upon the dismissal of this action. See Exhibit B. Further evidence of the attempted compromise can be found in: a letter of November 15, 2002 from Mr. Leath to Peter Morgan, attached as Exhibit G; Mr. Baker's infamous bonus letter of February 5, 2003, attached as Exhibit H; see also Dryvit Doc # 0244 attached as Exhibit A, and an excerpt from the deposition of Bill Bowen, p. 48, lines 15-20 attached as Exhibit I. These documents clearly and

[1] On January 7, 2009, this Court found that it was: "Clearly convinced that it was the intentions of the people that were involved in those discussions to remove this Court from its role, fiduciary role." Page 6 Transcript of Hearing Line 19-22. The Court also found, inter alia, that: "At a minimum in a class action realm, I believe that a Court should be made aware when settlements take place that have the potential of compromising the fiduciary duties of the class representatives . . . my conclusion that the vigorous prosecution of this case is one of those fiduciary duties. . ." Page 10, lines 17-23. This Motion is intended to restore the Court to its fiduciary oversight role regarding all benefits and monies that affected this case.

convincingly demonstrate that the fees promised and/or paid to original class counsel were for the "SC Class". [2]

Jurisdiction

Pursuant to an Order of the Supreme Court Dated August 31, 2006, the Honorable J. Mark Hayes, II, Circuit Court Judge has jurisdiction over all matters concerning this case. Judge Hayes has jurisdiction over original class counsel pursuant to Rule 23, SCRCP and the specific provisions of the January 18, 2006 Order allowing their withdrawal from the Action, but specifically reserving the withdrawing counsel's right to participate in an award of attorneys fees.

Standard of Review

Rule 23, SCRCP affords a circuit court broad powers over the conduct of class action litigation and settlement proceedings including the power to craft and/or approval an award of attorney fees. Rule 23 requires the trial judge to ensure that putative class members have been treated fairly by any settlement and the settlement was not the product of collusion between the named class representatives, the defendant, and the parties' lawyers. Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992). In Eldridge, the Court stated: "South Carolina Rule of Civil Procedure 23(d)(2) gives the circuit court the broad power to 'impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended . . . 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.'" 308 S.C. at 127, 417 S.E.2d at 534.

[2] Clearly Original Class Counsel did not represent William and Allison DeLoache, as evidenced by the affidavit of Mrs. DeLaoche. Further all of their clients received preferential settlements, so the only client they had left was the SC Class, as is evidenced by the "SC Class" subject line in the extensive documentation provided by Dryvit.

It is inherent in class-action litigation that every member of the class is a party. Salmonsen v. CGD, Inc., 377 S.C. 442, 458, 661 S.E.2d 81, 90 (2008). In South Carolina, as well as in numerous other states, a class action, once certified, may not be dismissed to the prejudice of class members or compromised without court approval and notification of all members of the class. Although individual members of a class may settle their claims against a party to a class action, class representatives may not enter into settlements of their individual claims because of their fiduciary duty to the class. Premium Investment Corp. v. Green, 283 S.C. 464, 472, 324 S.E.2d 72, 77 (Ct.App. 1984); see also In re: Green, 291 S.C. 523, 354 S.E.2d 557 (1987) and Rodgers v. U.S. Steel Corp., 70 F.R.D. 639 (W.D.Pa. 1976).

Whenever a class of plaintiffs possesses a "community of interest" in claims involving common questions of law or fact, Rule 23 of the South Carolina Rules of Civil Procedure allows the prosecution of a Class Action case. McGann v. Mungo, 287 S.C. 561, 340 S.E.2d 154 (1986). Class members undertaking the prosecution of a class action are known as class representatives and must "fairly and adequately protect the interests of the class." Rule 23(a)(4), SCRCP. Once class representatives have been selected, they "surrender the right to settle the action in return for individual gain." Premium Investment Corp. v. Green, 283 S.C. 464, 470, 324 S.E.2d 72 (1984).

Argument

I. The Original Class Counsel have duties to the Court and Class under Rule 23.

There can be no doubt that Class Counsel has a duty to have any fees associated with this case approved by this Court. In, Premium Investment Corp., the Court explained class counsel who are in receipt of monies (or property) as part of a settlement holds those monies in trust whether or not they were received at the expense of the class:

> If the class representative or class counsel breaches the fiduciary duties he assumes and receives and retains benefits flowing from the breach, he holds what he receives upon a constructive trust for the class. Bank of America National Trust & Savings Association v. Ryan, 207 Cal.App.2d 698, 706, 24 Cal.Rptr. 739, 744 (1962). This is true although the benefit received by the class representative is not at the expense of the class. Id. at 706 24 Cal.Rptr. 739. Under no circumstances will the fiduciary be permitted to profit from a breach of his duty as fiduciary. Crowder v. Lyle, 225 Cal.App.2d 439, 449, 37 Cal.Rptr. 343, 350 (1964).

283 S.C. at 470, 324 S.E.2d at 76.

The Original Class Counsel received and retained benefits and money flowing from this action which they concealed from any Court's oversight or approval. As a result, the monies received by the Original Class Counsel should be disgorged and held in constructive trust for the benefit of the class to be disbursed only upon application to and order of this Court. Furthermore, unfulfilled duties of candor to the Court exist as to fees paid or promised to be paid in connection with this case. This motion offers all interested persons a chance to come before the Court.

After the certification of the South Carolina Class, then Class Counsel undertook extensive negotiations regarding the compromise and dismissal of this class action:

December 12, 2002

Message from SC class counsel Jeff Leath to Dryvit Counsel Peter Morgan and others:

> "I am currently awaiting word from Peter Morgan as to where this thing stands vis a vis our group." Dry 0078.

Response from Peter Morgan to Jeff Leath and others:

> "We are arranging a call with our client." Dry0079.

December 13, 2002

Message from SC class counsel Jeff Leath to Dryvit Counsel Peter Morgan:

> "Peter, where are we? Do you think we will come to an agreement? Tenn. is approaching, and I don't have anything to

take to our group one way or another, and they want to know what will be our positions in Tenn. and SC." Dry0103.

January 2, 2003

Message from SC class counsel Jeff Leath to Dryvit Counsel Peter Morgan:

"Subject: NEED SOME HELP. Peter, I know you have talked to Dickson 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 approval and dismissal of the SC class. His case in 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!!" Dry0379.

January 7, 2003

Message from SC class counsel Jeff Leath (by _____, Paralegal) to Dryvit counsel Peter Morgan:

"Dear 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 Mike Seekings and probably the settlement will need to be completed after Posey is certified in order to eliminate the SC class." Dry0244.

April 22, 2004

Message from SC class counsel Jeff Leath to Dryvit counsel Peter Morgan and Posey class counsel Everette Doffermyre:

"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 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." Dry0970.

April 25, 2003

Message from Peter Morgan to SC Class Counsel Jeff Leath:

Re: SC CLASS

> "Per my voice mail to you both, I agree that S.C. counsel should receive a total of $825,000. Dryvit agree to help in this process in tht [sic] total amount of $225,000 by agreeing to assist Posey class counsel, specifically, as follows [per language agreed upon at the time]:...." Dry0492.

April 26, 2004

Message from SC class counsel Jeff Leath to Dryvit's counsel Peter Morgan:

> "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." Dry0496.

September 29, 2005

Message from Peter Morgan to SC Class Counsel Jeff Leath:

> "Jeff : . . . Per your request, heres the email that spelled things out, reflecting the language agreed upon in Knoxville, lo those many months ago."
>
> "Per my voice mail to you both, I agree that S.C. counsel should receive a total of $825,000. Dryvit agree to help in this process in tht [sic] total amount of $225,000 by agreeing to assist Posey class counsel, specifically, as follows ...." Dry0492.

The preceding email chain clearly demonstrates that counsel for the Original Class Counsel attached a list of individual cases then pending against Dryvit, and suggested that these cases needed to be resolved "in order to eliminate the SC class." In a letter dated February 5, 2003, one of Dryvit's lawyers, acknowledged that Dryvit was settling with John and Sally Cardamone individually in order to eliminate the Cardamone class action:

> the [$90,000.00] that Dryvit has agreed to pay [the Cardamones] 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.

Thereafter, Original Class Counsel took no further action to prosecute this case on behalf of the South Carolina Class, and yet after being relieved as class counsel accepted substantial fees for actions taken or not taken during their tenure as class counsel.

The record clearly and convincingly establishes that the settlements and attorneys fees received by Original Class Counsel, were intended to compromise the prosecution of this class action and prevent the preparation and submission of a notice plan previously ordered by Judge Kemmerlin, all in violation of Rule 23 and in violation of Judge Kemmerlin's Order.

There was no effort was made by Original Class Counsel to seek an order from the Court to dismiss or otherwise compromise the claims of the South Carolina Class pursuant to Rule 23, SCRCP in a manner that would allow this Court to fulfill its role of reviewing the settlement and approving any attorneys paid in the case. Rather than the obscure reference made in the order which relieved them as Class Counsel, on January 5, 2005, Original Class Counsel should have disclosed to the Court the agreement that was then in place for them to receive fees.

In the following e-mail chain, Original Class Counsel are coordinating the arguments they planned to present to the "local state court judge." The below e-mail demonstrates the misguided strategy and attempt to avoid the requirements of SCRCP Rule 23 which Original Class Counsel adopted to avoid the Rule 23 required scrutiny of this Court.

Message from Dryvit's counsel Peter Morgan to Original Class Representatives's counsel Jeff Leath and Dryvit's local counsel Hada Haulsee:

> Thanks, Hada, for the draft papers. It seems to me that they are very thorough and well done. I have only one substantive point which is basically one of emphasis (noted below). In addition, althougth I am sure you and *Jeff* will catch

them, there are typos on brief p. 7 as to Jeff's's name: someone typed it as "Leak" rather than "Leath" in three places.

Here's the substantive point:

I suggest emphasizing even more the Full Faith and Credit (FFC) argument by moving Argument IV.B up to (to become IV.A) so that we can emphasize the FFC argument as our first argument (as you do in the opening paragraph to the memorandum). It seems to me that the FFC point is game, set match and we ought to make crystal clear that we think so.

By the time the papers are filed, we will have secured—as you point out—a final judgment in TN. That judgment settles claims for all persons who did not opt out within its terms. Regardless of what might have happened if Cardamone had been prosecuted to completion (or even partial completion. . . with formal notice, etc.) it is now constitutionally required (as the SC Court has recognized) that Posey final judgment be given FFC in S.C. As a result, there is no longer a Cardamone class action to prosecute, and the case must be dismissed.

Then I'd move to the old Argument IV.A: specifically

The above result would be correct at this stage for reasons of comity even if it were not constitutionally required. The Cardamone Action has been in the deep freeze for more than two years, precisely so that plaintiff's counsel could see if *Posey* benefits could be increased and result in enhanced benefits to South Carolinians. This has occurred. Under these circumstances, especially if no notice was ever provided to the Cardamone class members, it would be legal error even if *Posey* weren't yet final to move forward with a case that is premised on the notion that there sould be a mass opt-out of South Carolinians. {The I'd cite the cases that require that opt outs be done individually.} Since this is so, there can be no Cardamone Class action for the additional reason that the class is structured in an improper way.

BUT, the Court need not reach this second question since Posey final judgment is now final and as the S.C. Court has held in an analogous context—this Court is therefore constitutionally required to enforce its terms.

Hope this helps. Again, the papers look very good to me; my comment is basically one of emphasis, but I think we should make this as easy as possible for the local state court judge.

The record before the Court is replete with clear and convincing evidence that Original Class Counsel intended to craft an argument to decertify or otherwise compromise the prosecution of this action that was based, in part on the nondisclosure of the individual

settlements and class compromise it had reached in violation of the requirements of Rule 23(c), SCRCP. The following email exchange is illustrative of attempts to decertify the instant action without fully informing this Court of the actions taken to compromise the action:

August 22, 2005

Message from SC counsel Jeff Leath to Dryvit's counsel Peter Morgan:

> "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 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?" Dry0263.

August 23, 2005

Message from Dryvit counsel Peter Morgan to SC class counsel Jeff Leath:

> "Main point is that – while the Creasys settled – Finkel and Altman still have clients who are putative class members in Cardamone. As a result, they have clients with standing to object to decertification. For this and other reasons, we think there should be memos and affidavits [sic] supporting the dismissal/decertification. More later. Dry0275.

September 29, 2005

Message from Peter Morgan to SC Class Counsel Jeff Leath

> "Jeff : . . . Per your request, heres the email that spelled things out, reflecting the language agreed upon in Knoxville, lo those many months ago."
>
> "Per my voice mail to you both, I agree that S.C. counsel should receive a total of $825,000. Dryvit agree to help in this process in tht [sic] total amount of $225,000 by agreeing to assist Posey class counsel, specifically, as follows ...." Dry0492.

November 18, 2005

Message from Dryvit Counsel Erin Dean to SC class counsel Jeff Leath and others:

> "Jeff : ... In that the intervenors are alleging that original class counsel was ineffective, etc. you may want to consider filing a

> response to their motion (I do not know if you discussed this with Mike, Ned, and Stephanie during your meeting last month). I would also suggest that the original class counsel folks pick someone other than George to be the spokesperson. Bobby advised [that] George was 'fired up' about the intervenors and I would hate for his passion and zealous representation of the original class to over shadow the valid legal arguments for the denial of the intervention and dismissal of the SC Class action." Card06740-41.

Response from Jeff Leath to Erin Dean's previous message:

> "Erin, you are probably right. I can work up something Monday. I do need you to nail down one issue in Posey through Dryvit so we will be on the exact page. In Posey, we (SC Class Counsel) attempted to opt out the entire SC class. I know this was denied, and this denial has later been referred to in some Dryvit papers – we need to see if there is any transcript or order reference to this in Posey." Card06740.

Response from Dryvit counsel Hada Haulsee to Jeff Leath's previous message:

> "Jeff , Erin Dean forwarded your question to me. There is no reference to the attempted opt-out of the entire SC class in any of the Posey hearing transcripts. ... [Dryvit's argument against the SC opt-out] is explained in detail in our brief in support of the motion to dismiss. I'm going to be arguing for Dryvit at the hearing on [December] 5th. I would very much like to meet with you and anyone else on your team who is going to argue. This is a rare occasion in which your interests and ours are aligned, at least to some extent. It would be good if we could coordinate our arguments and make sure we don't get at cross-purposes." Card06739-40.

To further, and then after discovered, to hide and obscure this scheme, these attorneys engaged in numerous acts of lack of candor towards the tribunal. The fact that they received fees and other benefits for the "SC CLASS" require that they appear before this Court and make a proper accounting and tender of all Benefits received as required by *Premium Investment,* Rule 23 of the SCRCP and under the inherent powers of the court to protect the integrity of the judicial process.

For the foregoing reasons, Original Class Counsel should be required to appear before this Court to account for any fees they received in connection with this case

This 12th day of January, 2010

Hilton Head Island, South Carolina

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(803) 254-1570

CONFIDENTIAL

From: Dolores Calapano [dcalapano@leathbouchlaw.com]
Sent: Tuesday, January 07, 2003 1:55 PM
To: 'morganp@dsmo.com'
Subject: list of Dryvit cases

Dear 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 Mike Seekings and probably the settlement will need to be completed after *Posey* is certified in order to eliminate the SC class.

Thank you,
Jeff Leath (by Dolores Calapano, Paralegal)
543-937-8811

<<Dryvit Cases.doc>>

DRY0244

1/7/2003

EXHIBIT A

EXHIBIT 18

CONFIDENTIAL

Dryvit Cases (pending) Redacted

Leath, Bouch & Crawford/William M. Bowen

Benjamin T. Clark and Diane M. Clark v. Estate Builders, Inc., and Dryvit, Inc.
filed in Beaufort County

Philip R. Schriger and Judith L. Schriger v. Dryvit Systems, Inc., Cambridge Building Corporation, Coastal Concepts, Inc., Atlantic Pest Control, Inc. and Pella Window & Door, LLC, f/k/a Pella Window & Door Company, Inc.; Pella Corporation
filed in Beaufort County

William Grossman, M.D. and Judy Grossman, Dryvit Systems, Inc., Todd Poore Contractor, Inc., and Dillon Construction Services, Inc.
filed in Charleston County

Mullen, Wylie & Seckings Redacted

John and Sally Cardamone, et al v. Dryvit Systems, Inc., et al
filed in Beaufort County

Ronald E. Wilson and Nancy E. Wilson v. Dryvit Systems, Inc., Margaret R. Barton, Trustee, and Custom Home Consultants, Inc.
filed in Beaufort County

Ramona Gianni v. Dryvit Systems, Inc.
filed in Horry County

Gloria Schuaars v. Dryvit Systems, Inc.
filed in Georgetown County Redacted

William Dixon Robertson

Anthony and Diana Cutrone v. Dryvits Systems, Inc.
filed in York County

Leon S. Goodall v. Dryvit Systems, Inc.
filed in Richland County Redacted

William and Pamela Griffith v. Dryvit Systems, Inc.
filed in Pickens County

DRY0245

CONFIDENTIAL

Russell and Carolyn Karpick v. Dryvit Systems, Inc.
filed in Oconee County

Don and Brenda Martin v. Dryvit Systems, Inc.
filed in Lexington County

Bob and Ilona McClure v. Dryvit Systems, Inc.
Redacted filed in Richland County

William and Diane Neglia v. Dryvit Systems, Inc.
filed in Richland County

Henry and Stacy Orr v. Dryvit Systems, Inc.
filed in Greenville County

Michael Reed v. Dryvit Systems, Inc.
filed in Richland County

Kevin and Brenda Rose v. Dryvit Systems, Inc.
filed in York County

RECORDS COPY
Client/Matter Name: RPM/Dryvit
Client/Matter #: RB025.0000
File Name: Corresp.
4/26/04

From: W Jefferson Leath [wjleath@leathbouchlaw.com]
Sent: Monday, April 26, 2004 9:23 AM
To: Morgan, Peter
Subject: RE: SC CLASS

WE WILL RESCHEDULE. 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.

-----Original Message-----
From: Morgan, Peter [mailto:MorganP@dsmo.com]
Sent: Friday, April 23, 2004 5:41 PM
To: W Jefferson Leath; EDOFFERMYRE@DSCKD.COM
Subject: RE: SC CLASS

Jeff.

I was out of the office/returned today. Will speak with Everette and get back to you early next week. I saw that the Judge postponed the hearing on the motion to decertify. Any word? Just scheduling?

-----Original Message-----
From: W Jefferson Leath [mailto:wjleath@leathbouchlaw.com]
Sent: Thursday, April 22, 2004 2:18 PM
To: 'EDOFFERMYRE@DSCKD.COM'
Cc: Morgan, Peter
Subject: SC CLASS

HI TO BOTH OF YOU. WE ARE PREPARING TO ATTEND AND AGREE TO THE MOTION TO DECERTIFY THE CLASS WHICH WILL TAKE PLACE MONDAY IN BEAUFORT, S.C. SOME OF MY SC LAWYERS ARE CONCERNED ABOUT NOT HAVING ANY MEMORIALIZATION OF THE AGREEMENT FRANK GRIMBALL AND I REACHED WITH THE 2 OF YOU IN TENNESSEE ABOUT CLASS COUNSEL COMPENSATION, AND I AGREE WE SHOULD AT LEAST HAVE AN E-MAIL WRITING OF IT PRIOR TO MONDAY AT 1PM. HERE IS MY UNDERSTANDING OF IT: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. MANY THANKS AND BEST REGARDS.JEFF

This e-mail message and any attached files are confidential and are intended solely for the use of the addressee(s) named above. This communication may contain material protected by attorney-client, work product, or other privileges. If you are not the intended recipient or person responsible for delivering this confidential communication to the intended recipient, you have received this communication in error, and any review, use, dissemination, forwarding, printing, copying, or other distribution of this e-mail message and any attached files is strictly prohibited. Dickstein Shapiro reserves the right to monitor any communication that is created, received, or sent on its network. If you have received this confidential communication in error, please notify the sender immediately by reply e-mail message and permanently delete the original message.

To reply to our email administrator directly, send an email to postmaster@dsmo.com

DRY0496

EXHIBIT B

STATE OF SOUTH CAROLINA)
) IN THE CIRCUIT COURT
COUNTY OF BEAUFORT

06 JAN 19 PM 12:42

BEAUFORT COUNTY
CLERK OF COURT
ORT, SC

John Cardamone and his wife, Sally Cardamone, and Benjamin T. Clark and his wife, Diane M. Clark, and Ramona Gianni, and Nathan W. Gordon, individually and on behalf of others similarly situated in the State of South Carolina,

Plaintiffs,

vs.

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

Defendants.

Civil Action No. 2002-CP-07-1377

CONSENT ORDER RELIEVING CERTAIN OF PLAINTIFFS' COUNSEL

COPY

This is an action seeking declaratory and injunctive relief and damages arising from the installation of artificial stucco siding manufactured by Dryvit Systems, Inc. It was commenced in August 2002. Over three years later, four of the original counsel for plaintiffs no longer have individual clients with an interest in the litigation. Those four—William M. Bowen, P.A.; Leath Bouch & Crawford; Michael A. Seekings; and William Dixon Robertson III—ask to be relieved as counsel for the plaintiffs and for the class previously certified. None of the remaining counsel for plaintiffs, nor counsel for defendants, object. Accordingly, it is hereby

ORDERED ADJUDGED AND DECREED that William M. Bowen, P.A.; Leath Bouch & Crawford; Michael A. Seekings; and William Dixon Robertson III, shall be and hereby are relieved as counsel for plaintiffs and for the class of plaintiffs previously certified. This order is without prejudice to any claim these lawyers may make for attorneys' fees, if any be awarded in this case, based on services rendered by them prior to this order.

IT IS SO ORDERED.

Spartanburg, South Carolina

January 18, 2006.

J. Mark Hayes II
Circuit Court Judge

EXHIBIT C

STATE OF SOUTH CAROLINA BEAUFORT COUNTY	) IN THE COURT OF COMMON PLEAS) FOURTEENTH JUDICIAL CIRCUIT
TIMOTHY TREON, JANIE TREON, P. JENNINGS SCEARCE, STEVE TUCKER, JEANEEN TUCKER, CHARLES H. DAVIS, STEPHANIE H. DAVIS individually and on behalf of Others similarly situated in the State of South Carolina, Plaintiffs, v. LEATH, BOUCHE & CRAWFORD, LLP W. JEFFERSON LEATH, JR., WILLIAM DIXON ROBERTSON, III, MICHAEL S. SEEKINGS, FRANK E. GRIMBALL & MULLEN WYLIE, LLC formally (sic) MULLEN, WYLIE & SEEKINGS, LLC, WILLIAM M. BOWEN, JOHN CARDAMONE and his wife SALLY CARDAMONE; BENJAMIN T. CLARK and his wife, DIANE M. CLARK, RAMONA GIANNI, NATHAN W. GORDON, Defendants.	) Civil Action No.: 2008-CP-07-03145 **ANSWERS OF DEFENDANTS FRANK E. GRIMBALL AND MULLEN WYLIE, LLC, formerly MULLEN, WYLIE & SEEKINGS, LLC TO PLAINTIFFS' SUPPLEMENTAL INTERROGATORIES**

Pursuant to Rules 26 and 33 of the South Carolina Rules of Civil Procedure, Defendants Frank E. Grimball and Mullen Wylie, LLC, formerly Mullen, Wylie & Seekings, LLC ("Defendants"), hereby submit their Answers to Plaintiffs' Supplemental Interrogatories as follows:

GENERAL OBJECTIONS

Defendants make the following general objections to Plaintiffs' Supplemental Interrogatories, which are incorporated in and made a part of each Answer set forth below:

EXHIBIT
0340

1. Defendants object to Plaintiffs' Supplemental Interrogatories to the extent they are inconsistent with or exceed the scope of the South Carolina Rules of Civil Procedure.

2. Defendants object to Plaintiffs' Supplemental Interrogatories to the extent they seek the disclosure of information which is protected by the attorney/client privilege, the work product doctrine or any other applicable privilege or doctrine.

3. Defendants object to Plaintiffs' Supplemental Interrogatories to the extent they seek the disclosure of confidential or proprietary information. Defendants will only disclose such information, if it is not subject to any other objections, upon obtaining an appropriate protective order.

INTERROGATORIES

1. List all cases YOU participated in either as counsel or co-counsel wherein Dryvit was a defendant. For such cases listed, provide the following:

a) Name and caption of case;

b) Current status of case;

c) If the case has ended, state whether it settled or reached a verdict;

d) If a verdict was reached, state in whose favor the verdict was reached;

e) State the amount of the verdict or settlement paid by Dryvit for each case listed.

ANSWER: **Defendants object to this interrogatory as it is overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and subject to the attorney/client privilege. Without waiving these objections, see the following:**

CASE NAME	CASE NUMBER	STATUS/DISMISSAL DATE
Open Matters		
Ernest and Joan Bryan v. Randy Jeffcoat Builders, Inc., et al	2007-CP-07-1475	Pending
Cardamone, et al. n/k/a Treon, et al. v. Dryvit, Inc., et al.	2002-CP-07-1377	Pending

CASE NAME	CASE NUMBER	STATUS/DISMISSAL DATE
David and Fay Dixon v. Authentic Builders, Inc., et al.	2006-CP-07-1131	Pending
Scott and Frances Moody v. T.D. Peeples Construction Co., Inc., et al.	2004-CP-07-1140	Pending
Bjarte and Mona Rekdal v. Randy Jeffcoat Builders, Inc., et al	2007-CP-07-1379	Pending
Randy Sheets v. Signature Properties Inc, Dryvit, TDR Construction Inc, and Summers Roofing	2005-CP-26-5786	Pending
Closed Matters		
Alfred Balkin v. Tuten Construction Company, Inc., et al.	2002-CP-07-1610	09/15/03
Beach City Associates, L.P. v. Tremont Construction Company, Inc., et al.	2004-CP-07-841	01/01/07
Kara Berrady v. Margaret R. Barton, Trustee of the Margaret R. Barton Trust, et al.	2003-CP-07-0620	03/26/04
Lawrence Blob v. Powers Co's, Inc., et al.	2005-CP-07-567	01/01/07
H. Martin Bougus, Jr., et al. v. Collins-Guilbert & Associates, Inc., et al.	2002-CP-07-1563	05/25/04
Buford Brown and Ashlyn Brown v. Archie Bell Construction, Inc. AND Archie Bell Construction, Inc. v. Dryvit Systems, Inc., Commercial Systems, Inc., Lee Moore Plastering Co., Inc., Stand Chemical Co., Inc. and Lanes Professional Pest Elimination, Inc.	2002-CP-26-5993	02/10/05
John Cardamone and Sally Cardamone v. Graves Commercial Builders, Inc., Dryvit Systems, Inc., American Way Applicators of South Carolina, Inc. AND Graves Commercial Builders, Inc. v. Ronnie Smith d/b/a Ronnie Smith Roofing, Metal Roofing Company, Inc., Pella Window and Door Company, Inc. and Carolina Termite and Pest Control	1999-CP-07-1237	02/24/03
Barry Fehl and Paulete Fehl v. Signature Properties, Inc., Dryvit Systems, Inc., Commercial Systems, Inc. and Best Exterminating Services, Inc.	2004-CP-26-3652	01/24/06
Robert Furr v. Signature Properties, Inc, Dryvit Systems Inc. and Commercial Systems Inc.	2006-CP-26-3916	03/18/09
Janet Garrity v. W.R. Simms, Inc., et al.	2000-CP-07-804	05/01/03
Ramona Gianni v. Regal Corporation of Myrtle Beach, Dryvit Systems, Inc., Commercial Systems, Inc. and Best Exterminating, Inc.	2001-CP-26-5153	07/28/03

CASE NAME	CASE NUMBER	STATUS/DISMISSAL DATE
Carolyn Green v. Dryvit Systems, Inc., Commercial Systems, Inc., Terminix Inc., M&W Windows, Inc. and Paddy and Son Development, Co., Inc.	2003-CP-22-0485	01/27/05
William Higgs v. Vanguard Homes, Inc., et al.	2003-CP-07-06	06/01/05
Jon and Jan Jameson v. B&C Partnership, et al.	2003-CP-07-1779	12/13/06
Walter and Teresa Lawson v. GHG, Inc., et al.	2005-CP-07-1488	09/01/07
Micke Lott v. Roberts Construction Company, Inc., et al.	2002-CP-07-964	10/01/05
Edwin J. and Sheila S. Menkus v. Mark Longworth, et al.	2004-CP-07-204	10/03/06
Michael and Sharon Mikolajczyk v. Regal Corporation of Myrtle Beach, Dryvit Systems, Inc., Commercial Systems, Inc. and Home Team Pest Defense	2004-CP-26-1144	08/30/05
Robert & Donna Miller v. Coleman Bell Builder, Inc., et al.	2003-CP-07-912	12/14/05
Donald and Rose Marie Nelson v. J.A. Aldrich & Sons Builders & Developers, Inc., et al.	2006-CP-07-2717	01/15/08
Robert D. and Gloria K. Olmstead v. Bryan Homes, Inc., et al	2004-CP-07-341	09/29/06
Raymond and Kristina Pasqualone v. McNair Building Construction, Inc., et al.	2003-CP-07-715	03/24/06
Luba Roberts v. Sand Dollar Construction, et al	2000-CP-07-0775	09/29/03
Gloria Schnaars v. Butler Construction Co., Inc., Contractor Specialty Supply d/b/a Cota Southeast and Orkin Exterminating, Inc.	2001-CP-22-582	10/15/03
Danielle Smith v. Joe Breedlove, et al.	2002-CP-07-1767	01/01/06
Paul & Martha Smith v. Andrew Rullo Builders, et al.	2004-CP-07-423	05/23/06
Gerald Smoak and Peggy Smoak vs. Dryvit Systems, Inc., et al.	1999-CP-07-1353	07/26/00
Bill Therien v. Summer Tree Construction Company, Inc., et al.	2005-CP-07-825	05/08/06
Alfred W. Vadnais and Joan M. Vadnais v. Great Oaks Custom Builders, Inc., et al.	2003-CP-07-1214	01/12/06

CASE NAME	CASE NUMBER	STATUS/DISMISSAL DATE
Robert and Mary Viventi v. Walberry Contracting, Inc., et al.	2005-CP-07-1489	07/05/07
Nancy E. Wilson v. Dryvit Systems, Inc.	2003-CP-07-0619	03/26/04
Ronald E. Wilson and Nancy E. Wilson v. Custom Home Consultants, Inc., et al.	1999-CP-07-1809	03/26/04
Ronald E. Wilson and Nancy E. Wilson v. Custom Home Consultants, Inc., et al. AND Margaret R. Barton; and Custom Home Consultants, Inc. v. Pamela Hodges, Individually and d/b/a Hodges Stucco; and Dryvit Systems, Inc.	2002-CP-07-11R (1999-CP-07-1809 was re-filed)	03/26/04

2. For list of cases attached to these Interrogatories, state as they apply to YOU the amount Dryvit paid in settlement and the amount of attorneys' fees collected from such settlement by YOU.

ANSWER: **Defendants object on the grounds that the information requested is not reasonably calculated to lead to the discovery of admissible evidence; information concerning settlement is confidential and the information is protected by the attorney/client privilege.**

3. For the moneys described/referenced in Mr. Bowen's deposition taken on December 18, 2006 (attached), state the date of the payments to YOU and the amount each of payment YOU received.

ANSWER: **The firm received some funds in December 2005 and some in late 2006. As a result of the *Posey* settlement, Mullen Wylie, LLC received check #1003 from Mike Seekings dated 12/16/05 in the amount of $40,334.00. Mullen Wylie, LLC then wrote check #5694 to Dixon Robertson on 2/16/06 in the amount of $24,400.00. Mullen Wylie, LLC received check #1026 from Mike Seekings dated 12/18/06 in the amount of $82,100.00.**

Susan Taylor Wall
Email: susanwall@parkerpoe.com
Krista M. McGuire
Email: kristamcguire@parkerpoe.com
PARKER POE ADAMS & BERNSTEIN, LLP
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ATTORNEYS FOR DEFENDANTS FRANK E. GRIMBALL AND MULLEN WYLIE, LLC, FORMERLY MULLEN, WYLIE & SEEKINGS, LLC

March 25, 2009

Charleston, South Carolina

STATE OF SOUTH CAROLINA BEAUFORT COUNTY	) IN THE COURT OF COMMON PLEAS) FOURTEENTH JUDICIAL CIRCUIT
TIMOTHY TREON, JANIE TREON, P. JENNINGS SCEARCE, STEVE TUCKER, JEANEEN TUCKER, CHARLES H. DAVIS, STEPHANIE H. DAVIS individually and on behalf of Others similarly situated in the State of South Carolina, Plaintiffs, v. LEATH, BOUCHE & CRAWFORD, LLP W. JEFFERSON LEATH, JR., WILLIAM DIXON ROBERTSON, III, MICHAEL S. SEEKINGS, FRANK E. GRIMBALL & MULLEN WYLIE, LLC formally (sic) MULLEN, WYLIE & SEEKINGS, LLC, WILLIAM M. BOWEN, JOHN CARDAMONE and his wife SALLY CARDAMONE; BENJAMIN T. CLARK and his wife, DIANE M. CLARK, RAMONA GIANNI, NATHAN W. GORDON, Defendants.	) Civil Action No.: 2008-CP-07-03145 CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **ANSWERS OF DEFENDANTS FRANK E. GRIMBALL AND MULLEN WYLIE, LLC, formerly MULLEN, WYLIE & SEEKINGS, LLC TO PLAINTIFFS' SUPPLEMENTAL INTERROGATORIES** have been served upon the following counsel of record via email this 25th day of March, 2009.

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Hilton Head Island, SC 29938

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Thomas J. Finn, Esq.
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ATTORNEYS FOR DEFENDANT WILLIAM M. BOWEN

Jacklyn Harvey

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Charleston, South Carolina 29401
(843) 727-2650

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS
Timothy Treon, Janie Treon, P. Jennings Scearce, Steve Tucker, Jeaneen Tucker, Charles H. Davis, Stephanie H. Davis individually and on behalf of others similarly situated in the State of South Carolina, Plaintiffs, vs. Leath, Bouche & Crawford, LLP, W. Jefferson Leath, Jr., William Dixon Robertson, III, Michael S. Seekings, Frank E. Grimball, Mullen Wylie, LLC formerly Mullen, Wylie and Seekings, LLC, William M. Bowen, John Cardamone, Sally Cardamone, Benjamin T. Clark, Diane M. Clark, Ramona Gianni and Nathan W. Gordon, Defendants.	Case No 08-CP-07-3145 **ANSWERS TO PLAINTIFFS' INTERROGATORIES BY DEFENDANT WILLIAM M. BOWEN**

Defendant William M. Bowen ("Bowen") answers the Plaintiffs' Interrogatories as follows:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and who has possession of such statements.

ANSWER: Bowen incorporates by reference the names and facts known to those persons listed as witnesses by the co-defendants and by the plaintiffs in their respective answers to interrogatories.

EXHIBIT 9

EXHIBIT E

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.

ANSWER: Bowen has very few documents responsive to this interrogatory. Among them are a copy of the Motion to Intervene and related documents and affidavits filed by Plaintiffs' counsel in the *Cardamone* case on September 21, 2005.

3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claims, and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER: ALPS
Policy No. ALPS2420-13
Limits: $2 million per claim

4. For every insurance policy identified in response to the preceding interrogatory, please indicate whether the defendants have filed any claim(s) under the policy, and the status/disposition of the claim(s).

ANSWER: The Defendants have not filed any claims against the policy.

5. For each person known to the Defendant or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statement taken from such witness.

ANSWER: See Answer to Interrogatory Number 1.

6. Identify by name, address and telephone number of (sic) each person who has been retained specifically employed (sic) by you in anticipation of litigation or

preparation for trial as an expert and the subject matter as to which each such person has been retained or specifically employed by you.

ANSWER: Defendant Bowen has not yet retained an expert but reserves the right to do so at a later time.

7. Identify by name, address and telephone number each person named in response to the preceding interrogatory, and state whether you expect to call him as an expert witness at the trial, his profession, occupation, employer, and filed of expertise.

ANSWER: See Answer to Interrogatory Number 6.

8. Set forth the substance of the facts and opinions about which alleged expert is expected to testify and a summary of the grounds for each opinion, or attach to your answers to these Interrogatories a report of the experts listed above which contains the information sought by this request.

ANSWER: See Answer to Interrogatory Number 6.

9. State the dates and location of each test, analysis, or examination relating to this litigation conducted by each person or persons listed above, and the examiners, conclusion as to the results of the test, analysis or examination.

ANSWER: See Answer to Interrogatory Number 6.

10. Indicate whether you have ever employed the alleged expert or experts listed above as expert witnesses or as litigation consultants in other matters. If so, indicate the dates, the name of the case, and the term number where appropriate.

ANSWER: See Answer to Interrogatory Number 6.

11. Please state the legal status of your organization, its state of corporation (sic), its principal officers, and place of business, its domicile, the date of its organization,

and its affiliates, successors, and subsidiaries at the time of the filing of the Complaint in this action.

ANSWER: William M. Bowen, PA is a South Carolina Professional Association which filed its Articles of Incorporation on January 28, 1992. William M. Bowen is the President and registered agent.

12. On what date did you receive the $50,000 payment identified by you on page 28 of your deposition of December 18, 2006.(attached)

ANSWER: Bowen is not certain as to the date on which the check was received but he is informed and believes that the check was deposited on January 27, 2006.

13. State who was the client you represented that entitled you to receive the above fee.

ANSWER: Class counsel in *Posey v. Dryvit*, Civil Action No. 17,715IV, in the Circuit Court for Jefferson County, Tennessee, was paid a legal fee pursuant to the amended Settlement Agreement with Dryvit of approximately $11 million. Out of that fee, *Posey* class counsel agreed to pay $600,000 of their fee to the South Carolina lawyers whose collective efforts significantly improved the *Posey* class settlement. One-half of that fee, or $300,000, was split with two-thirds going to Leath Bouch and one-third going to Bowen.

14. List all cases YOU participated in either as counsel or co-counsel wherein Dryvit was a defendant. For such cases listed provide the following:

a. Name and caption of the case;

b. Current status of the case;

c. If the case has ended, state whether it settled or reached a verdict;

d. If a verdict was reached state in whose favor the verdict was reached;

e. State the amount of the verdict or settlement paid by Dryvit for each case listed.

ANSWER:

A. *Benjamin T. Clark and Diane M. Clark v. Estate Builders, Inc. and Dryvit, Inc.*, Case No. 02-CP-07-905, Court of Common Pleas, Beaufort County, South Carolina. Case settled. The terms of the settlement agreement are subject to a confidentiality clause that requires the written consent of the parties or an Order from a Court of competent jurisdiction;

B. *John Cardamone, et. al.v. Dryvit Systems, Inc.*, Case No. 02-CP-07-1377, Court of Common Pleas, Beaufort County, South Carolina. Case still pending;

C. *Nathan W. Gordon, et. al. v. Paragon Construction, Inc., v. Dryvit, Systems, Inc., et. al.*, Case No. 00-CP-07-498, Court of Common Pleas, Beaufort County, South Carolina. Case settled in mediation. The terms of the settlement agreement are subject to a confidentiality clause that requires the written consent of the parties or an Order from a Court of competent jurisdiction; and

D. *Harry H. Mellon, et. al. v. Dryvit Systems, Inc.*, Case No. 99-CP-07-1209, Court of Common Pleas, Beaufort County, South Carolina. Case settled in mediation. The terms of the settlement agreement are subject to a confidentiality clause that requires the written consent of the parties or an Order from a Court of competent jurisdiction.

15. Describe in detail all laws and acts having the force and effect of law, code violations, which you contend are applicable to this action.

ANSWER: *S. C. Code Ann.* § 15-3-530 (1976, as amended).

16. List the names and addresses and capacities of all persons consulted in obtaining information to answer these interrogatories and as to each, indicate each interrogatory to which they contribute (sic) information.

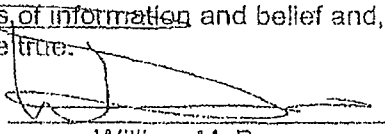
ANSWER: William M. Bowen.

James L. Bruner
Warren C. Powell, Jr.
Bruner, Powell, Robbins,
Wall & Mullins, LLC
P. O. Box 61110
Columbia, SC 29260
(803) 252-7693
Attorneys for William M. Bowen

March 23, 2009

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS
Timothy Treon, Janie Treon, P. Jennings Scearce, Steve Tucker, Jeaneen Tucker, Charles H. Davis, Stephanie H. Davis individually and on behalf of others similarly situated in the State of South Carolina, Plaintiffs, vs. Leath, Bouche & Crawford, LLP, W. Jefferson Leath, Jr., William Dixon Robertson, III, Michael S. Seekings, Frank E. Grimball, Mullen Wylie, LLC formerly Mullen, Wylie and Seekings, LLC, William M. Bowen, John Cardamone, Sally Cardamone, Benjamin T. Clark, Diane M. Clark, Ramona Gianni and Nathan W. Gordon, Defendants.	)	Case No 08-CP-07-3145 VERIFICATION

PERSONALLY APPEARED before me the undersigned William M. Bowen who, being duly sworn, deposes and says that he is a defendant in the above-captioned matter, that he has read the foregoing Answers to Plaintiffs' Interrogatories by Defendant William M. Bowen, that the answers set forth therein are true of his own knowledge except those answered on the basis of information and belief and, as to those, he is informed and believes that they are true.



William M. Bowen

SWORN TO before me this 31 ST day of ~~April~~ MARCH, 2009.

Maxine J. Perry (SEAL)
Notary Public for South Carolina
My commission expires: 3/8/2014

CERTIFICATE OF SERVICE

I, Kaye White, an employee of Bruner, Powell, Robbins, Wall & Mullins, LLC, attorneys for William M. Bowen, do hereby certify that on March 23, 2009, I served a copy of the document(s) listed below on counsel of record by depositing a copy of same in the U.S. Mail, first-class, postage prepaid and addressed as follows:

Pleadings served:

1. **Answers to Plaintiffs' Interrogatories by Defendant William M. Bowen**

Counsel served:

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Krista M. McGuire, esq.
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1328 Blanding Street
Columbia, SC 29202
Attorney for the Plaintiff

Kaye White

From: W Jefferson Leath [wjleath@leathbouchlaw.com]

Sent: Thursday, January 02, 2003 3:22 PM

To: 'MORGANP@DSMO.COM'

Cc: 'WDRLAW@MSN.COM'

Subject: NEED SOME HELP

CONFIDENTIAL

PETER, I KNOW YOU HAVE TALKED TO DICKSON 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 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 NOTAS OFFICE TO GET THIS DONE. I AM CONCERNED THAT IF NOT, WE MAY HAVE SOME UNFORTUNATE REPERCUSSSIONS WITH OUR GROUP-I DONT THINK ANY OF US NEED THIS NOW, AND THIS WAS CLEARLY AN INTEGRAL PART OF OUR DEAL. THANKS!! DICKSON CAN BE REACHED AT@ 03-622-7537 OR WDRLAW@MSN.COM PLS LET ME KNOW.

2/10/2005

EXHIBIT F

LEATH, BOUCH & CRAWFORD LLP
PRACTICE LIMITED TO COMMERCIAL LITIGATION & CREDITORS RIGHTS
WITH EMPHASIS ON CONSTRUCTION & ENVIRONMENTAL LAW

CONFIDENTIAL

November 15, 2002

SETTLEMENT NEGOTIATIONS
CONFIDENTIAL

Peter W. Morgan, Esq.
Bruce Holcomb, Esq.
Dickstein, Shapiro, Morin & Oshinsky
2101 L Street N.W.
Washington, DC 20037-1526

RE: John Cardamone, et al., individually and on behalf of all others similarly situated in the state of South Carolina v. Dryvit Systems, Inc., et al.
Case No. 2002-CP-07-1377
File No. 1198.1

Dear Peter and Bruce:

You will find attached the following:

1. A proposed Amendment to the Settlement Agreement between the Plaintiffs and Dryvit Systems, Inc. in Posey and

2. A letter of understanding from Moisture Warranty Corporation regarding the issues of consequential damage repairs and mold.

3. A letter of understanding from Moisture Warranty Corporation regarding the meaning of the term "consequential damage" in the Dryvit Edition MoistureFree Warranty.

The enhancements and Amendments to Posey are self-explanatory. The South Carolina attorneys believe that these enhancements are in the interest of all parties, including Dryvit's. These enhancements would appear to answer many, if not most of, the substantive objections which have been filed to the Posey settlement.

If these Amendments are agreed to, Mike Seekings and I, on behalf of the South Carolina group, will recommend withdrawing our objections to the Posey settlement, and we will, in fact, recommend supporting the Posey settlement by whatever means and in whatever form necessary.

CONFIDENTIAL

The Amendments above, if agreed to, would go a substantial distance toward resolving the outstanding issues with the South Carolina class, and once some further negotiations take place on some additional issues, we would be quite hopeful that we could effect a global resolution.

Very truly yours,

LEATH, BOUCH & CRAWFORD, LLP

W. Jefferson Leath, Jr.

WJLjr/lc

Enclosures

DRY0319

Buist · Moore · Smythe · McGee · P.A.

February 5, 2003

CHARLES J. BAKER III
ATTORNEY AT LAW
DIRECT DIAL: 843-720-4619
cbaker@buistlaw.com

Via Facsimile Only

Michael S. Seekings, Esq.
Mullen, Wylie & Seekings
171 Church St., Suite 370
Charleston, SC 29402

RE: *John and Sally Cardamone v. Dryvit Systems, Inc., et al.*
Beaufort County Common Pleas Case No. 99-CP-07-1237
Our File No.7276.0029

Dear Mike:

This will confirm that the Plaintiffs have agreed to accept and Dryvit Systems, Inc. has agreed to pay the total sum of $90,000 in settlement of the above-referenced action. Plaintiffs agree to release any and all claims against Dryvit, its related companies, and any applicable insurance carriers and will dismiss Dryvit with prejudice from the action now pending in the Court of Common Pleas for Beaufort County. Plaintiffs also agree that the terms of the settlement will be confidential. My firm will prepare a Release and Stipulation of Dismissal and forward it to you.

You have acknowledged that the amount that Dryvit has agreed to pay 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.

To comply with the Rules of Civil Procedure, please sign in the space indicated at the bottom of this letter, and fax it back to me in order to memorialize our agreement.

Very truly yours,

Charles J. Baker III

/kmw

Michael S. Seekings, Esq.
Dated: 2/4/03

CONFIDENTIAL

CARD00838

EXHIBIT H

ALFORD - BOWEN (DIRECT EXAMINATION)

Leath or Frank Grimball, whoever else, I don't know.

Q Okay.

A Somehow everybody got together. I know that I was not involved in any discussions with anyone other than Jeff, Tim and my clients about it.

Q Okay. Did you have any good or bad feelings about Mr. Mullen -- and I seem to recall that you weren't pleased some time ago when the class action case wasn't dismissed to South Carolina class; do you recall that?

MS. HAULSEE: Object to the form.

THE WITNESS: I was surprised because I thought that it had been rolled into the Tennessee action so to speak. And I thought the Tennessee action was determinative of whatever was going on down here.

EXHIBIT 5

BY MR. ALFORD:

Q And what would have been your basis for that understanding, just your conversation with Mr. Leath?

A All in the Tennessee court. And my

EXHIBIT 1

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

LEATH, BOUCHE & CRAWFORD, LLP, W. Jefferson Leath, Jr., William Dixon Robertson, III, Michael S. Seekings, Frank E. Grimball, MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC, William M. Bowen, John Cardamone, Sally Cardamone, Benjamin T. Clark, Diane M. Clark, Ramona Gianni, and Nathan W. Gordon,

Defendants.

CIVIL ACTION NO. 2008-CP-07-3145

MOTION FOR CLASS CERTIFICATION

Timothy Treon and P. Jennings Scearce individually and on behalf of Others similarly situated in the State of South Carolina,

Plaintiffs,

vs.

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

Defendants.

CIVIL ACTION NO. 2008-CP-07-0774

TO: JAMES L. BRUNER, J.D., M. DAWES COOKE, J.D., JOHN ARTHUR JONES, J.D., M. ELIZABETH JOWERS, J.D., SUSAN P. MCWILLIAMS, J.D., WARREN C. POWELL, JR., J.D., KENT T. STAIR, J.D., and SUSAN TAYLOR WALL, J.D., ATTORNEYS FOR DEFENDANTS:

NOTICE

YOU WILL PLEASE TAKE NOTICE THAT on the 10th day after service hereof, or as soon thereafter as counsel can be heard before The Honorable J. Mark Hayes, II at a location to be determined by Judge Hayes, Plaintiffs will move pursuant to Rule 23, SCRCP, before the Court for an Order granting class certification for the Plaintiffs in both of the above-captioned cases.

MOTION

Pursuant to Rule 23, SCRCP, the above-named Plaintiffs move this Court for an Order certifying both of these matters as class actions with the above-named Plaintiffs as representative parties on behalf of all Others similarly situated in the State of South Carolina.

The grounds for this motion include 1) Defendants are barred from arguing against the existence of a Class and for certification of the Class by this Court by the Doctrine of Judicial Estoppel based upon Defendants' conduct in obtaining an Order providing class certification for this very same Class in the underlying product liability matter; 2) Plaintiffs in this proposed Class are identical to the Class of similarly situated South Carolina Plaintiffs already recognized by a South Carolina court in the underlying product liability matter;[1] 3) Plaintiffs in this proposed Class meet all requirements under Rule 23(a), SCRCP; and 4) in the alternative, other available facts and evidence are available in support of Plaintiffs' motion.

---

[1] With the exception, of course, of the particular Defendants who were former Class Representatives in the underlying product liability matter before withdrawing after breaching their fiduciary duties to the Class.

Plaintiffs respectfully request that this Court proceed with scheduling a hearing on Plaintiffs' motion at its earliest convenience. There simply is no need to conduct additional discovery and delay the ruling on this motion until 2011, which will be almost 9 years since the underlying *Cardamone* action was first certified as a class action.

MEMORANDUM IN SUPPORT

I. THE DOCTRINE OF JUDICIAL ESTOPPEL PRECLUDES DEFENDANTS' CHALLENGE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION.

Defendants should be judicially estopped from asserting positions inconsistent with, or in conflict with, the positions Defendants previously asserted, as the original Class lawyers and original Class representatives, to obtain class certification in the underlying matter originally styled *Cardamone et al. v. Dryvit Systems, Inc.*, Civil Action No. 2002-CP-07-1377 ("*Cardamone* action"). *See Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004). Plaintiffs brought these two cases as putative class representatives of "[t]he Class of the instant action is comprised of members of the Class created by the *Cardamone* Action" and as representatives "of the members of the Class created by the *Cardamone* Action and . . . includ[ing] those members of the *Cardamone* action:

> Who without formal notice, settled their claims against Dryvit for reduced compensation based on the assertion that the *Posey* settlement ended their right to make claims against Dryvit.

See p. 7 at ¶26 of the COMPLAINT filed in 2008-CP-07-0774 and p. 9 at ¶ 31 of the AMENDED COMPLAINT filed in 2008-CP-07-3145.

The legal malpractice and breach of fiduciary duty claims asserted in the above-captioned cases are based upon Defendants' acts and omissions as counsel and

Class representatives of the Class in the *Cardamone* action. Class discovery would be an unnecessary waste of the parties' judicial and financial resources given that the putative Classes in the above-captioned cases were previously certified as a Class, especially when that certification was accomplished based on the positions these Defendants previously asserted, and, in the alternative, the proposed Class meets all requirements under Rule 23(a), SCRCP.

A. Procedural Background and History.

Defendants previously satisfied a South Carolina court with their assertions that this identical Class of Plaintiffs satisfied the Rule 23 requirements. On August 12, 2002, Defendants filed the *Cardamone* action COMPLAINT asserting in ¶¶ 20 - 26 that the following Class certified all of the provisions of Rule 23, SCRCP:

> All persons who own or have owned a one- or two-family residential dwelling, or townhouse (hereinafter "structure") in the State of South Carolina who would be a member of the Class purportedly created in the action pending in Tennessee, Posey, et al. v. Dryvit Systems, Inc.
>
> All persons who own or have owned a structure in the State of South Carolina on which an Exterior Insulation and Finish System ("EIF system") has been installed or any previous owner of such structures who incurred any costs or expenses to inspect, repair or replace the EIF system or other property damages by the EIF system at any time from January 1, 1989, until the date Defendants' continuing conduct is terminated (the "Class Period").

Cardamone action COMPLAINT at ¶ 20, copy attached and incorporated herein by reference as **Exhibit 1.** *See also*, ¶¶ 21 - 26 for additional allegations asserted by Defendants to obtain class certification.

On August 19, 2002, Defendants filed a MOTION FOR CONDITIONAL CLASS CERTIFICATION OR, IN THE ALTERNATIVE, FOR AN INJUNCTION, a copy of which is attached and incorporated herein by reference as **Exhibit 2.**

On August 27, 2002, Defendants filed a MEMORANDUM IN SUPPORT OF CLASS CERTIFICATION further asserting that proposed Class met all of the Rule 23, SCRCP requirements of numerosity, commonality, typicality, and adequacy. A copy of Defendants' memorandum is attached and incorporated herein by reference as **Exhibit 3.**

On August 27, 2002, Defendant W. Jefferson Leath, Jr. and Defendant William Dixon Robertson, III, both filed affidavits that they had signed in support of the motion for class certification. In Mr. Leath's affidavit and Mr. Robertson's affidavit, they both made statements under oath in support of the motion for class certification in the *Cardamone* action. A copy of Defendant Leath's and Defendant Robertson's affidavits are attached and incorporated herein by reference as **Exhibit 4** and **Exhibit 5** respectively. In further support of the motion for class certification, on August 27, 2002, Defendants also filed the AFFIDAVIT OF G. HAMLIN O'KELLEY, III, a copy of which is attached and incorporated herein by reference as **Exhibit 6.**

On August 28, 2002, Defendants filed PLAINTIFF'S (SIC.) REPLY MEMORANDUM, a copy of which is attached and incorporated herein by reference as **Exhibit 7.** In this REPLY MEMORANDUM Defendants told the Circuit Court the following:

- "If the Cardamone class is certified, all prospective members will have a full and fair opportunity to opt out following full and fair disclosure, supervised by this Court." – p. 2.

- "The South Carolina homeowner who opts out can be a member of the Posey class, or pursue his own action." – p. 2.
- "The record support for the Rule 23 class is uncontested. The position of these Plaintiffs that their proposed class satisfies the requirements of Rule 239(a): numerosity, commonality, typicality, adequacy, and amount in controversy is thus deemed and admitted. On the foregoing reasoning and authority the Plaintiffs respectfully request that is Motion for Class Certification be granted." – p. 6.

On August 29, 2002, Defendants filed their eighteen page MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION OR IN THE ALTERNATIVE FOR AN INJUNCTION, a copy of which is attached and incorporated herein by reference as **Exhibit 8**. This memorandum asserts among other things that ". . . Plaintiffs have established all Class action prerequisites and are entitled to class certification . . .." *See* Exhibit 8 at p. 2. On pages 11 – 17, Defendants took positions – ultimately adopted by the Circuit Court – that the proposed Class met all of the requirements of Rule 23. Defendants stated on page 17, "[a]s demonstrated above, class certification should be granted unconditionally" and that "[a]ll of the facts and circumstances of this case lead to the conclusion that Plaintiffs' class should be certified particularly in light of the fact that Plaintiffs only see conditional certification at this time." In addition, Defendants included additional affidavits with the memorandum including the affidavit of Peter Sherratt. Copies of those affidavits are included with Exhibit 8.

Particularly relevant to the instant motion for class certification is the memorandum Defendants filed on September 3, 2003, styled PLAINTIFF'S (SIC.) SUR-REPLY To DEFENDANT'S (SIC.) THIRD SUBMISSION, a copy of which is attached and incorporated herein by reference **Exhibit 9**. As the Court will see in reviewing this SUR-REPLY, Defendants themselves asserted the Doctrine of Judicial Estoppel in an effort to convince the Circuit Court in the underlying *Cardamone* action to preclude Dryvit from taking inconsistent judicial positions regarding class certification. Defendants' own words against Dryvit in the underlying matter now describe Defendants' conduct in the above-captioned cases. With a few appropriate modifications to fit Defendants' history in the underlying *Cardamone* action and the positions taken in the above-captioned cases, Defendants' SUR-REPLY would now read:

> The perfidy of the Defendants' collusion is now only exceeded by their hypocrisy. These Defendants moved for and successfully obtained a Class in the underlying *Cardamone* action, and now oppose certification of the very same Class when faced with claims by those very same Class members. Thankfully, the South Carolina Supreme Court has dealt firmly with this kind of fraud on the Court. *Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2004); *Carrigg v. Cannon*, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001). These Defendants are judicially estopped from picking and choosing a position to seek current fashion.

By ORDER dated August 30, 2002 and entered on September 3, 2002, Judge Thomas Kemmerlin, Jr. certified a Class in the *Cardamone* action and designated the original Class Representatives as class representatives for the class defined as:

> all persons in South Carolina who were members of the *Posey* class and who own, or have owned a one- or two-family residential dwelling or townhouse (hereinafter "structure") in South Carolina on which an Exterior Insulation and Finish

> System (hereinafter "EIFS") have been installed or any previous owner of such structures who incurred any costs or expenses to inspect, repair, or replace the EIFS or other EIFS-related property damage from January 1, 1989 until the date Dryvit's continuing conduct is terminated.

ORDER dated August 30, 2002, attached and incorporated herein by reference as **Exhibit 10**.

After the ORDER certifying the class was issued, Defendants took many additional actions relying upon the fact that the Class in the underlying *Cardamone* action had been certified. For example, on September 3, 2002, Defendant Leath sent a letter to the Settlement Claims Administrator in the *Posey* lawsuit stating, "Enclosed please find an executed ' Request for Exclusion' form which has been completed on behalf of our clients in the above referenced matter. These clients have chosen to opt out of the Dryvit Systems' Class Action Settlement. Should you have any questions, please do not hesitate to contact me." A copy of the letter is attached and incorporated herein by reference as **Exhibit 11**. On that same day, September 3, 2002, Defendant Seekings also sent a letter to the Settlement Claims Administrator in the *Posey* lawsuit RE: Dryvit Class Action Lawsuit, Order from Judge Kemmerlin, Opt out form for Class" stating, "Enclosed please find and Order from Judge Kemmerlin signed today. Also enclosed is a signed Request for Exclusion form *for the Class listed in this Order.*" (Emphasis added). A copy of the letter is attached and incorporated herein by reference as **Exhibit 12.**

By Order dated November 17, 2009, a copy of which is attached and incorporated herein by reference as **Exhibit 13**, the Circuit Court re-certified the underlying *Cardamone* action with a settlement Class consisting of:

> All Persons who, as of the Notice Date, own or owned a Structure on which a Dryvit EIFS was installed during the Class Period.

The Circuit Court further found that "the current Class definition as set forth in the Settlement Agreement encompasses all of the class members of the class originally certified by this Court on September 3, 2002 or thereafter . . .." *Id.*

At the time the Circuit Court re-certified the Class, Defendant Francis E. Grimball remained as Class counsel and continued to seek recovery of attorney's fees.

By Order and Judgment Granting Final Approval of Settlement Agreement, filed June 10, 2010, in the underlying *Cardamone* action, a copy of which is attached and incorporated herein by reference as **Exhibit 14**, the Circuit Court concluded as a matter of law that "[p]ursuant to Rule 23(a) and (c) of the South Carolina Rules of Civil Procedure, the conditional certification of the settlement Class is made final with the Class defined as:

> All Persons who, as of the Notice Date, own or owned a Structure on which a Dryvit EIFS was installed during the Class Period."

Id. at p. 20, ¶ 2.

B. Application of the doctrine of judicial estoppel to Defendants' challenge to the motion for class certification.

In *Cothran v. Brown*, 357 S.C. 210, 216, 592 S.E.2d 629, 632 (2004), the Supreme Court set forth the requirements for the application of judicial estoppel as follows:

1. two inconsistent positions taken by the same party or parties in privity with one another;
2. the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;

3. the party taking the position must have been successful in maintaining that position and have received some benefit;

4. the inconsistency must be part of an intentional effort to mislead the court; and

5. the two positions must be totally inconsistent.

All of the foregoing elements are met by Defendants' past conduct and the positions Defendants are taking now in these above-captioned actions.

First, Defendants' position that the same Class was appropriate for class certification in the underlying *Cardamone* action is contrary and inconsistent with position Defendants are taking in these two cases opposing class certification for the identical Class of Plaintiffs. Second, the above-captioned cases are proceedings related to the underlying *Cardamone* action given that for proximate causation purposes Plaintiffs must establish that they would have obtained a better result if Defendants had exercised reasonable care in the underlying *Cardamone* action; Defendants are also the same parties (and are in direct privity with parties) and original class counsel in the underlying *Cardamone* action. Third, Defendants were successful in maintaining their position that this same proposed Class was appropriate for class certification in the underlying *Cardamone* action. Forth, Defendants' efforts to resist class certification in these above-referenced cases is clearly an intentional effort to mislead the Court – or at least to substantially delay and/or increase the costs and judicial resources devoted to the inevitable class certification. Finally, Defendants' positions in these two above-referenced cases are totally inconsistent with positions Defendants took in 2002 to obtain class certification of this same Class in the underlying *Cardamone* action.

The instant lawsuits claim that the Class members of the underlying *Cardamone* action were harmed by the negligent actions and omissions of the original Class attorneys and original Class Representatives. The members of the Class in the underlying *Cardamone* action are identical to the members of the putative Class in the instant lawsuits. The doctrine of judicial estoppel should be imposed to prevent Defendants from challenging class certification in these cases.

Plaintiffs respectfully request that this Court issue an Order judicially estopping Defendants from arguing against a certification of this Class, which is identical in person and nature to the Class Defendants established in the underlying *Cardamone* action and order an immediate certification of this proposed Class.

II. IMMEDIATE CERTIFICATION OF THIS CLASS IS PROPER BECAUSE PLAINTIFFS IN THESE PROPOSED CLASSES MEET ALL REQUIREMENTS UNDER RULE 23, SCRCP.

The same basis for class certification in the underlying *Cardamone* action exists for class certification in the two above-referenced matters. In addition, based on 1) the findings of fact and conclusions of law contained in the Order and Judgment Granting File Approval of Settlement Agreement, filed June 10, 2010, in the underlying *Cardamone* action, and 2) the allegations contained in Plaintiffs' Complaints filed in the two above-reference actions, both of the proposed Classes satisfy all requirements of Rule 23, SCRCP.

A certification of a Class of Plaintiffs in the above-captioned cases is necessary in that (1) the Class of injured persons in South Carolina is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the Class;

(3) the claims of the representative parties are typical of the claims of the Class; (4) the representative parties will fairly and adequately protect the interests of the Class; and (5) the amount in controversy exceeds one hundred dollars for each member of the Class. *See* Rule 23(a), SCRCP.

A. Numerosity – Rule 23(a)(1), SCRCP.

The proposed Class easily satisfies the numerosity requirements given that the same Class satisfied the numerosity requirements in underlying *Cardamone* action for the initial conditional class certification in August 2002 and remained certified through the final settlement approval in June 2010. See, Order and Judgment Granting File Approval of Settlement Agreement, filed June 10, 2010, in the underlying *Cardamone* action. The numerosity requirement is satisfied if the record gives rise to a reasonable inference that the number of class members is "so numerous that joinder of all members is impracticable." *See In re: Alcoholic Beverages Litigation*, 95 F.R.D. 321 (E.D.N.Y. 1982). Identification of the precise number of class members known to exist is not necessary. *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925 (11th Clr. 1983).

Because the proposed Classes are identical to the Class approved and certified in the underlying *Cardamone* action, it clearly satisfies the numerosity requirement of Rule 23(a)(1), SCRCP.

B. Commonality – Rule 23(a)(2), SCRCP.

Common issues predominate Plaintiffs' legal malpractice, breach of fiduciary duty, and related claims against Defendants in the two above-captioned actions. Defendants, as Class representatives and certainly attorneys representing the Class had obligations of

undivided loyalty not only to the named plaintiff-class representatives, but also to each unnamed member of the Class, which included all of the members of the proposed Class in the two above-referenced lawsuits. *See Janik v. Rudy, Exelrod & Zieff*, 119 Cal.App.4th 930, 14 Cal.Rptr.3d 751 (2004) (class member in underlying class action lawsuit brought legal malpractice action against attorneys who had represented the class; attorneys owed duties to all class members); *Bachman v. Pertschuk*, 437 F. Supp. 973(D.D.C. 1977) (class counsel of undivided duties of loyalty to all members of the class); *Smith v. McCleskey, Harriger, Brazill, & Graf, L.L.P.*, 15 S.W.3d 644 (Tex. App. 2000) (former class members bought legal malpractice lawsuit against lawyers representing the class based upon alleged breach of duties to the class).

In the Order and Judgment Granting File Approval of Settlement Agreement, filed June 10, 2010, in the underlying *Cardamone* action, the Circuit Court recognized that "*[s]ince the intervention* [by Intervening Class Representatives and Intervening Counsel], the Parties have contested this case vigorously; that there had been *"numerous ongoing disputes regarding the conduct of Original Class Counsel*"; and that the Court made "no specific finding here as to the adequacy or inadequacy of representation in this case by any individual attorney or attorneys *reserving those issues for later determination.*" (Emphasis added).

The commonality requirement of Rule 23(a)(2), SCRCP is satisfied because the conduct alleged to have caused injury to the Class occurred while Defendants were serving as Class Counsel and Class Representatives of the underlying Class in the *Cardamone* action. Therefore, the legal malpractice, breach of fiduciary duty, and related claims

asserted in the two above-referenced actions are issues of law common to all proposed Class members because the Defendants all owed identical duties as either class counsel or class representatives to the Class. See *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F. Supp. 1196, 1212-17 (Tex. App. 1992) (class member in underlying class action lawsuit brought legal malpractice action against attorneys who had represented the class); *Scholes v. Stone, Maguire & Benjamin*, 143 F.R.D. 181 (N.D.Ill. 1992) (same).

C. Typicality - Rule 23(a)(3), SCRCP.

Similar to the commonality analysis, Plaintiffs' legal malpractice, breach of fiduciary duty and related claims are typical of the other proposed class members. For example, in *Masztal v. City of Miami*, 971 So.2d 803 (Fla. 3d DCA 2008), a group of property owners' brought class action against the City of Miami challenging proposed fire rescue assessment, and seeking refund for all who had paid such assessments. Prior to class certification, the trial court issued a partial summary judgment in favor of the plaintiffs. After the original parties reached a $7M settlement agreement, however, additional property owners intervened and moved to vacate and set aside settlement agreement. The motion was based upon allegations of breach of fiduciary duty by the original class representatives and class counsel. The trial court granted the motion on the grounds of breach of fiduciary duty and collusion and ordered the original plaintiffs to disgorge first $3.5M installment under the agreement, appointed intervenors as class representatives and certified the class. *Id.* at 808. Inherent in the *Masztal* opinion is a finding that the intervenors claims were typical of the remaining members of the class. Plaintiffs in these two above-reference cases are similarly situated with typical claims.

"[T]ypicality does not require that the claims or defenses of the class representatives be identical or perfectly coextensive with the claims and defenses of the members; substantial similarity of legal theory will be sufficient even in the face of differences of fact." *Haywood v. Barnes*, 109 F.R.D. 568, 576 (E.D.N.C. 1986).

D. Adequacy - Rule 23(a)(4), SCRCP.

The Circuit Court in the underlying *Cardamone* action found as a matter of fact and concluded as a matter of law that

> the named Plaintiffs are adequate Class Representatives for the Class. Mr. and Mrs. Treon and Mr. Scearce have served as Class Representatives since intervening in December of 2005. The Court has observed these representatives, either directly or through their counsel, vigorously and ably prosecuting this case on behalf of the Class. Mr. Christian joined as a Class Representative as part of the Settlement process. While the Court has had less opportunity to observe Mr. Christian, his shorter service has also been able and beneficial to the Class and to the settlement process.

The same Plaintiffs,[2] with the addition of Plaintiffs, Stephen Tucker, Jeaneen Tucker, Charles Davis, and Stephanie Davis, remain ready and able to fairly and adequately protect the interests of the Classes proposed by this motion. Plaintiffs' counsel have substantial experience in handling legal malpractice claims, breach of fiduciary duty claims, and class actions. If the Court desires, counsel for Plaintiffs are prepared to submit their curriculum vitae in further support of the adequacy component of the motion for class certification. "In class action context, adequacy of legal counsel focuses on whether counsel is competent, dedicated, qualified, and experienced enough to conduct litigation

---

[2] Plaintiffs will be seeking leave to amend their Complaint to add Mr. Stephen Christian as an additional Class Representative.

and whether there is assurance of vigorous prosecution." *McGlothin v. Connors,* 142 F.R.D. 626, 633-634 (W.D.Vir. 1992). Plaintiffs and their counsel remain prepared to adequately represent the proposed Classes in these two cases.

E. Amount in Controversy- Rule 23(a)(5), SCRCP.

Plaintiffs respectfully submit that the amounts in controversy for each proposed Class member substantially exceeds $100.

III. PRIVITY AND THEREFORE STANDING TO SUE EXISTS BETWEEN PLAINTIFFS AS CLASS MEMBERS OF THE UNDERLYING *CARDAMONE* ACTION AND DEFENDANTS AS CLASS COUNSEL AND FORMER CLASS REPRESENTATIVES.

Because Plaintiffs are and were members of the Class certified in the underlying *Cardamone* action, they have standing to sue Defendants. This is important because any person who opted out of the underlying *Cardamone* action would not have standing to assert these claims against Defendants, and therefore could not satisfy the commonality and typicality requirements of Rule 23, SCRCP.

Defendants either admit or have not denied in their Answers that they all were in privity with Plaintiffs, either as class counsel or as former class representatives. "Before a claim for malpractice may be asserted, there must exist an attorney-client relationship." *Rydde v. Morris*, 381 S.C. 643, 647, 675 S.E.2d 431, 433 (2009) (citing *Am. Fed. Bank, FSB v. No. One Main Joint Venture*, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996) and *Pye v. Estate of Fox,* 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) ("[A]n attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.")

IV. THE PROXIMATE CAUSE REQUIREMENTS OF PLAINTIFFS' CLAIMS REQUIRE PROOF THAT DEFENDANTS' ACTIONS IN THE UNDERLYING MATTER CAUSED THEM HARM.

A component of the above-captioned cases is a legal malpractice claim against the original class attorneys who represented the Class members in the underlying Dryvit product liability case, the underlying *Cardamone* action. In South Carolina, to prevail in a legal malpractice lawsuit, a plaintiff must prove (1) the existence of the attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the plaintiff's damages by the breach. *See Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions*, ___ S.C. ___, 697 S.E.2d 551 (2010); *Rydde v. Morris*, 381 S.C. 643, 647, 675 S.E.2d 431, 433 (2009).

The fourth element is what has been described as the case-within-the-case doctrine. In the instant legal malpractice action, the case-within-the-case is the underlying *Cardamone* action. Plaintiffs are claiming that their attorneys committed malpractice and the former Class Representatives breached their duties causing substantial damages to the Class in the underlying matter. Plaintiffs are identical. Therefore, since Plaintiffs in the case-within-the-case are a certified Class, it stands uncontroverted that the same Plaintiffs and putative Class members in the instant malpractice and breach of fiduciary duty lawsuits should be a certified Class.

> The client's burden of establishing proximate cause in a legal malpractice action requires that he prove that he would have obtained a better result in the underlying matter if the attorney had exercised reasonable care. The burden does not necessarily compel the client to demonstrate that he would have won the underlying case. Rather, it is enough for the legal malpractice plaintiff to show that he has lost a valuable right; e.g., the settlement value of the underlying case. Stated

> otherwise, the client need not show a perfect claim. But the client must show at least that he has lost a probability of success as a result of the attorney's negligence.

Doe v. Howe, 367 S.C. 432, 446, 626 S.E.2d 25, 32 (Ct. App. 2005) (internal quotations omitted).

After obtaining class certification for the Class in the underlying *Cardamone* action, it is absurd for Defendants to argue that the same Class cannot be certified a second time to pursue legal malpractice and breach of fiduciary duty claims while at the same time arguing that Plaintiffs are required prove proximate cause, *i.e.*, a better result in the underlying matter.

V. FULL DISCOVERY ON THE MERITS IS APPROPRIATE IN THE EVENT THE COURT DELAYS ITS RULING ON THE FOREGOING MOTION.

In the alternative, if the Court finds that an additional period of discovery is permissible, to the extent any additional facts are necessary to support the foregoing motion, Plaintiffs propose that full discovery on all issues relevant to the claims in these cases be allowed by the Court. The additional information obtained through full discovery will be submitted to the Court in further support of the motion.

A period of class certification discovery is needless and would be an unnecessary waste of time, money, and judicial resources to confirm the obvious: Plaintiffs in the proposed Classes meet all requirements of a representative class under Rule 23(a) of the South Carolina Rules of Civil Procedure.

Plaintiffs respectfully request that this Court recognize the superfluous delay tactic that a period of class certification discovery would entail and order an immediate certification of this proposed Class.

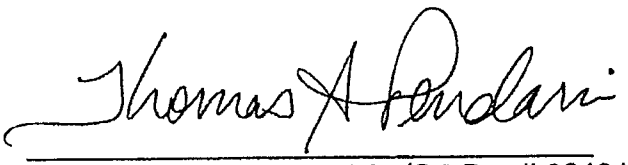
CONCLUSION

Plaintiffs therefore move this Court, pursuant to Rule 23(a), SCRCP, to issue an Order certifying a Class of Plaintiffs to include the above-named Plaintiffs and all Others similarly situated in the State of South Carolina described as follows:

> All members of the Class created by the *Cardamone* Action including those members who without formal notice, settled their claims against Dryvit for reduced compensation based on the assertion that the *Posey* settlement ended their right to make claims against Dryvit.

Respectfully submitted,

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Beaufort, South Carolina

October 15, 2010

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NEXSEN PRUET, LLC

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Stephen Tucker, Jeaneen Tucker, Charles Davis, Stephanie Davis, Timothy Treon, Janie Treon, and P. Jennings Scearce, and John Doe and Jane Doe, individually and on behalf of Others similarly situated in the State of South Carolina,

Plaintiffs,

vs.

LEATH, BOUCH & CRAWFORD, LLP, W. Jefferson Leath, Jr., William Dixon Robertson, III, Michael S. Seekings, Frank E. Grimball, MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC, William M. Bowen, John Cardamone, Sally Cardamone, Benjamin T. Clark, Diane M. Clark, Ramona Gianni, and Nathan W. Gordon,

Defendants.

CIVIL ACTION NO. 2008-CP-07-3145

PLAINTIFFS' CONDITIONAL STIPULATION FOR CONSENT ORDER WITHDRAWING CERTAIN PROPOSED CLASS REPRESENTATIVES AND CLAIM FOR DISGORGEMENT

Timothy Treon and P. Jennings Scearce, individually and on behalf of Others similarly situated in the State of South Carolina,

Plaintiffs,

vs.

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

Defendants.

CIVIL ACTION NO. 2008-CP-07-0774

TO: JAMES L. BRUNER, J.D., M. DAWES COOKE, J.D., JOHN ARTHUR JONES, J.D., M. ELIZABETH JOWERS, J.D., SUSAN P. MCWILLIAMS, J.D., WARREN C. POWELL, JR., J.D., KENT T. STAIR, J.D., and SUSAN TAYLOR WALL, J.D., ATTORNEYS FOR DEFENDANTS:

CONDITIONAL STIPULATION

YOU WILL PLEASE TAKE NOTICE THAT as a condition effective in the event the Court grants Plaintiffs' MOTION FOR CLASS CERTIFICATION creating a trial class, and as stated by putative Class Counsel before The Honorable J. Mark Hayes, II during the hearings in Spartanburg on July 21 and July 22, 2011, to which no objections were taken or asserted by counsel for any Defendant, Plaintiffs stipulate to the entry of a Consent Order effecting the following:

1. Plaintiffs, Timothy Treon, Janie Treon, and P. Jennings Scearce, will be withdrawn as Class Representatives and will remain in these cases only as Members of the Plaintiff Class.
2. The withdrawal of Timothy Treon, Janie Treon, and P. Jennings Scearce as proposed Class Representatives in these cases will have no bearing whatsoever on their status as class representatives in the underlying, *Treon, et al. v. Dryvit Systems, Inc.*, 2002-CP-07-1377 lawsuit.
3. As part of the withdrawal of Timothy Treon, Janie Treon, and P. Jennings Scearce as proposed Class Representatives, Plaintiffs propose and stipulate to a revised case style with regard to Case No. 2008-CP-07-0774, in which Stephen Tucker, Jeaneen Tucker, Charles Davis, and Stephanie Davis, are substituted as the named Plaintiffs. In addition regarding Case No. 2008-CP-07-0774, DRYVIT SYSTEMS, INC. will be removed from the style of the case based on the prior dismissal with prejudice of the claims against it.
4. The Class Representatives will withdraw their claim for Disgorgement of all attorney's fees paid to the Defendant Lawyers as asserted in ¶ 65 and

WHEREFORE clause in the AMENDED COMPLAINT for #3145, *i.e.*, attorney's fees paid to or for the benefit of any combination of LEATH, BOUCH & CRAWFORD, LLP; W. Jefferson Leath, Jr.; William Dixon Robertson, III; Michael S. Seekings; Frank E. Grimball; MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC; and William M. Bowen.

Respectfully submitted,

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August 18, 2011

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT TIMOTHY TREON, JANIE TREON, P. JENNINGS SCEARCE, STEVE TUCKER, JEANEEN TUCKER, CHARLES H. DAVIS, STEPHANIE H. DAVIS, individually and on behalf of others similarly situated in the State of South Carolina, Plaintiffs, vs. LEATH BOUCH & CRAWFORD, LLP, W. JEFFERSON LEATH, JR., WILLIAM DIXON ROBERTSON, III, MICHAEL S. SEEKINGS, FRANK E. GRIMBALL & MULLEN WYLIE, LLC FORMERLY MULLEN WYLIE & SEEKINGS, LLC, FORMERLY MULLEN WYLIE & SEEKINGS, LLC, WILLIAM M. BOWEN, JOHN CARDAMONE, AND HIS WIFE SALLY CARDAMONE, BENJAMIN T. CLARK AND HIS WIFE DIANE M. CLARK, RAMONA GIANNI, NATHAN W. GORDON, Defendants.	IN THE COURT OF COMMON PLEAS THE FOURTEENTH JUDICIAL CIRCUIT CASE NO.: 2008-CP-07-3145 **DEFENDANTS LEATH BOUCH & CRAWFORD, LLP, W. JEFFERSON LEATH, JR., AND MICHAEL S. SEEKINGS' MOTION TO RECUSE**

COME NOW, Leath Bouch & Crawford, LLP, W. Jefferson Leath, Jr. and Michael S. Seekings, (collectively "LBC Defendants"), acting by and through their undersigned counsel, and move to recuse the Honorable J. Mark Hayes, II. This Motion is made pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, which commands that "A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, ..." (Emphasis added).

As a result of statements made by the Court in this case and the underling action, as referenced in LBC Defendants' Memorandum in Support of Motion to Recuse, and otherwise, LBC Defendants respectfully request that the Honorable J. Mark Hayes, II recuse himself from ruling on any and all matters with regard to this case. This Motion is based on South Carolina law, the South Carolina Rules of Civil Procedure, the Code of Judicial Conduct, the pleadings filed in this case, and any legal memoranda in support of this Motion to be submitted to this Court under separate filing.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: Kent T. Stair by TPW

KENT T. STAIR
State Bar No.: 14029

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.....
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2008-CP-07-3145
	)	
TIMOTHY TREON, JANIE TREON, P. JENNINGS SCEARCE, STEVE TUCKER, JEANEEN TUCKER, CHARLES H. DAVIS, STEPHANIE H. DAVIS, individually and on behalf of others similarly situated in the State of South Carolina,	)	**CERTIFICATE OF SERVICE**
Plaintiffs,	)	
vs.	)	
LEATH BOUCH & CRAWFORD, LLP, W. JEFFERSON LEATH, JR., WILLIAM DIXON ROBERTSON, III, MICHAEL S. SEEKINGS, FRANK E. GRIMBALL & MULLEN WYLIE, LLC FORMERLY MULLEN WYLIE & SEEKINGS, LLC, formerly MULLEN WYLIE & SEEKINGS, LLC, WILLIAM M. BOWEN, JOHN CARDAMONE, and his wife SALLY CARDAMONE, BENJAMIN T. CLARK and his wife DIANE M. CLARK, RAMONA GIANNI, NATHAN W. GORDON,	)	
Defendants.	)	

I hereby certify that I have this day served a copy of the within and foregoing pleading upon all parties to this matter via email addressed to counsel of record as follows:

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This 4th day of November, 2011.

Amy Eversole

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2008-CP-07-3145
	)	
TIMOTHY TREON, JANIE TREON, P. JENNINGS SCEARCE, STEVE TUCKER, JEANEEN TUCKER, CHARLES H. DAVIS, STEPHANIE H. DAVIS, individually and on behalf of others similarly situated in the State of South Carolina,	)	
Plaintiffs,	)	**MEMORANDUM IN SUPPORT OF DEFENDANTS LEATH BOUCH & CRAWFORD, LLP, W. JEFFERSON LEATH, JR., AND MICHAEL S. SEEKINGS' MOTION TO RECUSE**
vs.	)	
LEATH BOUCH & CRAWFORD, LLP, W. JEFFERSON LEATH, JR., WILLIAM DIXON ROBERTSON, III, MICHAEL S. SEEKINGS, FRANK E. GRIMBALL & MULLEN WYLIE, LLC FORMERLY MULLEN WYLIE & SEEKINGS, LLC, FORMERLY MULLEN WYLIE & SEEKINGS, LLC, WILLIAM M. BOWEN, JOHN CARDAMONE, AND HIS WIFE SALLY CARDAMONE, BENJAMIN T. CLARK AND HIS WIFE DIANE M. CLARK, RAMONA GIANNI, NATHAN W. GORDON,	)	
Defendants.	)	

INTRODUCTION

On or about August 24, 2010, The Honorable J. Mark Hayes, II was appointed to handle this case. Because there are few places in the State of South Carolina that are further apart, from a distance standpoint, than Beaufort and Spartanburg Counties, it is obvious that the reason for this Court's appointment was its prior involvement in the underlying action.[1] While that may or

[1] Civil Action No.:2002-CP-07-1377.

may not be a good idea in some instances, the first day of the hearing on the Motion for Class Certification in this case revealed that in this particular situation, it was not. That revelation gave rise to the oral Motion for Recusal that was made by the undersigned counsel (hereinafter "LBC's Counsel") on the morning of July 22nd, the second day of the hearing.

In its initial response to the recusal motion, this Court asked LBC's Counsel to file a written motion with The Honorable Perry Buckner, because Judge Buckner was responsible for this Court's appointment to the case. Upon reflection, however, this Court advised the parties that it felt that the Motion should be directed to it (rather than Judge Buckner or any other judge in the state) and, in accordance with the resulting directive, this written Motion is being presented to this Court for consideration. As a result of this Court's clear knowledge of the circumstances to be addressed, Leath Bouch & Crawford, LLP, W. Jefferson Leath, Jr. and Michael S. Seekings, (collectively hereinafter "LBC Defendants" or "these Defendants") will essentially forego the typical recitation of background facts and circumstances and will, instead, proceed with the fundamental arguments in support of their Motion.

REQUIREMENT FOR JUDICIAL IMPARTIALITY

Canon 3(E)(1)(a) of Rule 501, SCACR provides that **"a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...".** A good statement of the purpose for, and interpretation of, that Rule can be found in a brief filed by Plaintiff's counsel, Thomas Pendarvis, in the Anderson County case of *Christopher A. Eadie v. Steven M. Krause and Krause & Moorehead, P.A.*, 2006 WL 6345516 (S.C.Com.Pl.). In that case, Mr. Pendarvis filed a Motion to Recuse The Honorable J.C. Nicholson, Jr. based on the same canon which is the subject of the Motion before this Court.

Relying upon a Tennessee Supreme Court Case, "applying an identically worded Canon 3(E)(1) with regard to the appearance of impropriety", Mr. Pendarvis quoted that Court in *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, (Tenn. 2001) as follows:

> Litigants, as the Courts have often said, are entitled to the cold neutrality of an impartial Court. Thus, one of the core tenets of our jurisprudence is that litigants have a right to have their cases heard by fair and impartial judges. Indeed, it goes without saying that a trial before a biased or prejudiced fact finder is a denial of due process. Accordingly, judges must conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and shall not be swayed by partisan interests, public clamor, or fear of criticism. As we said many years ago, it is of immense importance, not only that justice be administered ... but that the public shall have no sound reason for supposing that it is not administered. If the public is to maintain confidence in the judiciary, cases must be tried by unprejudiced and unbiased judges.
>
> Given the importance of impartiality, both in fact and appearance, decisions concerning whether recusal is warranted are addressed to the judge's discretion, which will not be reversed on appeal unless a clear abuse appears on the face of the record. A motion to recuse should be granted if the judge has any doubt as to his or her ability to preside impartially in the case. However, because perception is important, recusal is also appropriate when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality. Thus, even when a judge believes that he or she can hear a case fairly and impartially, the judge should grant the motion to recuse if the judge's impartiality might reasonably be questioned. Hence, the test is ultimately an objective one since the appearance of bias is as injurious to the integrity of the judicial system as actual bias.
>
> *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564-65 (Tenn. 2001) (internal quotes omitted).

At the hearing, Mr. Pendarvis' co-counsel described his view of the standard in less academic, but still understandable, terms when he said: "[T]he only thing that a party and a lawyer can expect or should expect from the Court is simply to have an even playing field".[2] Again, without responding in exceedingly academic terms, LBC's Counsel said:

He says we are entitled to an even playing field and that's not a bad way to

[2] Motion for Class Certification Hearing Transcript (July 21-22, 2011), p. 185, lines 3 - 5. (Selected pages from this hearing transcript are attached hereto as Exhibit 1).

> describe the situation. With due respect to the Court, we don't feel we have an even playing field and I [sic] that's what we want and I think that a judge with no background in this case and no thoughts about the case would provide us with that and we are otherwise not going to get it.[3]

An "even playing field", as it relates to civil litigation generally, and to Plaintiffs' Motion for Class Certification specifically, requires the Plaintiffs to carry their various burdens of proof to the satisfaction of a judge and jury who come to the case with no preconceived notions concerning the material issues. For that reason, it is a fundamental, if not axiomatic, requirement that both the judge and the jury arrive without any such thoughts or preconceptions.

Might The Court's Impartiality Be Reasonably Questioned?

This Court's concluding statements, given at the end of the first day of the hearing on Plaintiffs' Motion for Class Certification, demonstrate that the thoughts and opinions developed by the Court over the course of its involvement in the underlying action make it impossible for it to consider the critical issues in this case from the detached perspective required of an impartial judge. After LBC's Counsel had concluded a detailed presentation as to why the Plaintiffs had not carried their various burdens in relation to their Motion, the Court first said "I do not want to grant this class certification".[4] The Court went on to say, however:

> The Court: --- but **what I'm having a difficulty separating from**, sir, 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. There are class representatives that are named in this litigation that received settlements that on their face seem to be extremely favorable to them. 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

[3] Motion for Class Certification Hearing Transcript, p. 186, lines 4 - 10.
[4] Id. at p. 136, lines 3 and 4.

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 undersigned [sic][5] counsel are talking about the first stage class certification and there are certain facts that are screaming at me that undersigned [sic] counsel need to have a class certification as much as I do not want to do it.[6]

The fact that the Court had "heard" and seen so much "for years" was a concern to LBC's Counsel that was addressed at various times and in various ways during the hearing on July 21, 2011. The following, stated in response to LBC's Counsel's insistence that "for purposes of class certification here, the record there (i.e the underlying action) is not the record here",[7] fairly captures the essence of the Court's response:

> The Court: Well I suggest that you get it because there have been representations made to me in the other case that apply to representations that will be made here in this court and I shared with you the example of the criminal defendant who injured a young man on the highways of the state, came to court in one legal proceeding and asserted to this court that she was under the influence of crack cocaine and then in a subsequent civil proceeding she was represented by a lawyer and who was representing her and the insurance company that insured the vehicle and represented to me that they were going to contest that she was not intoxicated. I do not view that substantial amount of misrepresentations of very important facts to me I don't view that very fondly and I don't take it kindly and I think it shows a great amount of disrespect to the Court. The representations that have been made to me as to the conduct that is the subject matter of this litigation I consider it to be very serious so I want to strongly suggest and encourage you to please get a copy of the -- of those transcripts and have someone, either you or have someone take a look at them because these are very serious allegations that have been made involving these lawyers, officers of the court, including

[5] LBC's Counsel believes the Court Reporter misunderstood the Court, since "undersigned" makes no sense in the context of the statement. Most likely, the Court said "other side's".
[6] Motion for Class Certification Hearing Transcript, p.136, line 21 - p. 138, line 4.
[7] Id. at p.112, lines 6 - 8.

representations that have been made to me, this judge, this court, this same person that sat in December of 2005.[8]

As suggested by the Court, these Defendants have reviewed significant portions of the record in the underlying action and that review demonstrates the burden of preconceived thoughts, opinions, and conclusions that this Court carried into this case. For the purposes of this Motion to Recuse, these Defendants will focus upon: (1) the Order Denying Defendant Dryvit's Motion for Summary Judgment; (2) the transcript from the March 31, 2010 hearing on Plaintiffs' Motion for Accounting; and (3) the transcript from the January 26, 2011 hearing on the Motion for Attorney's Fees.

Order Denying Defendant Dryvit's Motion for Summary Judgment

On January 7, 2009, Judge Hayes entered an Order Denying Dryvit's Motion for Summary Judgment. A review of the Order reflects the Court's acceptance of the negative arguments that had been made by the Plaintiffs against Dryvit and the current defendants in this case - the latter of whom were not parties to that case and, as a result, did not contribute to the arguments or presentation of evidence that formed the basis for the Court's findings. Selected portions of the Court's Order are set forth in the table below[9]:

Page/Line #	Quote
p. 2-3	As will be briefly discussed, significant and clear evidence has been presented from which a reasonable inference can be drawn that after the South Carolina class action was started, Dryvit engaged in wrongful conduct with the specific intent of stifling the proper and vigorous prosecution as required by SCRCP Rule 23 of the South Carolina lawsuit to the extent that the South Carolina class action's race to "finality" never had a chance of succeeding.....

[8] Motion for Class Certification Hearing Transcript, p. 112, lines 9 - p. 113, line 7

[9] Judge Hayes' Order Denying Dryvit's Motion for Summary Judgment is attached hereto as Exhibit 2.

Footnote # 2, at bottom of p. 2.	**... sufficient evidence has been presented which creates a serious...issue of material fact ... due to the possibility of improper collusion by Dryvit in reaching settlements with class representatives and class counsel and improper conduct in violation of SCRCP Rule 23.** The record before this Court creates a strong inference that Dryvit engaged in conduct that prevented the South Carolina class litigation from going forward, including complying with the original judge's order that a notice plan be prepared, by settling the individual claims of the South Carolina class representatives which also included, but is not limited to, the payment of substantial bonuses to the class representatives and the promise of or payment of substantial attorneys fees. A strong inference exists that the payment of attorney fees was conditioned upon class counsel's participation and presentation in arguments to the South Carolina Court in the "Full Faith and Credit" presentation and that the fees would be paid only upon a South Carolina Court accepting the "Full Faith and Credit" argument of Posey, thereby dismissing the South Carolina class litigation. A strong inference exists that Dryvit's conduct was meant to prevent the class representatives and class counsel from performing their fiduciary duties as class representatives and counsel. Additionally, a strong inference exists that Dryvit's conduct was meant to deprive the South Carolina Court of the ability to perform its duties to non-represented South Carolina class members as proscribed by SCRCP Rule 27. There exists a strong inference that Dryvit's conduct stopped the lawful pursuit of the South Carolina class litigation to allow the Tennessee Posey settlement to reach "final" status so that the Full Faith and Credit argument would be enhanced and thus accepted by the South Carolina Court. Moreover, all of such conduct being accomplished by Dryvit with the apparent lack of regard for the Court's function under SCRCP Rule 23 is an attempt to purposefully mislead the Court as to material issues involving the parties and class counsel.
p. 7	Even though no action was taken by Dryvit in the South Carolina litigation until the latter part of 2005, Dryvit, during that time, did have significant dealings with the named South Carolina class representatives and their attorneys. As a result, all individually filed cases with all the Original Class representatives were settled by September 2003 and bonus payments were made or were arranged to be made to lawyers representing the class representatives. Discovery strongly indicates that these bonus payments to the attorneys were, at least in part if not wholly, "contingent" on a South Carolina judge dismissing the South Carolina case based on the preclusive effect of the Posey case. Discovery produced reflects that Dryvit paid bonuses to class representatives and their lawyers with the expressed goal of stifling the South Carolina litigation so that Posey could reach "final" status in Tennessee and so that the "final" Posey settlement would not be challenged in regards to its "Full Faith and Credit" effect on the South Carolina class litigation.
p. 10	Although Dryvit did nothing to contest this Action from September of 2002 until September of 2005, during this time it vigorously prosecuted a global nationwide settlement in Posey and offered financial incentives to class representatives and lawyers involved in the South Carolina case. A significant inference exists that in order to bolster the Posey settlement and undermine the viability of the South Carolina class action, Dryvit began their negotiations with the Original Class representatives to compromise and attempt to fatally wound the South Carolina class by eliminating incentives for vigorous prosecution of the South Carolina class action.
p.13	The preceding email chain demonstrates that counsel for the Original Class representatives attached a list of individual cases then pending against Dryvit, including the individual actions brought by class representatives Clark, Cardamone, and Gianni, and suggested that these cases needed to be resolved "in order to eliminate the SC class.
pp. 13-14	Thereafter, as this Court may infer for purposes of this motion and as Dryvit apparently intended, the original class representatives took no further action to prosecute this case on behalf of the South Carolina Class. The record reflects that Dryvit began to negotiate settlements with the original class representatives shortly after Judge Kemmerlin certified this class action in September of 2002.

p. 14	A significant inference exists that the settlements Dryvit paid and its offer to pay attorneys fees after the dismissal of this case were actions intended to chill the property and vigorous prosecution of this class action.
p. 16	To this Court, these e-mails establish an inference of a strategy which attempts to avoid the requirements of SCRCP Rule 23 and the scrutiny of this Court. From the Dryvit documents, the inference is made that it was Dryvit that was directly and controlling the activities related to the manipulation of the South Carolina class.
pp. 17-18	In other words, genuine issues exist as to whether the "finality" of Posey was improperly bought by Dryvit "buying off" the South Carolina case in violation of SCRCP Rule 23 and compounding its actions by hiding these events from the Court to secure a ruling of Full Faith and Credit in its favor to the detriment of the unrepresented members of the South Carolina Class.

While it is true that the statements made by the Court in this Order speak directly to the Court's findings concerning Dryvit, it is also obvious that they speak indirectly of corresponding findings concerning the defendants in this case and go directly to the precise claims that the Plaintiffs in this case are making against these Defendants.

March 31, 2010 hearing on Plaintiffs' Motion for Accounting

On March 31, 2010, a hearing was held in the underlying case on Plaintiffs' Motion for Accounting. At that time, plaintiff's counsel reiterated their arguments against the defendants in this case (but who, again, were not parties in that case). In response, the Court provided further insight into its feelings about the defendants in this case concerning the issues that are now before the Court in this case. Selected excerpts from that hearing are set forth in the following table[10]:

[10] Selected pages of the March 31, 2010 hearing transcript on Plaintiffs' Motion for Accounting are attached hereto as Exhibit 3.

p. 47, line 23 - p. 48, line 13. (Emphasis added).	The Court: "But I want it to be very clear to everyone that is sitting in this courtroom that these issues that are being raised and presented to me and very concerning to me. Not only is **there a history that has been documented and presented to me that touches directly upon respect and the role of not only, and I say this court, I mean not this court as being me personally who did not get assigned this case by the Chief Justice until 2006 and first heard the first hearing in 2005, but also the role of Judge Kemmerlin when he had this case, but those are very concerning issues.** Whether it is direct or indirect misrepresentations that have been made to a matter to which under Rule 23 this court has the, and I agree with Mr. Alford, a duty to monitor and police. That's very concerning."
p. 83, lines 10 - 25. (Emphasis added).	The Court: "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 issues 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 that have been presented to me are just screaming and yelling."**
p. 87, lines 1-14.	Mr. Alford: "and it went bad when they made a deal to take money out of Tennessee and not come back to South Carolina and tell the truth. And when it went really wrong is when we sat in the courtroom on December the 5th, 2005, none of us knew each other, none of us really knew, Lord, what a journey we would go on in this process. But they sat there, they had money in their pocket, they had made a deal. And Peter Morgan emailed about the deep freeze and talks about that. They had made this deal. And they didn't tell you. That's the line for me, Judge. And with due respect, that's got to be the line for the court."
p. 87 lines 15-23	The Court: "I'm having -- I'm trying to perceive that -- I'm trying to identify where, you know, they conceptually came up with a strategy. They said, okay, conceptually we have got to increase our hand in Tennessee. And conceptually they came up with this idea that part of what we're going to do is we're going to opt-out people in South Carolina -- we're going to opt-out the people in South Carolina, and we're going to increase our bargaining strength in Tennessee."
p. 88, line 21 - p. 89, line 5.	Mr. Alford: "They didn't come back and say to Judge Kemmerlin, hey, we came back with -- we approved a settlement, we got paid a bonus, we got paid six hundred thousand dollars, we got two twenty-five more coming the date after this case gets dismissed. They didn't tell him that. And that's, respectively, Judge, I mean, I don't know why you're struggling so hard. Rule 23 puts it right in your -- right in your lap. I hate to say it. And what it is is those fees were related to this case. And that's why I want you to dig it up. That's why."

LBC Defendants understand that the Court had spent much time in the underlying action, prior to March 31, 2010, hearing the arguments and reviewing the evidence presented by the parties in that case. In fairness to both the Court and to the defendants in this case, however, the

Court's various – and obviously strong – opinions about the facts and circumstances surrounding that litigation were developed over a period of years without the input of these Defendants or their counsel. While these Defendants do not feel that the Court's stated perception of what they did or did not do is correct, they should not be required in this litigation to "change (the Court's) opinion" about those things. Instead, they should have the benefit of a Judge who has come to the case with an impartial mind as to all issues in dispute. In fairness to this Court - and to ensure fairness of the process generally and to these Defendants specifically - this Court's prior involvement in the underlying action makes that impartiality impossible.

January 26, 2011 hearing on the Motion for Attorney's Fees

On January 26, 2011, the Court in the underlying case conducted a hearing on the issue of attorney's fees to be awarded in that case. The following selected statements by the Court at that hearing[11] again reflect its feelings, beliefs and opinions concerning the defendants in this case:

p. 443, lines 4-9 (Emphasis added).	The Court: "By failure to act, by failure of class counsel to perform the duties in a reasonable and diligent fashion, I believe that the court was not allowed to engage in its supervisory functions that the court needed to do. **Things were hid from the court. Or even worse, things were misrepresented to the court."**
p. 453, lines 20-22 (Emphasis added).	The Court: **"The record is clear. Either Judge Kemmerlin was lied to by Mr. Seekings or he was not told the truth, something was misrepresented."**
p. 459, line 20 - p. 460, line 2	The Court: "there is evidence that has been presented over the last several years that, it's flown around in here, that someone on the outside looking in very well could say that there was this scheme and plan to settle and buy out the South Carolina class action lawsuits, and that that could have been arranged by lawyers in South Carolina. There's documents that support that Conclusion."

[11] Selected pages of the January 26, 2011 hearing transcript on the Motion for Attorney's Fees are attached hereto as Exhibit 4.

p. 498, lines 6-8	The Court: "And while **the substance of what you uncovered is discomforting to me since it deals with the legal profession.**" Mr. Alford: "it's disheartening to everybody." The Court: "yeah, it really is. I mean, **it's sickening from where I sit.**"

Again, while the Court should know that these Defendants vehemently dispute the characterizations of their conduct as outlined above, they urge the Court to understand that statements of that nature give rise to more than reasonable questions as to the impartiality of this Court to preside over this case.

Motion to Recuse

It was against the various burdens created by this Court's prior involvement in the underlying action that LBC's Counsel appeared before the Court on July 21, 2011 and attempted to show the Court why the Plaintiffs in this case had not carried their burden for having their proposed Class certified. As was noted at the time the oral Motion to Recuse was made, this Court was most gracious in its treatment of LBC's Counsel and in its acceptance of LBC's Counsel's argument – and LBC's Counsel wants to once again acknowledge that fact and express his appreciation for those courtesies. The need for this Motion, however, does not involve the treatment of LBC's Counsel, but instead goes directly to the question of whether this Court's impartiality as to these Defendants can be reasonably questioned.

Compounding the problem created by this Court's prior development of adverse thoughts, opinions and/or conclusions about these Defendants, concerning the very issues that are at the heart of this case, is the fact that the expressions of the Court demonstrate the Judge's own

feelings of involvement in the issues. Illustrative statements by the Court during the hearing on Motion for Class Certification include[12]:

p. 31, line 21-24 (Emphasis added).	The Court: Well unfortunately **you have not sat through these hearings that I have sat through for the past several years** and able to form a factual foundation for issuing the rule to show cause.
p. 38, line 7-15 (Emphasis added).	The Court: That rule to show cause is being issued because **there have been some allegations backed up with some factual information that lawyers have engaged in conduct that involve me, this court, in making misrepresentations** that has resulted, potentially I could conclude, resulted in this court goi--chasing rabbits down a litigation trail that has lasted for three, four, five, years, that information that this court had been --had known of originally maybe we would not be here even today.
p. 44, line 25 - p. 45, line 1.	The Court: I'm just a little bit involved, I'm connected in this case.
p. 83, line 17 - p. 84, line 25 (Emphasis added).	The Court: I'm left with the impression based upon your arguments and filings that I've reviewed that your case of legal malpractice and claims against this class representative stem completely from the actions that were taken by the class representatives and prior class counsel when they started the South Carolina opt out lawsuit, re -- got the judge to say he's going to certify class and then in your words dropped the ball and didn't do anything, allowed the Tennessee case then to go through their court systems and get finalized and then, and then came back down to South Carolina and tried to say it's *res* -- the Tennessee court is res judicata to South Carolina because they got there first. **I know defense counsel says I I -- he doesn't agree that I can rely upon prior records but I also can't ignore what has been represented to the Court and I say "the Court", to me, in prior hearings by lawyers** in cases similar to. I had a defense lawyer one time, a civil defense lawyer, representing a trucking company that was involved -- representing a trucking company and the truck driver that had hit a person on the highway over in -- out on the highways and in criminal court, the lady was charged with felony DUI causing great bodily injury and she came to court and appeared in front of me and acknowledged that she had used cocaine, cocaine was in her system and that she was intoxicated at the time of the accident and I sent her to prison based upon those representations and then in a separate, one subsequent civil matter where the insurance defense lawyer representing her and the insurance company came to court and said, Your Honor, we understand those representations were made to the Court before you but we intend to challenge those at the subsequent civil hearing, I don't operate in that fashion that I will allow those blatant factual contradictions to exist in a court when people come in front of me, whether they're made by lawyers or by litigants.
p. 92, lines 10-24 (Emphasis added).	The Court: See, **I have a genuine concern that based on again what I know that has gone on before** and what I believe is viewed your basis of this lawsuit as being the lawyers opting out, Tennessee coming down to South Carolina, gettin' a class certified and then sitting on it and doing nothing waiting for the Tennessee court to run its course and then engaging in what is alleged to be conspiratorial conversations with Dryvit so that they actually don't do anything waiting for the Tennessee court to actually get it's -- get everybody approved and then come down to South Carolina and say, Oop, yo, it's over, we can't do anything so and everybody come, wantin' to come to court and agreein', ya know, Judge, it's -- you're right, you know, it's over with in Tennessee, you know, they can't do anything that that being where the bad stuff is.

[12] Again, selected pages of the hearing transcript on Plaintiffs' Motion for Class Certification are attached hereto as Exhibit 1.

p. 112, line 6-8	Stair: Yeah, but my point is that for purposes of class certification here the record there is not the record here.
p. 112, line 9 - p. 113, line 15 (Emphasis added).	The Court: Well I I suggest that you get it **because there have been representations made to me in the other case that apply to representations that will be made here in this court and I shared with you the example of the criminal defendant who injured a young man on the highways of the state, came to court in one legal proceeding and asserted to this court that she was under the influence of crack cocaine and then in a subsequent civil proceeding she was represented by a lawyer and who was representing her and the insurance company that insured the vehicle and represented to me that they were going to contest that she was not intoxicated. I do not view that substantial amount of misrepresentations of very important facts to me I don't view that very fondly and I don't take it kindly and I think it shows a great amount of disrespect to the Court. The representations that have been made to me as to the conduct that is the subject matter of this litigation I consider it to be very serious** so I want to strongly suggest and encourage you to please get a copy of the -- of those transcripts and and have someone, either you or have someone take a look at them because **these are very serious allegations that have been made involving these lawyers, officers of the court, including representations that have been made to me, this judge, this court, this same person that sat in December of 2005...**
p. 133 line 15-20 (Emphasis added).	The Court: **Also way before the mis-representations were made, alleged mis-representations were made and the alleged conspiracy that took place** between prior plaintiffs' counsel or class counsel and Dryvit prior to all of that occurring ---
p. 137, line 20-22 (Emphasis added).	The Court: **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.**

The problem with the Court's stated concerns over what it perceives to be misrepresentations made to it is demonstrated by the segment of the record quoted above from pages 82 - 84.[13] In that situation, someone in a criminal case confessed to the usage of drugs and a lawyer in a subsequent civil proceeding sought to distance their related client from that confession. This Court stated (twice during the hearing) that it would not tolerate such a thing. While the LBC Defendants absolutely deny the making of any misrepresentations to this or any other Judge, they are understandably concerned that the Court's perception of such a thing - developed from the long time it spent in another case - results in the comparison made by the Court. The manifestation of that concern can be reasonably seen in the Court's statement to LBC's Counsel - made after a well documented presentation in opposition to Plaintiffs' Motion

for Class Certification - that **"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".** [14]

CONCLUSION

Without attempting to recite all of the remaining portions of the hearing transcript that might bear on this Motion, additional excerpts from the transcript are set forth below:

p. 93, Line 12-23 (Emphasis added).	The Court: So far I'm I'm hearing that if the allegations are proved to be correct, that the lawyers and the class representatives that first handled the South Carolina lawsuit actually used the class action litigation in a way that they were trying to simply enhance a value in the *Posey* case up in Tennessee, **I think that's wrong**, when they actually had no intentions of following through with the South Carolina lawsuit, **I think that's wrong.** If it is that the la -- that that the South Carolina class action litigation was going to be used in an effort to strong-arm Dryvit to settle individual claims of these claimants to receive a higher value in order to buy off the class representatives so that they no longer had an individual personal interest in pursuing the class action litigation, **I believe that is wrong.**
p. 135, line 13-15 (Emphasis added).	**There's a very strong indication based upon what's been given to me so far that there was a secret deal going.**
p. 138, lines 2-3 (Emphasis added).	The Court: 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.**
p. 141, lines 14-25 (Emphasis added).	The Court: you can't just set up a class action in order to let individual lawsuits get more money and then settle because you run into the situation of where **there's allegations have been made that that even the class representatives used the class action mechanism as a tool to enhance their individual settlements and se -- individually settle their cases, put more money in their back pocket but yet in doing so blatantly violated their ethical ob -- or their fiduciary obligations to the class at whole** which is to try to, you know, work -- watch out for their interest so I don't think I would, individual lawsuits that had been pursued, I don't think that I would

[13] Motion for Class Certification Hearing Transcript, p. 83, line 17 - p. 84, line 25.
[14] Id. at p. 137, line 20 - 22.

p. 227, line 7-22 (Emphasis added).	The Court: **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 inexcu -- there's no way **I don't think anybody can argue that there is not the overlap of facts 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.** I have knowledge of legal issues that were raised in the other case that are the same legal issues that are raised in thi -- that are being raised or have been argued and I anticipate will be raised in this case no question about that clearly and I -- so that those are not disputed.

As this Court noted durring the hearing, it had nothing to do with being appointed to act as the Judge in this case. Presumably, that appointment was made with the idea that some judicial economy may result from having a Judge familiar with the situation preside over the related case. In fairness to both the Judge who appointed this Court and to this Court itself, the particular problems created by such an appointment in this unique case may not have been foreseeable. Now that the issues have been put to a test (through the hearing on the Motion for Class Certification) it is, or these Defendants strenuously submit it should be, apparent that this Court is simply unable to separate what it has heard in, and concluded from its involvement in the underlying case from its responsibilities to judge this case and all of its issues, in an impartial manner. Moreover, this Court should not be put to the burden of wondering - now and in the future - if it is, or was, able to put aside its knowledge, feelings, beliefs, opinions, and conclusions reached in a case where these Defendants were not involved, as it rules on critical matters of fact and law in this important case in which these Defendants are now involved. Similarly, no one else, including these Defendants, should be placed in a position to have to concern themselves with those same questions.

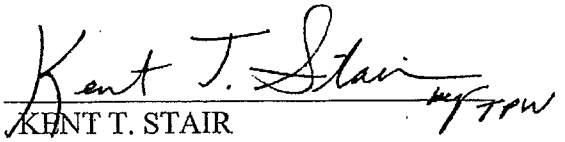
The State of South Carolina is blessed with an abundance of highly qualified and fair minded Judges - including this Court. In fairness, however, to everyone involved - including this Court - it should be recognized that there are far more than reasonable questions as to whether

this Court can be impartial in this case. A finding to that effect is not an indictment of this Court; it is, instead, simply an acknowledgement of the reality created by the highly unusual circumstances under which this Court has been asked - through the appointments of others - to operate.

With absolute due respect for this Court, LBC Defendants request this Court to recuse itself from further involvement in this matter.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By: 

KENT T. STAIR
State Bar No.: 14029

Attorneys for Defendants Leath Bouch & Crawford, LLP, W. Jefferson Leath, Jr., and Michael S. Seekings

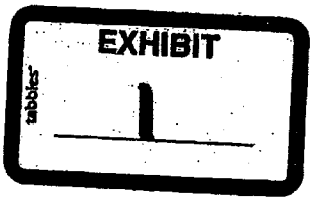
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STATE OF SOUTH CAROLINA)) COUNTY OF BEAUFORT)	IN THE COURT OF COMMON PLEAS
Stephen and Jeaneen Tucker, et al., Plaintiffs, -vs- Leath, Bouch & Crawford, LLP, et al., Defendants.	TRANSCRIPT OF RECORD 2008-CP-07-3145 July 21 and 22, 2011 Spartanburg, South Carolina
Timothy Treon and P. Jennings Scearce individually and on behalf of Others similarly situated in the State of South Carolina, Plaintiffs, -vs- Dryvit Systems, Inc., et al. Defendants.	TRANSCRIPT OF RECORD 2008-CP-07-0774 ORIGINAL JULY 21 and 22, 2011 Spartanburg, South Carolina

B E F O R E:

HONORABLE J. MARK HAYES, II, JUDGE



cause interest in the other case and so we'll address that but that's not really before us today so my role here is to simply suggest that a class for settlement or for any other purpose to me there just doesn't seem to be a class in this case and and what I don't want you to do is have a settlement class and it be suggested that we did not note our feelings that that's not an appropriate thing to do ---

THE COURT: Okay.

MR. STAIR: --- and as far as the settlement I guess if somebody's gonna pay money in this case we'd wanna have credit for it in this case and then I guess I would also note, if I might change my hat around a little bit and look down the road, if through this settlement in this case the Mullen folks are given some relief from the show cause in the other case, we will suggest in that other case if the occasion ever arises that we should get the same relief, that they should not be excused and us not be.

THE COURT: Why not?

MR. STAIR: Well I I -- we don't think that it would be proper for them to be relieved that ---

THE COURT: Well unfortunately you have not sat through these hearings that I have sat through for the past several years and and able to form a factual foundation for issuing the rule to show cause.

MR. STAIR: Yeah.

for one moment before we go down -- chase a rabbit down a trail that has -- that I might have very little to do with what we're doing here today as part of this settlement hearing. I am simply being asked to approve this settlement. This settlement has a term in this that relates to a potent -- that a rule to show cause that I have indicated in another lawsuit that I intend to issue. That rule to show cause is being issued because there have been some allegations backed up with some factual information that lawyers have engaged in conduct that involved me, this court, in making misrepresentations that has resulted, potentially I could conclude, resulted in this court goi -- chasing rabbits down a litigation trail that has lasted for three, four, five, years, that information that this court had been -- had known of originally maybe we would nct be here even today. Now that's where the rule of show -- rule to show cause stems from. I am being addre -- I'm being asked as part of this settlement to simply say that these lawyers who have stepped up to the plate and have worked in this -- on the other lawsuit for all those years, participated in developing that record, that have actually engaged in negotiations of the settlement in the other lawsuit which are the people that were actually injured by the Dryvit product and could could then assert claims, claims that would have not gone forward but for the work of the other lawsuit, I am simply being asked that if I issue

sternly and the reason I especially in this case my demeanor may be a little bit more stronger what I typically like for it to be is that I hope the lawyers understand my view on the legal profession and the role of lawyers in our community and how much high regard I actually have for the judicial system and the, and that role that lawyers, both plaintiff and defense lawyers play to the successful operation of of our legal system and how important our legal system is to the protection of our -- the basic core of our democracy found in our Constitution and when lawyers are accused of deviating from the standards of professional conduct, my skin crawls, I get uncomfortable and then when they -- when those types of allegations that are brought before me I take them with a high degree of sensitivity and I have tried in my role when I got this case to structure a judicial strategy that will try to see to it that everybody is treated fairly but also afford the lawyers an opportunity to have some control over how those issues are going to be addressed and if we have to address them in open court, air all the dirty laundry, even though that dirty laundry may prove not to be what is alleged it is, it's still going to be dirty laundry, that those people outside of the legal profession that when they hear it they may not understand it and the legal profession will not stand in as high regard after that is aired than before. So this case is just a -- I'm just a little bit involved, I'm

connected in this case. I would like to see this case resolved one way or the other, preferably with the parties having some control over the resolution of it but if it does not it will not. Alright, but please don't -- do not any -- don't don't -- any lawyer please do not let my tone if I take a sharp tone with you, don't let that prevent you from being the advocate that you're hired to be, the advocate that that you, that that you should be so I apologize for my tone. Alright. Anything else on -- yes, ma'am.

MS. WALL: Yes, sir, I just wanted to make sure that the record is clear here because I was listening to other counsel reference things such as when they were looking at Section 6 in the 1377 issue rule to show cause, I heard words like allocation, credit. Let me make sure that and I know that the Court does understand this but I'd like to put it again on the record as it's written in the second paragraph, In fact, as a condition precedent we're requesting that the Court either decline to issue because it has not yet done so, decline to issue a rule to show cause as to the settling parties known as Mullen Wylie or in the alternative not to impose any monetary sanctions against Mullen Wylie, so I'm I'm repeating that for the record simply because I'm hearing about credits and allocations and I don't know how that would come into anything, Your Honor. This settlement is premised on the principle that the remaining monies in the policy are to be

can be adjusted as it was in the underlying case a little bit to to to accurately state what claims are available and what class members have a right so my -- to answer your question, no, does not have to be done at this point. I believe that the pleading itself will be sufficient and if there needs to be some more specific qualifying language that needs to be included in notice, that's certainly something the parties and the Court can address before notice is transmitted to to class members ---

THE COURT: Okay.

MR. PENDARVIS: --- if the Court so certifies this class.

THE COURT: Let's let's let's have a discussion and in my comments I'm looking for answers, I'm looking for help on how to resolve this so please don''t take from my comments I have anything, I'm predisposed to rule one way or the other. Your -- I mean, I'm I'm left with the impression based upon your arguments and filings that I've reviewed that your case of legal malpractice and claims against this class representative stem completely from the actions that were taken by by the class representatives and prior class counsel when they started the South Carolina opt out lawsuit, re -- got the judge to say he's going to certify class and then in your words dropped the ball and didn't do anything, allowed the Tennessee case then to go through their court

systems and and and and get finalized and then, and then came back down to South Carolina and tried to say it's *res* -- the Tennessee court is *res judicata* to South Carolina because they they got there first. I I know defense counsel says I I -- he doesn't agree that I can rely upon prior records but I also can't ignore what has been represented to the Court and I say "the Court", to me, in prior hearings by lawyers in cases similar to. I had a defense lawyer one time, a civil defense lawyer, representing a trucking company that was involved -- representing a trucking company and the truck driver that had hit a person on the highway over in -- out on the highways and in criminal court, the lady was charged with felony DUI causing great bodily injury and she came to court and appeared in front of me and acknowledged that she had used cocaine, cocaine was in her system and that she was intoxicated at the time of the accident and I sent her to prison based upon those representations and then in a separate, one subsequent civil matter where the insurance defense lawyer representing her and the insurance company came to court and said, Your Honor, we understand those representations were made to the Court before you but we intend to challenge those at the subsequent civil hearing, I don't operate in that fashion that I will allow those blatant factual contradictions to exist in a court when people come in front of me, whether they're made by lawyers or by litigants.

these lawsuits but the claims that we're talking about are for breach of fiduciary duty, civil conspiracy, fraudulent concealment; all of those claims are not subsumed in a legal malpractice claim by any stretch and also don't require the type of proof of actual damages that the legal malpractice claim gets and again, we're not conceding the malpractice claim doesn't have actual damages for each subclass but those -- that legal malpractice claim is not the only claim asserted in these amend -- in this amended complaint.

THE COURT: See, I I I have a genuine concern that based on again what I know that has gone on before and what I believe is viewed your basis of this lawsuit as being the lawyers opting out, Tennessee coming down to South Carolina, gettin' a class certified and then sitting on it and doing nothing waiting for the Tennessee court to run its course and then engaging in what is alleged to be conspiratorial conversations with Dryvit so that they actually don't do anything waiting for the Tennessee court to actually get it's -- get everybody approved and then come down to South Carolina and say, Oop, yo, it's over, we can't do anything so and everybody come, wantin' to come to court and agreein', ya know, Judge, it's -- you're right, you know, it's it's over with in Tennessee, you you know, they can't do anything that that being where the bad stuff is. Then it seems to me that if you're going to have a class action litigation based upon

THE COURT: If you don't have it, I would strongly suggest that you obtain it.

MR. STAIR: Well and and and I have read portions of it I can assure you.

THE COURT: Okay.

MR. STAIR: Yeah, but my point is is that for purposes of class certification here the record there is not the record here.

THE COURT: Well I I suggest that you get it because there have been representations made to me in the other case that apply to representations that will be made here in this court and I shared with you the example of the criminal defendant who injured a young man on the highways of the state, came to court in one legal proceeding and asserted to this court that she was under the influence of crack cocaine and then in a subsequent civil proceeding she was represented by a lawyer and who was representing her and the insurance company that insured the vehicle and represented to me that they were going to contest that she was not intoxicated. I do not view that substantial amount of misrepresentations of very important facts to me I don't view that very fondly and I don't take it kindly and I think it shows a great amount of disrespect to the Court. The representations that have been made to me as to the conduct that is the subject matter of this litigation I consider it to be very serious so I want to

strongly suggest and encourage you to please get a copy of the -- of those transcripts and and have someone, either you or have someone take a look at them because these are very serious allegations that have been made involving these lawyers, officers of the court, including representations that have been made to me, this judge, this court, this same person that sat in December of 2005. I understand what you're saying that my role has been assigned to this judge in this case is different than my role as the judge in the other case but we're dealing with a lotta similarities in facts and I don't -- I'm tired, an -- I'm I'm very concerned when factual representations are made to me by very competent lawyers who have excellent reputations in the state who work very hard for their clients and I I -- so I I want to know what the truth is, ---

MR STAIR: Yeah

THE COURT: --- okay? So please if you don't have 'em please get the, please get the -- please get those records, okay?

MR. STAIR: By suggesting the distinction between the two records I was not suggesting I had not read some portions of of 'em nor do I fail to understand the Court's feelings about a lot of things arising from those and I just make the point as the lawyer in this case that the record in that case is not the record in this case but I understand what the Court is

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Posey case, they appealed in the *Posey* case, with a document that says that they had satisfied and settled their claims with Dryvit and so my point there, and that that really comes in January of '04, my point there is that the Creasys were represented by exceedingly competent counsel, I'm not here to criticize Mr. Phillips, and with exceedingly competent counsel who had knowledge of everything that had taken place in this case -- excuse me, in 1377, in the *Cardamone* case, had knowledge of what had taken place in *Posey*, worked his way through the situation and ultimately resolved the claim on behalf of the Creasys with the Dryvit to their mutual satisfaction and that was done more than three years before the complaint in this case was filed and so my point here is that ---

THE COURT: Also also way before the misrepresentations were made, alleged misrepresentations were made and the alleged conspiracy that took place between prior plaintiffs' counsel or class counsel and Dryvit prior to all of that occurring ---

MR. STAIR: No, I ---

THE COURT: --- which forms the factual basis as leas -- at least the meat and bones of what I understand the claim is from that side of the courtroom which forms the actual foundation of where they go with their case.

MR. STAIR: Okay. If we might return focus to motion for

just said and at some point I -- we'll probably have some explanation and understanding about what happened back when it all happened but as it relates to the motion for class certification, ---

THE COURT: Um-hum.

MR. STAIR: --- if you don't mind my focusing on commonality, the question is is if the Creasys were coming at these lawyers with a breach of fiduciary duty, malpractice case, whatever you wanna call and they said as these plaintiffs here are saying where is that, they say well you all abandoned the class, you made a deal, you you didn't tell anybody ---

THE COURT: There's a very strong indication based upon what's been given to me so far that there was a secret deal going.

MR. STAIR: Well and and again I didn't come to argue that today ---

THE COURT: Okay.

MR. STAIR: --- but but I came to argue that if these people, the Creasys, come to us now and knew what they knew in August of '03 and tried to claim malpractice or breach of fiduciary duty, I hope you would understand that we as attorneys representing other attorneys would raise a statute of limitations defense ---

THE COURT Um-hum.

extremely long period of time, let that fruit rot on the vine and did not send out any notice. There are class representatives that are named in this litigation that received settlements that on their face seem to be extremely favorable to them. 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.

MR. STAIR: Okay.

THE COURT: You're picking Mr. Scearcy, or if I say his name incorrectly, I have heard this argument. I have heard this argument as an attack on Sam Phillips, I heard it in the other case and I will tell you that Mr. Phillips's participation in the 1377 case was extremely valuable to the class who eventually received a better settlement or no settlement that resulted from the attorneys that are being represented on your side of the room. He was invaluable in 1377 in reaching that settlement.

MR. STAIR: I don't think I suggested otherwise.

THE COURT: Alright.

MR. STAIR: Alright, now if if you might I think our dialogue here has demonstrated a lot of the problem under which I operate which is I have not been involved in the other case, you obviously have, ---

THE COURT: And I would hope that you had obtained those records.

MR. STAIR: Again, again, I -- I'm not ignorant at all of the other case ---

THE COURT: Okay.

THE COURT: I I -- maybe I -- maybe our conversation back and forth I've lost track of your position, how would these people let that have -- that somehow opted out of, you know, were represented by individual -- okay, let me back up. It has been represented to me that one of the goals in opting out of *Posey* in Tennessee was to a -- was to have South Carolina opt out and then in fact set up a mechanism where lawyers could represent individual claimants and pursue claims against Dryvit.

MR. STAIR: Okay.

THE COURT: Alright. I don't see, and and and it was brought out at the other hearing and I believe that that this is a correct statement, use of the, use of the class action vehicle in that manner is not proper, you know, you you can't just set up a class action in order to to let individual lawsuits get more money and then settle because you run into the situation of where there's allegations have been made that that even the class representatives used the class action mechanism as a tool to enhance their individual settlements and se -- individually settle their cases, put more money in their back pocket but yet in doing so blatantly violated their ethical ob -- or their their fiduciary obligations to the class at whole which is to try to, you know, work -- watch out for their interest so I don't think I would, individual lawsuits that had been pursued, I don't think that I would

preconceived conclusions adverse to these defendants and there is no doubt in my mind this court will be eminently fair to all the parties involved in the case and the only thing that a party and a lawyer can expect or should expect from the Court is simply to have an even playing field. Now I've been told by my colleagues here that in South Carolina judge can't be disqualified and should not be disqualified unless the folks seeking to disqualify that judge can show actual harm. They've not been able to show any actual harm in this case and I would suggest to the Court and I firmly believe that this is simply a subterfuge in an effort to delay this case. We need to try this case, we need to get this motion heard and granted or denied and we need to move forward. Thank you.

MR. STAIR: Your Honor, first of all, I take offense to the suggestion we've done anything improper in the litigation of this case, that has not occurred and other than noting my objection to that I'll move on. As it relates to the timing of my motion, frankly I think my timing is quite good because in all honesty and not to sound like Charlie Sheen I think we're winning on the motion for class certification, I think you indicated you were not going to grant their motion for class certification, certainly not as they issued it but that's the only motion we've got on the table at the moment so if anything my motion is made at a time when I believe we are ahead rather than behind. It is interesting that they

apparently have discussed the issue of disqualification since my friend from Georgia seems to understand the rules; I don't think it's a surprise to them that the issue is ripe for consideration here, and finally he says we're entitled to a even playing field and that's not a bad way to describe the situation. With due respect to the Court, we don't feel we have an even playing field and I that's what we want and I think that a judge with no back background in this case and no thoughts about the case would provide us with that and we're otherwise not going to get it. Thank you.

THE COURT: Alright, um, a -- let's do this: I will take that motion under advisement and take a look at it. The motion is a surprise to me so I wanna take a look at what the actual rules, canons and requirements are to be sure that that I comply with those. I will let defense counsel know that as far as this court is concerned, and that I do take my judicial duties extremely serious, if based upon my prior work in the companion case, the case to which this case, the factual foundation that they are asserting leads to their theories of liability in this case that if I have formed an opinion or a conclusion to the extent that I viewed your clients in a way that is suggested by the facts then my judicial obligation and duties would have required me to do something substantially more than what I have done so far in regards to those allegations. Do you understand what I mean?

cross over hundreds of times. I am aware of the defendants that are in this case being the defendant or or being lawyers that at one time participated in the other case and they did at one time appear before me in the other case for a brief moment through a motion of -- to to be relieved. The names of the defendants and allegations related to the defendants in this case were brought up in the other case. 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 inexcu -- there's no way I don't think anybody can can argue that there is not the overlap of facts and 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. I have knowledge of legal issues that were raised in the other case that are the same legal issues that are raised in thi -- that are being raised or have been argued and I anticipate will be raised in this case no question about that clearly and I -- so that those are not disputed. And I'm taking a look running through Canon 3 Subsection (e) to see if there's any other areas where I believe the defense motion for disqualification may be based other than on my prior knowledge. I don't see anything that

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
TIMOTHY J. TREON and his wife, FRANCES TREON, and P. JENNINGS SCEARCE individually, and on behalf of others similarly situated in the State of South Carolina, Plaintiffs, v. DRYVIT SYSTEMS, INC., ESTATE BUILDERS, INC., and AMERICAN WAY APPLICATORS OF SOUTH CAROLINA, INC., Defendants.	Civil Action No.: 2002-CP-07-1377 **Order Denying Defendant Dryvit's Motion For Summary Judgment**

I. Introduction

This matter is before the Court on Defendant Dryvit's motion for Summary Judgment. The underlying lawsuit is a South Carolina class action construction product liability case originally filed in South Carolina in 2002. In its motion, Dryvit moves for Summary Judgment based on the principles of *res judicata* and settlement and release claiming that a Tennessee state court class action[1], which was purportedly transformed by a Tennessee State Court judge into a nationwide (minus North Carolina) class action and finally settled in 2005, should be given Full Faith and Credit and, thus, as a matter of law, the South Carolina 2002 class action should be dismissed. The legal effect, Dryvit asserts, of the Posey settlement thereby acts, as a matter of

[1] The Tennessee class action will be commonly referred to as Posey, and in doing so is referring to the Posey, et al v. Dryvit Systems, Inc., Case No.: 1775-IV, 2005 Tenn. App. LEXIS I, 7-8 T. App. 2005 from Jefferson County, Tennessee.

EXHIBIT 2

law, to preclude the claims of all South Carolina residents who are adversely affected by Dryvit products.[2]

As Dryvit stated during the first of many hearings conducted thus far in this case, "[T]his is a matter that had to do with Two--Two class actions that were going on at the same time, one which came to a final judgment before the other and, therefore, is entitled to Full Faith and Credit."

As explained by Dryvit attorneys, its Full Faith and Credit agreement is premised on the basic belief that since the Tennessee class action crossed the finish-line of being "final" before the South Carolina class action, the South Carolina class action and its present members and absent members lose. As will be briefly discussed, significant and clear evidence has been presented from which a reasonable inference can be drawn that after the South Carolina class

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[2]The present motion involves only the Defendants' Summary Judgment motion to impose, as a matter of law, the provisions of Article IV, section I of the U.S. Constitution, to prevent the South Carolina class litigation from going forward. In its written motion, the only two legal theories used by Dryvit in applying Article IV, section I, are (1) *res judicata* and (2) settlement and release. The herein analysis applies to both legal theories.

As will be discussed herein, sufficient evidence has been presented which creates a serious and genuine issue of material fact that either of the theories of *res judicata* or settlement and release can be used by Dryvit to prevent the South Carolina class action claims from going forward due to the possibility of improper collusion by Dryvit in reaching settlements with class representatives and class counsel and improper conduct in violation of SCRCP Rule 23.

The record before this Court creates a strong inference that Dryvit engaged in conduct that prevented the South Carolina class litigation from going forward, including complying with the original judge's order that a notice plan be prepared, by settling the individual claims of the South Carolina class representatives which also included, but is not limited to, the payment of substantial bonuses to the class representatives and the promise of or payment of substantial attorneys fees. A strong inference exists that the payment of attorney fees was conditioned upon class counsel's participation and presentation in arguments to the South Carolina court in the "Full Faith and Credit" presentation and that the fees would be paid only upon a South Carolina Court accepting the "Full Faith and Credit" argument of Posey, thereby dismissing the South Carolina class litigation. A strong inference exists that Dryvit's conduct was meant to prevent the class representatives and class counsel from performing their fiduciary duties as class representatives and counsel. Additionally, a strong inference exists that Dryvit's conduct was meant to deprive the South Carolina Court of the ability to perform its duties to non-represented South Carolina class members as proscribed by SCRCP Rule 27. There exists a strong inference that Dryvit's conduct stopped the lawful pursuit of the South Carolina class litigation to allow the Tennessee Posey settlement to reach "final" status so that the Full Faith and Credit argument would be enhanced and thus accepted by the South Carolina Court. Moreover, all of such conduct being accomplished by Dryvit with the apparent lack of regard for the Court's function under SCRCP Rule 23 is an attempt to purposefully mislead the Court as to material issues involving the parties and class counsel.

Originally, the Plaintiffs had requested that Partial Summary Judgment also be granted in its favor as to the affirmative defenses raised by Dryvit. The Court was recently notified that the Plaintiffs did not desire a ruling by the Court as part of its decision as to Dryvit's motion for Summary Judgment.

action was started, Dryvit engaged in wrongful conduct with the specific intent of stifling the proper and vigorous prosecution as required by SCRCP Rule 23 of the South Carolina lawsuit to the extent that the South Carolina class action's race to "finality" never had a chance of succeeding, thereby creating a genuine issue in dispute as to the application of the Full Faith and Credit doctrine as a proper legal means of terminating the South Carolina class action and preventing otherwise law claims by South Carolina homeowners adversely affected by the Dryvit product from going forward.

Additionally, there is strong evidence to suggest that the individuals who opted out of Posey did so successfully and lawfully and thereby established the South Carolina class action which is not controlled by Posey.

Furthermore, as will also be briefly discussed herein, under a Hospitality Management Associates limited collaterally review and analysis, there exist genuine disputes as to material factual and the application of legal principles as to whether there were safeguards in place to guarantee sufficient notice and adequate representation; and whether such safeguards were, in fact, applied, due to, among other issues, the untimely filing of the Posey Amended Complaint. 356 S.C. 644, 591 S.E. 2d 611 (2004).

II. Summary Judgment Standard

Dryvit's motion is made pursuant to SCRCP Rule 56. Summary Judgment is properly granted where the evidence presented to the Court shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Id. The Court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. City of Columbia v. Town of Irmo, 316 S.C. 193, 447 S.E. 2d 855 (1994); Law v. SCDC, 368 S.C. 424, 629 S.E. 2d 642 (2006). If triable issues exist, these issues

must go to trial. Summary Judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of law. See Nelson v. Charleston County Parks and Recreation Comm., 362S.C. 1, 605 S.E. 2d 744 (Ct. App. 2004). Additionally, even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, Summary Judgment should be denied. Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E. 2d 496 (Ct. App. 2003).

III. Background

Dryvit, Inc., is the manufacturer of synthetic stucco, known as an Exterior Insulating and Finishing System or "EIFS", which has been used as an exterior cladding on homes throughout the State of South Carolina and the Country. It was estimated to the Court that about a third of all Dryvit products nationwide was sold in North Carolina and South Carolina. As previously indicated, North Carolina is not part of the Tennessee settlement class of Posey.[3]

In early 2002, an action entitled Humphrey v. Dryvit Systems, Inc., a state-wide class action, was filed in Jefferson County, Tennessee. This action ultimately became the Posey litigation. Within only a few months, the Tennessee state class action became a national class action by way of a settlement and subsequent Order issued by Judge O. Duane Slone in Tennessee on April 8, 2002. In that Order, Judge Slone certified the national class and required that the parties publish a notice of the existence of the national class and the settlement.

The Order required that absent class members, including those in South Carolina, to affirmatively opt out of the Posey class by September 3, 2002, or be bound by the terms of the Posey settlement. Any absent individual class members who desired to object to the settlement

[3] Even though Hospitality Management requires a limited collateral review of the Posey class action, it remains disturbing that this Court was presented information that the Posey notice produced only six people who made additional claims. It was represented to the Court that approximately 13% of all Dryvit national sales occurred in South Carolina.

had to subject themselves to the jurisdiction of the Tennessee court and file an objection by September 3, 2002.

On April 8, 2002, the parties who were at that time parties to Posey also filed an Agreed Order giving permission to file a Second Amended Class action Complaint. The Second Amended Class action Complaint was, however, **not** filed until October 27, 2006.[4]

In 2002, a number of South Carolinians were plaintiffs in construction defect and construction product liability cases against Dryvit in South Carolina. The plaintiffs in four of those existing South Carolina Cases opted out of Posey and filed this class action against Dryvit, Inc., and others on August 12, 2002.[5]

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[4] As will be discussed herein, this fact alone creates a genuine issue of material fact that even under the restrictive analysis offered by Dryvit of South Carolina's limited collateral review as articulated in Hospitality Management, the present denial of Summary Judgment is warranted, but given the extensive arguments presented by the attorneys and the possibility of appellate review of this decision, the Court believes further discussion is also warranted.

[5] Both the filing of the South Carolina class action and Judge Kemmerlin's order certifying the South Carolina Class appear proper and lawful and not inconsistent or prohibited by any legal authority in South Carolina. South Carolina has long recognized that SCRCP Rule 23 "intentionally omitted from our state rule the additional requirements found in Federal Rule 23(b)...[and] endorses a more expansive view of class action availability than its federal counterpart." Littlefield v. S.C. Forestry Comm., 337 S.C. 348, 523 S.E.2d 781 (1999).

In fact, in Dryvit's original motion and in its Reply Memorandum (as well as its statements during oral arguments), the crux of its position as to the validity of its "opt-out" limitation is that the Posey case "won" the race across the finish line of being "final" before the South Carolina case crossed the finish line.

The other aspect of Dryvit's argument on the "opt-out" of the South Carolina Class rests upon the idea that "notice" was deficient. Dryvit contends the opt-out from Posey was done without notice (Dryvit motion, pg. 18) or that any notice that would have been given in the South Carolina case would have been "confusing". (Dryvit's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment).

As noted herein, this Court has grave concerns whether Dryvit has the Full Faith and Credit argument available to it when significant events exist that Dryvit's conduct prevented the vigorous prosecution of the South Carolina class action, including the failure to timely develop a notice plan. Furthermore, Dryvit's argument that any notice issued by South Carolina would have been confusing is based on pure speculation and simply a bold allegation. (Bold allegations are insufficient to create questions of fact. See Baughman v. American Telephone and Telegraph, 306 S.C. 101, 410 S.E. 2d 537 (1991).) This speculative assertion ignores the function and ability of a South Carolina judge to have resolved disputes as to the notice that would have been sent in the South Carolina case. This Court notes that the text of any notice sent as part of a class action is usually decided by negotiation among counsel for the parties, and if concerns cannot be amicably resolved, the Court will decide the dispute. See Callaghan, Class Actions, §1:07.

Regardless of the discussion above, at the time the South Carolina class action was begun, the South Carolina court judge had the necessary legal authority to certify the South Carolina Class as presented to him. Ultimately, Dryvit acknowledges in its filing to this Court, that if Posey had not reached "final" status first, the South Carolina class action would be proper. (Dryvit's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment).

Plaintiffs also support the conclusion that Dryvit's opt-out argument is flawed and that the original opt-out was valid by referring to another order issued by Judge Kemmerlin. In an Order dated March 28, 2003, Judge

The South Carolina original case, again, filed on August 12, 2002, was begun by John and Sally Cardamone, Benjamin T. and Diane M. Clark, Nathan W. and Jill C. Gordon, and Ramona Gianni (hereinafter collectively the "Original Class representatives"). As will be discussed in more detail below, this action was filed in 2002 by Original Class representatives in an effort to protect South Carolina Residents who owned homes clad with the Defendant Dryvit's product, but were in danger of having their rights under South Carolina law compromised by a putative nationwide class action settlement that Dryvit was pursuing in the state courts of Tennessee (the Posey case).[6]

The Honorable Thomas Kemmerlin, Jr. granted the Plaintiff's motion for class certification[7] in this case and opted South Carolina residents out of the Posey settlement by order dated September 3, 2002. He granted the Motion and issued an Order dated September 3, 2002, *nunc pro tunc* to August 29, 2002, certifying this case as a class action. Forms were then filed in the Tennessee Court class action to opt all of the individual class members out of the Posey class.

Kemmerlin denied Harry and Trudy Creasy's motion to intervene in this action explaining that the Creasys had not exercised their right to opt out of Posey, but "[t]he Plaintiffs (i.e. the South Carolina class) in this action exercised that right and opted out." The Creaseys were South Carolina residents who had objected to the Posey settlement in Tennessee and who also sought to intervene in the Cardamone action. Judge Kemmerlin ruled that unlike Cardamone and the South Carolina Class who had opted out of Posey, the Creaseys had, by filing their objection in Tennessee, subjected themselves to the jurisdiction of that Court. This ruling by Judge Kemmerlin reinforces this Court's conclusion that Dryvit knew and recognized the existence of a class of homeowners in South Carolina who would have claims against Dryvit, but yet who might participate as part of the South Carolina Class through Cardamone, such as the Treons and Scearces. The plaintiffs also assert that, although the ineffectiveness of the "opt-out" argument was available to Dryvit both before and after the entry of the September 3, 2002 order certifying the Cardamone class, Dryvit chose not to advance it until years after the certification order was entered. The plaintiffs assert that Dryvit's failure to appeal the September 3rd order alone is fatal to its motion for Summary Judgment because its class-wide opt-out has long since become the law of the case.

[6] Additionally, the Original Class representatives claimed the Posey settlement was "grossly inadequate" and that notice of the settlement was not effectively provided in South Carolina. A deficiency in the Posey notice plan referenced to the present Court indicates, among other things, the notice provided no means for an affected homeowner to identify the "EIFS" product on their home as a Dryvit product, and the limited nature of the advertising in South Carolina of the Posey litigation.

[7] The South Carolina homeowners who make up the class certified by Judge Kemmerlin are hereinafter referred to as the "South Carolina Class."

Defendant Dryvit filed a Motion for Judge Kemmerlin to reconsider his Order. Judge Kemmerlin denied that Motion by Order dated March 19, 2003. This matter remained dormant until September 2005.

For over two years, Dryvit did nothing materially and official to pursue the South Carolina class action. Even though no action was taken by Dryvit in the South Carolina litigation until the latter part of 2005, Dryvit, during that time, did have significant dealings with the named South Carolina class representatives and their attorneys. As a result, all individually filed cases with all the Original Class representatives were settled by September 2003 and bonus payments were made or were arranged to be made to lawyers representing the class representatives.

Discovery strongly indicates that these bonus payments to the attorneys were, at least in part if not wholly, "contingent" on a South Carolina judge dismissing the South Carolina case based on the preclusive effect of the Posey case. Discovery produced reflects that Dryvit paid bonuses to class representatives and their lawyers with the expressed goal of stifling the South Carolina litigation so that Posey could reach "final" status in Tennessee and so that the "final" Posey settlement would not be challenged in regards to its "Full Faith and Credit" effect on the South Carolina class litigation.

While the South Carolina class action sat dormant, the Posey case in Tennessee went forward and was subject to two separate appeals. Even though Posey was highly criticized, it became final only on September 15, 2005.

In September of 2005, Timothy and Frances Treon and P. Jennings Scearce moved to intervene in the South Carolina action. Subsequently, Dryvit moved for Summary Judgment.

On December 5, 2005, this Court conducted the initial hearing on their motion. At the December 5, 2005 hearing, Treon and Scearce were ordered substituted as Class representatives.[8]

Dryvit asserts in its motion for Summary Judgment that Posey has reached final judgment and therefore has preclusive effect over the claims of the South Carolina Class certified by Judge Kemmerlin. In fact, Dryvit acknowledged in its filings before this Court that [c]ompeting class actions can proceed on parallel tracks. It is only when one of the competing class actions reaches the final judgment stage that *res judicata* and Full Faith and Credit come into play.[9] The Plaintiffs contend that Dryvit's motion should be denied because: (1) Judge Kemmerlin's opt-out of the South Carolina Class is effective to preclude the enforcement of Posey as a bar to the claims of South Carolinians, (2) Posey has jurisdictional defects that prevent it from enjoying preclusive effect, and (3) Dryvit should be estopped from asserting any preclusive effect of Posey because of its irregular and improper conduct which includes the settlements it reached with the Original Class representatives outside the parameters of Rule 23.

Dryvit, in turn, argues that the class-wide opt-out ordered by Judge Kemmerlin was ineffective[10], that Posey has no jurisdictional infirmities, and that its conduct in dealing with the Original Class representatives was entirely proper.

Since the December 5, 2005 hearing, this Court has held numerous hearings and reviewed voluminous materials presented by both sides. The Court has listened to the extensive arguments of counsel. After much consideration, this Court denies Dryvit's motion for Summary Judgment.

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[8] On at least three separate occasions during the December 2005 hearing, Dryvit acknowledged that the Treons and Scearce had "standing" to intervene because they were "class members" of the South Carolina class.

[9] Dryvit's System Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment RE Affirmative Defense of *Res judicata* and Reply Brief in Support of Motion to Dismiss, pg. 10.

[10] Dryvit's "ineffective" position as to the Kemmerlin order and particularly as to the "opt-out" being ineffective fails completely if Posey never reached "final" status first. As Dryvit stated "[T]he Tennessee Court's order requiring individual opt-outs is entitled to Full Faith and Credit because it is a final order of a court of competent "jurisdiction in a sister state." Id., 10.

Even though this Court has previously announced its decision to deny the present Summary Judgment motion, this Court has been advised that one or more interested parties intends to appeal this denial. Therefore, due to the size of the record and to assist any reviewing Court, this order is issued. This Court is fully aware that it is unnecessary to make findings of fact and conclusions of law in denying motions for Summary Judgment, Ballenger v. Bowen, 313 S.C. 476, 443 S.E. 2d 379, 380 n.1 (1994); and that the Supreme Court of this State has held that the denial of Summary Judgment is not directly appealable, even in an appeal from a final judgment. Id. 380.

IV. Brief Procedural History of the South Carolina Case

After the April 8, 2002 preliminary approval of Posey's putative nationwide settlement, a notice plan was begun in June of 2002.[11] The Cardamone South Carolina class action was filed here in response to the Posey preliminary settlement by John and Sally Cardamone, Benjamin T. and Diane M. Clark, Nathan W. and Jill C. Gordon, and Ramona Gianni ("Original Class representatives").

At the commencement of this action, the Original Class[12] representatives all owned homes clad with Dryvit's EIFS and each had commenced an individual suit against Dryvit and others regarding their EIFS homes. The Original Class representatives brought this action on behalf of:

> All persons who own or have owned a one- or two-family residential dwelling, or townhouse (hereinafter "structure") in the

[11] The purpose of the The Notice Plan was to inform putative class members of the terms and conditions of the preliminary Posey settlement, to establish a September 3, 2002 deadline for opting out of the settlement, and to schedule a fairness hearing on October 10, 2002 to hear from objectors to the settlement. Dryvit's use of Hospitality Management makes a 90-day time period from notice to "opt-out" deadline, a factor not to be considered by this Court.

[12] The finality, or lack thereof, of Posey does not alter the conclusion that a South Carolina Class existed, a conclusion Dryvit agreed with at the December 2005 hearing that a class of absent South Carolina homeowners existed who possessed legal standing to participate in the South Carolina litigation as a result of Judge Kemmerlin's initial order and thus, clearly, the application of the SCRCP Rule 23 obligation to the parties, lawyers, and the Court.

> State of South Carolina who would be a member of the Class purportedly created in the action pending in Tennessee, Posey, et al. v. Dryvit Systems, Inc.
>
> All persons who own or have owned a structure in the State of South Carolina on which an Exterior Insulation Finish System ("EIF System) has been installed or any previous owner of such structures who incurred any costs or expenses to inspect, repair or replace the EIF System or other property damages by the EIF System at any time from January 1, 1989, until the date Defendants' continuing conduct is terminated (the "Class Period").

The Original Class representatives sought through its Complaint to either opt the aforementioned South Carolina class out of the Posey action by its September 3, 2002 opt-out deadline or obtain an injunction against the operation of the Posey settlement.

In response, Dryvit filed a Motion to Dismiss this action on August 20, 2002 pursuant to Rule 12(B)(8), SCRCP on the grounds that the named plaintiffs had other state court actions pending against Dryvit. Significantly, Dryvit's motion did not mention the pending Posey action in Tennessee even though Posey is specifically referenced in defining the South Carolina class and Dryvit's lead counsel in Posey, Peter W. Morgan, joined in the motion.

By Order filed September 3, 2002, Judge Kemmerlin certified an opt-out class action comprised of the plaintiffs and the class as defined in the August 12th Complaint. Immediately thereafter, on September 3, 2002, John and Sally Cardamone on behalf of themselves and all South Carolina residents similarly situated filed a class opt-out request and a copy of Judge Kemmerlin's Certification Order with the Posey court. Even though Dryvit thereafter asked Judge Kemmerlin to reconsider the certification order, but it again did not raise the existence of the Tennessee action as a possible grounds for decertifying the South Carolina class.

Although Dryvit did nothing to contest this Action from September of 2002 until September of 2005, during this time it vigorously prosecuted a global nationwide settlement in

Posey and offered financial incentives to class representatives and lawyers involved in the South Carolina case. A significant inference exists that in order to bolster the Posey settlement and undermine the viability of the South Carolina class action, Dryvit began their negotiations with the Original Class representatives to compromise and attempt to fatally wound the South Carolina class by eliminating incentives for vigorous prosecution of the South Carolina class action.

As previously mentioned, after the certification of the South Carolina Class, Dryvit undertook extensive negotiations with the Original Class representatives regarding the compromise and dismissal of this class action. Since the first hearing, discovery has produced the following communications:

December 12, 2002
Message from SC class counsel _____ to Dryvit Counsel _____ and others:

> "I am currently awaiting word from _____ as to where this thing stands vis a vis our group."

Response from _____ to _____:

> "We are arranging a call with our client."

December 13, 2002
Message from SC class counsel _____ to Dryvit Counsel _____:

> "_____, where are we? Do you think we will come to an agreement? Tenn. is approaching, and I don't have anything to take to our group one way or another, and they want to know what will be our positions in Tenn. and SC."

January 2, 2003
Message from SC class counsel _____ to Dryvit Counsel _____:

> "Subject: NEED SOME HELP. _____, I know you have talked to _____. 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 approval and dismissal of the SC class. His case in

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 _____ in [Dryvit corporate counsel's _____] _____ 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!!"

January 7, 2003

Message from SC class counsel _____ (by _____, Paralegal) to Dryvit counsel _____:

"Dear _____, 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 _____ and probably the settlement will need to be completed after Posey is certified in order to eliminate the SC class."

April 22, 2004

Message from SC class counsel _____ to Dryvit counsel _____ and Posey class counsel _____:

"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 in Beaufort, S.C. Some of my SC lawyers are concerned about not having any memorialization of the agreement _____ 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."

April 26, 2004

Message from SC class counsel _____ to Dryvit's counsel _____:

"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 _____ will do it as far as I am concerned. Thanks."[13]

The preceding email chain demonstrates that counsel for the Original Class representatives attached a list of individual cases then pending against Dryvit, including the individual actions brought by class representatives Clark, Cardamone, and Gianni, and suggested that these cases needed to be resolved "in order to eliminate the SC class." Shortly thereafter, Dryvit offered individual settlements to all of the Original Class representatives as well as the other individual actions. In a letter dated February 5, 2003, one of Dryvit's lawyers acknowledged that Dryvit was settling with John and Sally Cardamone individually in order to eliminate the Cardamone class action:

> the [$90,000.00] that Dryvit has agreed to pay [the Cardamones] 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.

Dryvit and the Cardamones subsequently executed a Settlement, Release, and Confidentiality Agreement on March 3, 2003, however that Agreement made no mention of the "bonus" the Cardamones received due to their status as class representatives. In the months following the Cardamone settlement, Dryvit entered into similarly and potentially monetarily significant 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).[14] The last of these settlements was reached with the Clarks in September of 2003. Thereafter, as this Court may

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[13] The above-quoted statements were email exchanges produced during discovery. The Court has removed the identity of the individual attorneys since many are not part of the present litigation and given that the present order is a denial of Summary Judgment.

[14] Plaintiffs assert that a significant inference comes by way of contrast that of more than 8000 notices sent to South Carolina residents in the Posey case, only six (6) individuals received a monetary award of more than $10,000.00.

infer for purposes of this motion and as Dryvit apparently intended, the original class representatives took no further action to prosecute this case on behalf of the South Carolina Class.

The record reflects that Dryvit began to negotiate settlements with the original class representatives shortly after Judge Kemmerlin certified this class action in September of 2002. In a letter dated November 15, 2002, Cardamone class counsel wrote Dryvit's counsel in the Tennessee action of Posey v. Dryvit to propose "enhancements and amendments" to the Posey settlement. Counsel proposed that if the proffered amendments were enacted, the "South Carolina group will recommend withdrawing our objections to the Posey settlement, and we will, in fact, recommend supporting the Posey settlement **by whatever means and in whatever form necessary.**" (emphasis added). Counsel also stated that enactment of the amendments "would go a substantial distance toward resolving the outstanding issues with the South Carolina class, and once some further negotiations take place on some additional issues, we would be quite hopeful that we could **effect [sic] a global resolution.**"

Dryvit did not pursue a "global resolution" of the claims of the South Carolina class. Instead, Dryvit reached individual settlements with the original class representatives and offered to make a substantial payment of attorneys fees upon the compromise of the South Carolina class action.[15] A significant inference exists that the settlements Dryvit paid and its offer to pay attorneys fees after the dismissal of this case were actions intended to chill the proper and vigorous prosecution of this class action. See Newberg on Class Actions, section 3:1, explaining that Rule 23 contains the concept that the representative party should have no conflicts of interest

[15] Dryvit also reached settlements with other homeowners who were represented by Original Class counsel. These settlements give rise to the inference that Dryvit was aware of other potential South Carolina class members (individuals similar to the Treons and Scearce) who did not actually consent to Posey/Tennessee jurisdiction but yet had the potential to assert a claim against Dryvit as members of the South Carolina class.

with class members and that he or she prosecute the action vigorously on behalf of the class. This Court also notes that no effort was made by anyone to seek an order from the Court to dismiss or otherwise compromise the claims of the South Carolina class pursuant to Rule 23, SCRCP.[16] When Dryvit eventually filed its motion to decertify the South Carolina class in February of 2004, Dryvit made no reference to the individual settlements or the monies Dryvit had paid, or agreed to pay, to original class counsel even though evidence strongly indicates the payments were made or promised in order to adversely affect the South Carolina class action and to achieve a favorable outcome to the Full Faith and Credit agreement of Posey.[17]

Timothy J. and Frances Treon, and P. Jennings Scearce own homes clad with Dryvit's EIFS. The Treons purchased their home located at 34 Old Fort Drive, Hilton Head Island, South Carolina in February 1994. Mr. Scearce purchased his home located at 1 Upwind, Hilton Head Island, South Carolina in July 1999. Both homes were clad with a Dryvit EIFS product.

In September 2005 the Treons and Mr. Scearce filed a motion to intervene in the Cardamone action as class representatives. They had standing to do so because each had a personal stake in the outcome of this South Carolina class action and the outcome of the Cardamone action affected their right to a remedy from Dryvit for the damage caused by its EIFS product. Again Dryvit acknowledged the Treons and Scearce had standing to intervene as class representatives in the South Carolina class action because they were "class" members.

The Treons and Mr. Scearce argued that intervention was appropriate because the original class representatives failed to propose a class notice plan as required by the October 3,

[16] SCRCP 23 (c) provides, in part, that a class action shall not be dismissed or compromised without approval of the court. Even though Dryvit has repeatedly asserted that it only settled the individual claims, an inference exists that the individual settlements were made because of the "class" status of the representatives and meant to stifle the obligations imposed on class representatives found in SCRCP 23 (a)(4) of prosecuting the class action vigorously on behalf of the class.

[17] The Court was informed that individual settlements had been reached during the December 2005 hearing, but the substance of the settlements was not shared with the Court. It was suggested to the Court that these settlements had no importance to the case.

2002 order certifying the class, and the original class representatives had accepted settlements of their individual actions then attempted to compromise and dismiss the action without any notice to the rest of the South Carolina class.[18]

The Plaintiffs in the action intervened in the Cardamone case only weeks before a motion to dismiss based on Posey's *res judicata* effect was to be argued to this Court in the South Carolina case.

Finally, there appears a chain of e-mails from which Dryvit has redacted the dates, but which appear to be leading up to the motion to de-certify the South Carolina class. In this e-mail chain, Dryvit and Original Class counsel are coordinating the arguments they planned to present to the "local state court judge." To this Court, these e-mails establish an inference of a strategy which attempts to avoid the requirements of SCRCP Rule 23 and the scrutiny of this Court. From the Dryvit documents, the inference is made that it was Dryvit that was directing and controlling the activities related to the manipulation of the South Carolina class. The following is an undated e-mail which reads:

Message from Dryvit's counsel _____ *to Original Class representatives's counsel* _____ *and Dryvit's local counsel* _____*:*

> Thanks, _____, for the draft papers. It seems to me that they are very thorough and well done. I have only one substantive point which is basically one of emphasis (noted below). In addition, althougth I am sure you and _____ will catch them, there are typos on brief p. 7 as to _____'s name: someone typed it as "_____" rather than "_____" in three places.
>
> *Here's the substantive point:*
>
> I suggest emphasizing even more the Full Faith and Credit (FFC) argument by moving Argument IV.B up to (to become IV.A) so that we can emphasize the FFC argument as our first argument (as you do in the opening paragraph to the memorandum). It seems to me that the FFC point is game, set match and we ought to make crystal clear that we think so.

[18] Attached as Exhibit A is a timeline of events offered to the Court by the plaintiffs.

By the time the papers are filed, we will have secured—as you point out—a final judgment in TN. That judgment settles claims for all persons who did not opt out within its terms. Regardless of what might have happened if Cardamone had been prosecuted to completion (or even partial completion. . . with formal notice, etc.) it is now constitutionally required (as the SC Court has recognized) that Posey final judgment be given FFC in S.C. As a result, there is no longer a Cardamone class action to prosecute, and the case must be dismissed.

Then I'd move to the old Argument IV.A: specifically

The above result would be correct at this stage for reasons of comity even if it were not constitutionally required. The Cardamone Action has been in the deep freeze for more than two years, precisely so that plaintiff's counsel could see if *Posey* benefits could be increased and result in enhanced benefits to South Carolinians. This has occurred. Under these circumstances, especially if no notice was ever provided to the Cardamone class members, it would be legal error even if *Posey* weren't yet final to move forward with a case that is premised on the notion that there sould be a mass opt-out of South Carolinians. {The I'd cite the cases that require that opt outs be done individually.} Since this is so, there can be no Cardamone Class action for the additional reason that the class is structured in an improper way.

BUT, the Court need not reach this second question since Posey final judgment is now final and as the S.C. Court has held in an analogous context—this Court is therefore constitutionally required to enforce its terms.

Hope this helps. Again, the papers look very good to me; my comment is basically one of emphasis, but I think we should make this as easy as possible for the local state court judge.

The record before the Court is sufficient for this Court to infer at a Summary Judgment stage that Dryvit intended to craft an argument to decertify or otherwise compromise the prosecution of this action that was based, in part, on the nondisclosure of the individual settlements and class compromise it had reached in violation of the requirements of Rule 23 SCRCP and thus created a genuine issue of material fact whether the doctrines of *res judicata* and Settlement and Release should apply as a defense to the present South Carolina action. In other words, genuine issues exist as to whether the "finality" of Posey was improperly bought by Dryvit "buying off" the South Carolina case in violation of SCRCP Rule 23 and compounding its

actions by hiding these events from the Court to secure a ruling of Full Faith and Credit in its favor to the detriment of the unrepresented members of the South Carolina Class. See, Arnold v. Arnold, 285 S.C. 296, 328 S.E. 2d 924 (Ct. App. 1985) where the Court held *res judicata* does not bar a collateral attack of a judgment based on fraud; and Hilton Head Center of S.C. v. PSCC, 294 S.C. 9, 362 S.E. 2d 176 (1987) discussing extrinsic fraud and intrinsic fraud, including fraud that misleads a Court in determining issues.

The following email exchange is illustrative of Dryvit's attempts to effect the instant action without fully informing this Court of the actions taken to compromise the action:

August 22, 2005
Message from SC counsel _____ *to Dryvit's counsel* _____:

> "_____, in discussing this with everyone, as you know, we need to decertify the Cardamone class here. You will recall that the _____ firm per Mr. _____ 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 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?"

August 23, 2005
Message from Dryvit counsel _____ *to SC class counsel* _____:

> "Main point is that – while the Creasys settled – _____ and _____ still have clients who are putative class members in Cardamone. As a result, they have clients with standing to object to decertification. For this and other reasons, we think there should be memos and afidavits [sic] supporting the dismissal/decertification. More later.

September 29, 2005
Message from _____ *to SC Class Counsel* _____:

> "_____: . . . Per your request, heres the email that spelled things out, reflecting the language agreed upon in Knoxville, lo those many months ago."

"Per my voice mail to you both, I agree that S.C. counsel should receive a total of $825,000. Dryvit agree to help in this process in tht [sic] total amount of $225,000 by agreeing to assist Posey class counsel, specifically, as follows ...."

November 18, 2005

Message from Dryvit Counsel _____ *to SC class counsel* _____ *and others:*

"_____: ... In that the intervenors are alleging that original class counsel was ineffective, etc. you may want to consider filing a response to their motion (I do not know if you discussed this with _____, _____, and _____during your meeting last month). I would also suggest that the original class counsel folks pick someone other than _____ to be the spokesperson. _____[_____] advised [that] _____ [_____] was 'fired up' about the intervenors and I would hate for his passion and zealous representation of the original class to over shadow the valid legal arguments for the denial of the intervention and dismissal of the SC Class action."

Response from _____ *to* _____*'s previous message:*

"_____, you are probably right. I can work up something Monday. I do need you to nail down one issue in Posey through Dryvit so we will be on the exact page. In Posey, we (SC Class Counsel) attempted to opt out the entire SC class. I know this was denied, and this denial has later been referred to in some Dryvit papers – we need to see if there is any transcript or order reference to this in Posey."

Response from Dryvit counsel _____ *to* _____*'s previous message:*

"_____, _____ forwarded your question to me.. There is no reference to the attempted opt-out of the entire SC class in any of the Posey hearing transcripts.[19] ... [Dryvit's argument against the SC opt-out] is explained in detail in our brief in support of the motion to dismiss. I'm going to be arguing for Dryvit at the

[19] Even if the original "final" settlement of Posey is given Full Faith and Credit, it appears the original "opt-out" by the South Carolina individuals from Posey was effective. Even though Posey's original plan was that an individual opt-out would not be allowed, once an individual opt-out occurred, Posey could not be used to limit South Carolina procedural law once the individual was properly in the South Carolina court. Similar to the position that Posey could not be used to shorten the rights of South Carolina homeowners to their rights under the statute of repose, Posey could not be used to restrict South Carolina's rules pertaining to class action litigation. Thus, a Hospitality Management analysis to the valid exercise of the Posey "opt-out" is not necessary. Also, this Court notes that, unlike what occurred before this Court, the lawyer who appeared before Judge Sloan should be credited for fully disclosing their opt-outs and explaining their purpose was to create a class in South Carolina thereby not subject to Posey's terms.

> hearing on [December] 5th. I would very much like to meet with you and anyone else on your team who is going to argue. This is a rare occasion in which your interests and ours are aligned, at least to some extent. It would be good if we could coordinate our arguments and make sure we don't get a cross-purposes."

From the above, it can be inferred that Dryvit was attempting to orchestrate a staged argument to the South Carolina Court. On December 5, 2008, the motion to intervene was granted and by agreement, the Summary Judgment continued. After hearing the initial Summary Judgment arguments, this Court announced its first denial of the Summary Judgment motion in May 2006. Subsequent to this Court's initial denial, more motions were filed and substantial discovery exchanged which included disclosure of the terms of the settlements and the information referenced herein. After extensive briefing and numerous arguments, this Court announced its second denial of the present Summary Judgment motion in October of 2008.

V. Brief Procedural History of the Tennessee Class Action

The Posey litigation began in Tennessee on November 14, 2000 as a state-wide class action entitled Humphrey v. Dryvit System, Inc. The class created by Humphrey consisted of Tennessians who owned homes clad with a synthetic stucco or Exterior Insulation Finish System ("EIFS" or "EIF System") product manufactured by Defendant Dryvit Systems, Inc.

On April 8, 2002, counsel for Dryvit and the Humphrey plaintiffs jointly filed an *Agreed Order Granting Leave to File Second Amended Class action Complaint*, a *Motion for Preliminary Approval of Settlement*, and a *Motion for Conditional Class Certification*. These three (3) pleadings sought to create and simultaneously settle a nationwide class action that wound bind homeowners in every state except North Carolina.[20] Unexplained, the original plaintiff, Humphrey, was replaced in these pleadings by Mr. and Mrs. Bobby R. Posey and Dale

[20] Dryvit homeowners in North Carolina were already subject to a state-wide class action against Dryvit prior to the creation of the putative nationwide class action in Posey.

Teague. On the very same day these pleadings were filed, the Tennessee judge entered an order certifying a nationwide class and granting preliminary approval to the nationwide settlement. No complaint defining a nationwide class or substituting Mr. Teague and the Poseys for Humphrey was filed with the Tennessee court **until October 27, 2006,** more that four (4) years after the judge issued his April 8, 2002 orders.[21]

Judge Sloan conducted an initial fairness hearing regarding the putative nationwide settlement on October 10, 2002 and heard from many objectors, including counsel representing objectors from South Carolina. Judge Sloan approved the putative national settlement on January 14, 2003. Between the October 10th fairness hearing and the January 14th Order approving the putative settlement, the parties to the Posey action negotiated with counsel for the plaintiffs in this action.

Posey's putative settlement was immediately appealed by several class members who had objected to it at the initial fairness hearing. A group of home builders, who had attempted to intervene in the action at the first fairness hearing, challenged the denial of their intervention so that they too could challenge the purported settlement (hereinafter "Home Builders"). Dryvit eventually settled all of the appeals except with that filed by the Home Builders. The Home Builder eventually prosecuted two (2) appeals regarding Posey's putative settlement, and filed a third appeal, but abandoned it before a decision was rendered.[22] The resulting appellate decisions are known as Posey I & Posey II.

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[21] The failure to file the Second Amended Complaint in April of 2002 was discovered long before it's actual filing in October of 2006. More than a year after approving the putative nationwide settlement, Judge Slone issued an order on March 3, 2003 granting leave to file the Second Amended Complaint *nunc pro tunc* back to April 8, 2002. Despite the March 2003 order, the Second Amended Complaint was not filed until October of 2006.

[22] The Tennessee Court of Appeals expressed serious reservations with the notice provided absent class members and the terms of the Global Settlement. In its first opinion, issued March 22, 2004, the Court noted that the Global Settlement

In both Posey I and Posey II, the Tennessee Court of Appeals expressed grave concerns over the "fairness and validity" of the putative nationwide settlement and ordered Judge Sloan to review opposing points of view and pertinent evidence "whether put forth by the [Home Builders] or anyone else." In effect, the Court of Appeals was ordering Judge Sloan to conduct a new and more thorough fairness hearing.

Nowhere in the voluminous materials produced by Dryvit to this Court is there any evidence that the Posey court ever entertained argument on or ruled on the efficacy of the Cardamone class-wide opt-out, even though the Posey court was aware of the pending action in

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is a nationwide settlement which is estimated to affect at least 95,000 homeowners. There were serious questions raised (even by the trial judge himself) regarding adequacy of notice and of the terms of the settlement. (The high number of opt-outs and the low number of responses in general demonstrate there may have been valid concerns as to both.) . . . **This action has such far-reaching implications that consideration of *all opposing points of view* is imperative.**

Posey v. Dryvit Systems, Inc., 2004 Tenn. App. LEXIS 174, 11-12 (Ct. App. 2004) (emphasis added) (hereinafter referred to as "Posey I"). The Court remanded the case to the trial court and stayed the operation of the Settlement. The Court further noted that "it is obvious that the Trial Court is required to address the matter of class definition as contained in its final order, which as certified is a meaningless class." Id. at 19.

On remand, Judge Sloan summarily denied several motions filed by the Home Builders and limited the stay imposed by Posey I to those homes actually built by the Home Builders. The Home Builders filed an emergency petition with the Court of Appeals to challenge Judge Sloane's limitation of the stay. After conducting a second review of the Global Settlement, the Court of Appeals issued an opinion which stated in pertinent part that

> [t]he basis for the stay was to ensure that all evidence pertinent to the fairness and validity of this settlement be heard, whether put forth by the intervenors *or anyone else*. The Trial Court refused to hear intervenors' evidence regarding the propriety of the settlement in the original fairness hearing, but there is no question that, in a class action such as this, the Trial Court must exercise "the highest degree of vigilance in scrutinizing proposed settlements", and acts as a type of fiduciary for the class members. *See Reynolds v. Benefit Nat'l Bank*, 288 F.3d 277 (7th Cir. 2002). Courts recognize the importance of the trial court's role in approving class action settlements, and have required the trial court to take extra care when determining if the settlement is fair, considering all the factors as the "risk and likely return to the class of continued litigation", the range of possible outcomes and probability of each, whether class counsel's fees are proportional to the incremental benefits conferred on the class members, etc. *Id.* A review of the transcript of the fairness hearing in this case reveals that the Trial Court's scrutiny of the settlement was cursory at best. The Trial Court is directed to conduct an additional fairness hearing as soon as practicable so that the intervenors' rights can be determined. Posey v. Dryvit Sys., 2005 Tenn. App. LEXIS 1, 7-8 (Ct. App. 2005) (emphasis added) (hereinafter "Posey II").

South Carolina.[23] This statement is also confirmed in the emails exchanged between original South Carolina class counsel and Dryvit's counsel.

This Court finds that for purposes of this Summary Judgment motion denial, that genuine disputes as to material facts exist that not only did the South Carolina Court have the authority to opt the South Carolina Class out of Posey, but that it did do so and that neither Dryvit nor the Tennessee Court ever dealt with the opt-out form filed in Posey by the South Carolina Class and the probable conclusion that the opt-outs were effective, thus eliminating the applicability of a Full Faith and Credit analysis.

VI. Posey is Potentially Jurisdictionally Infirm

This Court also finds that Posey is potentially[24] jurisdictionally infirm and, as such, is not entitled to Full Faith and Credit outside the State of Tennessee and, thus, Dryvit's motion for Summary Judgment should be denied. Three appellate courts in two different states have reviewed the conduct of the Posey action and all have recognized procedural deficiencies. The most recent review was conducted earlier this year by the Ohio Court of Appeals in Bishopp v. Dryvit Systems, Inc., et al., 2007 WL 646252, 2007 Ohio App. Lexis 816, 2007-Ohio-917 (decided March 5, 2007). The plaintiffs in Bishopp owned a home clad with Dryvit EIFS in Morrow, Ohio. After several unsuccessful attempts to sell the home at a fair market price, the plaintiffs were informed that the presence of Dryvit EIFS on the home's exterior "significantly reduced the value of the residence" due to Dryvit's "reputation for water intrusion that could lead

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[23] One of the lawyers who acted as Original Class counsel in this Action, appeared on behalf of an objector at the first Posey fairness hearing in October 2002 and explained the position of Original Class representatives regarding Judge Kemmerlins Order: Posey trial judge: Someone mentioned earlier that all of South Carolina had opted out.

> Cardamone Class Counsel: We have filed a class action in South Carolina. We have actually gotten a conditional class certified by Judge Tom Kimberlin [sic] in Buford [sic] County to opt out the state. He signed that Order.

Transcript of Posey Fairness Hearing, October 1, 2002 at p.115, lines 17-25.

[24] As previously noted, the Court was recently advised the plaintiffs did not desire this Court to rule upon its motion for Partial Summary Judgment as part of its present ruling.

to mold developing within the exterior wall of the house." 2007 WL 646252 at *1, 2007 Lexis 816 at **2. The house eventually sold for a loss and the homeowner brought suit against Dryvit and others to "recover for the diminished property value." Id.

Dryvit eventually filed a motion for Summary Judgment "on the basis that [the homeowners'] suit [was] precluded due to the [Posey] settlement in Tennessee." WL at *2, Lexis at **2. The trial court granted the motion, but the Ohio Court of Appeals reversed because there was no evidence in the Tennessee record that a complaint defining a nationwide class was ever filed in Posey:

> A court does not have the power to certify a class in a class action unless a **complaint identifying the class to be certified is properly filed.** In the absence of a validly filed complaint identifying a class, a court would not have the jurisdiction over that class. If the class is not validly certified, claimants that would purportedly be included in the class are not parties, or privies, to that class action. As a result, a claimant cannot be precluded by a settlement or decision in a class action lawsuit unless the claimant was properly made a party, or privy, to the class action.

WL at *4, Lexis at **12 (emphasis added). The Bishopp Court noted that some six (6) months after the *Posey* opt-out deadline (September 3, 2002) passed, the "Tennessee Circuit Court granted [a] motion [on March 3, 2003] to file the second amended complaint *nunc pro tunc* to April 8, 2002," but "did not issue an order stating that when a second amended complaint was filed it would be deemed filed *nunc pro tunc* to April 8, 2002." WL at *3, Lexis at **9. In fact, the second amended complaint was not filed in Tennessee until October of 2006, during the pendency of the Bishopp appeal.[25]

Dryvit argues that filing of the second amended complaint on October 27, 2006 cures the jurisdictional problem raised in Bishopp because the Tennessee Circuit Court also filed an *Order*

[25] This Court is aware that Bishopp is still on appeal in Ohio but finds the reasoning and questions raised about Posey in the Ohio Court's opinion as sufficient, at this stage, to require this Court to presume the defects alleged in Bishopp exist.

Clarifying the Record Regarding Filing of Second Amended Class action Complaint explaining that the trial judge "considered" the amended complaint "to have been filed as of the date the Amended Complaint was originally brought before the Court." This Court has concern that the October 2006 filing of the second amended complaint and the accompanying order in Tennessee is legally insufficient under Tennessee law to retroactively create jurisdiction over a nationwide settlement class back in April of 2002.

A Tennessee court cannot retroactively create jurisdiction over a nationwide class action more than four (4) years after approving a settlement of that class action. In Tennessee, as in most other states, a *nunc pro tunc* entry is an entry in the court record made now, of something which was actually previously done. It is not an entry made to supply an omission in the record of action by the court. Cantrell v. Humana of Tennessee, Inc., 617 S.W.2d 901, 902 (Tenn. Ct. App. 1981) (defining a *nunc pro tunc* entry as "an entry made now, of something which was actually previously done."). As the Bishopp Court noted in its analysis of Posey, there is no evidence that a complaint containing a definition of the class Dryvit seeks to bind to the Posey settlement was properly filed in Tennessee, even though the trial judge granted leave to file an amended complaint *nunc pro tunc*. Bishopp, WL at *4, Lexis at **12. Without a properly filed class action complaint defining the class to be certified, the certifying court has no jurisdiction over the class. Id.

In Smith v. Smith, the Tennessee Court of Appeals made it clear that Tennessee law does not allow an omission by counsel to be cured by a *nunc pro tunc* filing. 2006 WL 2052340 (Tenn. Ct. App. 2006). In Smith, counsel for a party to a divorce action sought to file a notice of appeal *nunc pro tunc* after learning that a notice it had mailed earlier was not received by the clerk of court in the time allotted by Tennessee law for filing that notice. 2006 WL 2052340 at

*1. Smith held that a *nunc pro tunc* filing was not available for curing the omission of counsel. 2006 WL 2052340 at p.*2. In arriving at its holding, Smith quoted from an earlier decision of the Tennessee Supreme Court, Gizzard v. Fite, for the proposition that *nunc pro tunc* filing "can only be made when the thing ordered has previously been allowed, but by inadvertence has not been entered. **It applies only to orders of court, and never the action of counsel.**" 2006 WL 2052340 at *1 (quoting Gizzard, 137 Tenn. 103, (1916) (emphasis in original)).

Even if the omission the parties sought to correct by filing the second amended complaint *nunc pro tunc* was an omission of the Posey court rather than counsel, Tennessee law, it appears, would not give the amended complaint retroactive effect back to April 8, 2002 because the class definition set forth in the amended complaint differs from the definition used by the court in its Order Granting Preliminary Approval of Settlement that was properly filed in the record on April 8, 2002. The amended complaint simply does not reflect the action taken by the court in April of 2002, and is probably therefore an impermissible fabrication of the court record rather than the correction of an accidental omission. It is axiomatic that a court's "power to amend [the record] . . . must not be confounded with the power to create." Gagnon v. United States, 193 U.S. 451, 457-58 (1904). The United States Supreme Court in Gagnon cautioned courts that the "the exercise of a power to recreate a record where no memorandum whatever exits of such record is evidently a dangerous one." 193 U.S. at 458 (emphasis added). Tennessee law comports well with Gagnon. As mentioned above, the Tennessee Supreme Court held that:

> the application to file the amended [complaint] "nunc pro tunc" was a misconception. A "nunc pro tunc order" can only be made when the thing ordered has previously been allowed, but by inadvertence has not been entered. **It applies only to orders of court, and never to action of counsel.**

Gizzard v. Fite, 137 Tenn. 103, 191 S.W. 969, 971 (1917) (emphasis in original). In Gizzard, the trial judge granted the plaintiff leave to file an amended complaint (declaration) after dismissing the plaintiff's equity action due to Plaintiffs' contradictory allegations in a related legal action. The plaintiff's attorney failed to file the amended complaint in the time proscribed by the trial judge, so the judge denied counsel's subsequent attempt to file the amended complaint *nunc pro tunc* and plaintiff appealed. The Supreme Court upheld the judge's decision noting that *nunc pro tunc* filing is available to correct an order that is inadvertently omitted from the court record, but it is not available to cure counsel's failure to make an entry to that record. In Posey, the Posey class counsel and Dryvit failed repeatedly to file a complaint that identified a class that includes South Carolina homeowners despite the passage of more than four (4) years. This Court notes that the Posey court allowed counsel to alter of the Posey class definition on more than five (5) occasions and is apparently unconcerned or unaware that the class definition that was "noticed" to the putative national class in 2002 was significantly different that the definition contained in the second amended complaint filed in October of 2006. This Court finds nothing in the Tennessee record to suggest the Posey court ever considered, approved, or ordered the notice of the exact class definition that appeared in the second amended complaint. To the contrary, the record in Tennessee demonstrates that the Posey court recognized at least six (6) other class definitions, each of which was markedly different from the definition contained in the second amended complaint. A significant difference in definition involved previous owners of property clad with Dryvit EIFS. The class proposed by the second amended complaint included persons:

> who own a structure on which an Exterior Insulation and Finish System ("EIF System") has been installed or any previous owner of such structures who incurred any costs or expenses to inspect, repair or replace the EIF System or incurred other property damages caused by the EIF System during the Class Period.

This definition appears in no other portion of the Posey record; consequently, the second amended complaint most likely cannot be filed *nunc pro tunc* to correct the omission in the record that occurred more than four (4) years before it was filed.[26] It is doubtful that such a gross jurisdictional deficiency cannot be cured by an explanatory order entered after the fact in an attempt to create a record that did not exist.

In arriving at its decision in the Bishopp case, the Ohio Court of Appeals determined whether Posey was entitled to full faith and credit by undertaking the analysis of a foreign judgment set forth by the Ohio Supreme Court in Fine v. America Online, Inc. This Court finds the analysis of both the Bishopp and Fine courts' persuasive as the South Carolina Supreme Court relied on the Fine decision in deciding Hospitality Management.

Fine sets forth a three part review of a foreign judgment. First, a court must "[e]xamine the terms of the Full Faith and Credit Clause." This first step determines whether the foreign court rendering a judgment exceeded the bounds of its subject matter jurisdiction in doing so and is based on the Doctrine of Jurisdictional Finality first articulated by the United States Supreme Court in Durfee v. Duke.[27] The second step looks to the *res judicata* effect of a foreign judgment by determining "whether the case would be barred from raising claims in another lawsuit" under the law of the foreign jurisdiction. Id. Lastly, there must be a determination "whether [the

[26] Because the class defined by the second amended complaint was different from the definition that was noticed to the putative Posey class, those class members who were not part of the noticed definition never received the notice they were constitutionally entitled to receive. Even though this conclusion falls within the Hospitality analysis and is a separate basis for denying the Summary Judgment, this Court believes this conclusion regarding the adequacy of notice is secondary to the issues discussed herein and notes the failure of the notice plan as a consequence of the parties failure to properly create jurisdiction by filing the second amended complaint. Even though significant, this issue is one of many that leads to the decision to deny the present motion for Summary Judgment.

[27] The jurisdictional analysis of Durfee v. Duke is a part of the jurisprudence of both states, Tennessee and South Carolina. See Taylor v. Taylor, 229 S.C. 92, 98, 91 S.E.2d 876, 879 (1956) (holding that the jurisdiction of a foreign court rendering a judgment can be disproven by extrinsic evidence or the record itself) and Salisbury v. Salisbury, 675 S.W.2d 761 (Tenn.App. 1983) (applying the same Durfee v. Duke analysis relied on by the Bishopp and Fine courts).

foreign court] extended due process to the class when approving form of notice ... and finding that the class members were adequately represented." Id.

In Hospitality Management, the Supreme Court focused on the third element of the Fine test to determine the scope of collateral review of a foreign court's determination regarding the adequacy of notice and class representation. The Fine court also focused on this final prong of its analysis as notice and adequacy of representation were also key allegations in that matter. This Court is persuaded, however, that the first prong of the analysis can be determinative in the instant case as the record before this Court is replete with evidence that the Posey court may have acted beyond the scope of its jurisdiction. This Court finds support for this conclusion in the analysis of the same issues by the Ohio Court of Appeals in the Bishopp case.

Where jurisdictional questions are not fully addressed by the rendering court, "a court in one State, when asked to give effect to the judgment of a court of [the rending] State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment." Durfee v. Duke, 375 U.S. 106, 111 (1963), see also, Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 92, 390 S.E.2d 370, 371 (Ct. App. 1990) ("[A] court called upon to enforce a judgment of a court in another state may inquire into whether that court had jurisdiction.").

The jurisdiction of the foreign court may be presumed if the "question of jurisdiction" has been "fully and fairly litigated" and "finally decided" by the rendering court. Durfee, 375 U.S. at 111. However, this "general rule of finality of jurisdictional determinations is not without exception." 370 U.S. at 113. Courts must balance the doctrine of *res judicata* with the "policy against permitting [a] court to act beyond its jurisdiction." 375 U.S. at 114 n.12. Factors to consider when determining whether a court had exceeded its jurisdictional boundaries include a consideration of the sovereign rights of the state in which the judgment is to be enforced,

whether the rendering court clearly lacked jurisdiction over the subject matter, whether the question of jurisdiction is one of law or fact, whether the question of the foreign court's jurisdiction was litigated, and a strong public policy against a court acting beyond its jurisdiction. Id. Such an analysis of the instant action is highly suggestive of the conclusion that the Posey court acted without jurisdiction to impose a nationwide settlement.[28] Additionally, this Court agrees with and incorporates by reference the criticisms of the courts of appeal in Tennessee[29] and Ohio that have been raised earlier in this opinion.

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[28] Plaintiffs also assert that Dryvit opposed the certification of the instant action in August of 2002 on the grounds that certification of a South Carolina class action would prevent Dryvit from "*defending itself*" in the Posey action. Memo in Opposition to Certfication 8/28/2002 (emphasis in original). In fact, Posey was never a contested matter, it merely sought to expand the state class action pending in Tennessee called Humphries v. Dryvit System, Inc. into a nationwide settlement class that would bind homeowners in 49 states, including South Carolina, to a settlement reached with Humphries' class counsel. This action was initiated as a reaction to the proposed Posey settlement.

After the South Carolina class was certified by Judge Kemmerlin's Order of September 3, 2002, Dryvit moved to dismiss this action pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure on the grounds that the Original Class representatives (Cardamones, Clarks, Gordons, and Ms. Gianni) had *individual* actions pending against Dryvit. Dryvit did not raise Posey in its 12(b)(8) Motion (as it had in its opposition to class certification).

Rule 12(b) requires a defendant to set forth every available defense in either an answer or, in the case of certain enumerated defenses, a pre-answer motion. Glenn v. School Dist. No. 5, 294 S.C. 530, 534, 366 S.E.2d 47, 49 (Ct.App. 1988). The filing of a pre-answer motion alters the deadline for filing an answer which is not due until fifteen (15) days after the defendant receives notice of the denial of the pre-answer motion. Rule 12(a), SCRCP. One of the enumerated defenses that may be raised a pre-answer motion is the defense that another action is pending between the same parties for the same claims. Rule 12(b)(8), SCRCP. A 12(b)(8) defense is waived if not properly asserted in a pre-answer motion. Rule 12(h)(1), SCRCP. In the instant action, Dryvit chose not to assert Posey in its 12(b)(8) motion; therefore, it cannot now seek to raise Posey as grounds for dismissing this action. As noted above, Dryvit limited its pre-answer motion to the individual actions of the Original Class representatives as it failed to raise Posey as an alternative grounds for granting the motion. Dryvit then mooted its own motion by settling each of the Original Class representatives' individual lawsuits in early 2003. Without a pre-answer motion in place, Dryvit should have filed an answer within fifteen (15) days of resolving its own motion, but failed to do so. Dryvit did not file an answer until May 15, 2006 and did not request an extension for time to file an answer as prescribed by SCRCP.

Accordingly, the plaintiff asserts that the class-wide opt-out affected by Judge Kemmerlin's September 3, 2002 order removed the members of the South Carolina class from the jurisdiction of the Posey Court. The class-wide opt-out filed in Tennessee filed by Original Class counsel on September 3, 2002, and left unaddressed by the Tennessee Court and Dryvit, further support this assertion and conclusion. Dryvit could have timely challenged the class opt-out as either an order in the nature of an injunction under Section 14-3-330 and Rule 23(d)(2), SCRCP or by pre-answer motion pursuant to Rule 12(b)(8). Instead, Dryvit chose to pursue individual settlements with certain class members and did not assert Posey until September of 2005.

[29] The Tennessee Court of Appeals remanded Posey twice to the trial judge for further review of the purported settlement's fairness. In its first opinion, the Court characterized the settlement class definition as "meaningless." Posey I, 2004 WL 527348 at *7. In its second, the it found that a "review of the transcript of the fairness hearing in this case reveals that the Trial Court's scrutiny of the settlement was cursory at best." Posey II, 2005 WL 17425.

Therefore, for purposes of this Summary Judgment denial, evidence exists to reasonably infer that Dryvit may not have available the Full Faith and Credit argument to assert Posey against the South Carolina class action given the evidence of improper conduct on Dryvit's part in regards to the South Carolina litigation.

Also, again, for purposes of this Summary Judgment denial, evidence exists that reasonably infer that the opt-outs from Posey were effective and, thus, Posey's claim to finality does not prevent the South Carolina class action from going forward.

Finally, evidence exists to reasonably infer that Posey may be jurisdictionally infirm due to procedural defects which include the late filing of the Amended Complaint some four years later.

Based upon the above, this Court respectfully denies Defendant Dryvit's motion for Summary Judgment.

AND IT IS SO ORDERED.

The Honorable J. Mark Hayes, II
Circuit Court Judge

This 7 Day of January 2009
Spartanburg, South Carolina

The plaintiffs assert the speed in which the action was created, notice, and approved amply demonstrates the cursory nature of the Posey court's review. The plaintiffs also note to the Court that fewer than 100 South Carolinians received anything from Posey.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

TIMOTHY J. TREON AND HIS WIFE, JANE TREON, AND P. JENNINGS SCEARCE, INDIVIDUALLY, AND ON BEHALF OF OTHERS SIMILARLY SITUATED IN THE STATE OF SOUTH CAROLINA,

PLAINTIFFS,

-VS-

DRYVIT SYSTEMS, INC. ESTATE BUILDERS, INC., AND AMERICAN WAY APPLICATORS OF SOUTH CAROLINA, INC.,

DEFENDANTS.

2002-CP-07-1377

TRANSCRIPT OF RECORD

MARCH 31, 2010
SPARTANBURG, SOUTH CAROLINA

BEFORE:

THE HONORABLE J. MARK HAYES, II

APPEARANCES:

ATTORNEYS FOR PLAINTIFFS:

GREGORY M. ALFORD, ESQUIRE
ROBERT B. PHILLIPS, ESQUIRE
THOMAS E. WILLIAMS, ESQUIRE
DONALD E. JONAS, ESQUIRE
FRANCIS E. GRIMBALL, ESQUIRE

ATTORNEYS FOR DEFENDANTS:

ROBERT E. FIELDS, III, ESQUIRE
CATHERINE R. ATWOOD, ESQUIRE

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

EXHIBIT 3

MR. GRIMBALL: THEY ARE SEPARATE, BUT ONE CAN INFLUENCE THE OTHER. AND THAT'S THE POINT OF WHAT I'M TRYING TO GET ACROSS IN THE BRIEF REMARKS THAT I HAVE MADE.

AND, AGAIN, I'M NOT ARGUING AGAINST ---

THE COURT: I UNDERSTAND THAT. BUT THE SETTLEMENT THAT I HAVE BEEN ASKED TO GIVE MY PRELIMINARY APPROVAL TO, ---

MR. GRIMBALL: YES, SIR.

THE COURT: --- TO WHICH I HAVE GIVEN MY BLESSING, HAS -- IN NO WAY WAS I EVER INFORMED THAT THERE WAS A POTENTIAL THREAT TO THIS LITIGATION OR TO THIS SETTLEMENT BASED UPON SOME COLLATERAL ISSUE THAT WAS NOT ASSOCIATED WITH THAT SETTLEMENT.

MR. GRIMBALL: THIS IS MY FEAR, YOUR HONOR, THIS IS THE -- YOU HAVE EXPRESSED MY EXACT CONCERN, WHICH IS WHY I -- I THINK THERE'S A SOLUTION TO THE PROBLEM. AND I'D LIKE TO GO THROUGH IT. THAT IS ---

THE COURT: ALL RIGHT.

MR. GRIMBALL: I HAVE EXPRESSED THAT CONCERN TO THESE GENTLEMEN. AND I FELT AS IF I NEEDED TO ---

THE COURT: AND I -- AND I WANT TO HEAR YOU IN FULL. BUT I WANT IT TO BE VERY CLEAR TO EVERYONE THAT IS SITTING IN THIS COURTROOM THAT THESE ISSUES THAT ARE BEING RAISED AND PRESENTED TO ME ARE VERY CONCERNING TO

ME.

NOT ONLY IS THERE A HISTORY THAT HAS BEEN DOCUMENTED AND PRESENTED TO ME THAT TOUCHES DIRECTLY UPON RESPECT AND THE ROLE OF NOT ONLY, AND I SAY THIS COURT, I MEAN NOT THIS COURT AS BEING ME PERSONALLY WHO DID NOT GET ASSIGNED THIS CASE BY THE CHIEF JUSTICE UNTIL 2006 AND FIRST HEARD THE FIRST HEARING IN 2005, BUT ALSO THE ROLE OF JUDGE KEMMERLIN WHEN HE HAD THIS CASE, BUT THOSE ARE VERY CONCERNING ISSUES.

WHETHER IT IS DIRECT OR INDIRECT MISREPRESENTATIONS THAT HAVE BEEN MADE TO A MATTER TO WHICH UNDER RULE 23 THIS COURT HAS THE, AND I AGREE WITH MR. ALFORD, A DUTY TO MONITOR AND POLICE. THAT'S VERY CONCERNING.

SO I WANT TO HEAR YOU, AND I WANT TO HEAR YOU IN FULL AS TO WHAT YOU THINK THOSE ISSUES ARE THAT MIGHT HAVE SOME BEARING ON THE SETTLEMENT THAT I HAVE GIVEN MY PRELIMINARY APPROVAL. THEN I WOULD ALSO LIKE TO ASK YOU WHY AM I JUST NOW HEARING ABOUT THEM?

MR. GRIMBALL: HEARING ABOUT THESE ISSUES?

THE COURT: YES, SIR.

MR. GRIMBALL: WELL, LET ME PROCEED, THEN WE CAN -- IF I DON'T ANSWER THAT QUESTION WE CAN COME BACK TO IT.

THE COURT: ALL RIGHT.

MR. GRIMBALL: MR. PHILLIPS AND I HAD A BRIEF CONVERSATION AFTER LAST TIME WE WERE HERE, I THINK, AS A

PAID FOR THE SPECIFIC PURPOSE OF ENHANCING THAT ARGUMENT AND THAT POSITION IN SOUTH CAROLINA THAT WE CAN COME INTO SOUTH CAROLINA COURT AND WE CAN SAY, SOUTH CAROLINA, YOU DON'T HAVE A CASE ANYMORE BECAUSE FULL, FAITH AND CREDIT IS GOING TO APPLY BECAUSE THE TENNESSEE COURT HAS EXHAUSTED ALL OF ITS ACTIONS. IT'S EXHAUSTED, YOU KNOW, ALL POSSIBLE AVENUES OF APPEALS, AND IT IS A FINAL RULING. AND, THEREFORE, BASED UPON THE CONSTITUTIONAL ARGUMENT WE'RE GOING TO SHUT YOU DOWN, SOUTH CAROLINA.

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 EVER THOSE ISSUES, IF I HAVE TO DECIDE THOSE ISSUES 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 THAT HAVE BEEN PRESENTED TO ME ARE JUST SCREAMING AND YELLING.

LAWYERING, BUT THEN IT WENT SOUTH. AND IT WENT BAD. AND IT WENT BAD WHEN THEY MADE A DEAL TO TAKE MONEY OUT OF TENNESSEE AND NOT TO COME BACK TO SOUTH CAROLINA AND TELL THE TRUTH.

AND WHEN IT WENT REALLY WRONG IS WHEN WE SAT IN THE COURTROOM ON DECEMBER THE 5TH, 2005, NONE OF US KNEW EACH OTHER, NONE OF US REALLY KNEW, LORD, WHAT A JOURNEY WE WOULD GO ON IN THIS PROCESS. BUT THEY SAT THERE, THEY HAD MONEY IN THEIR POCKET, THEY HAD MADE A DEAL. AND PETER MORGAN EMAILED ABOUT THE DEEP FREEZE AND TALKS ABOUT THAT. THEY HAD MADE THIS DEAL.

AND THEY DIDN'T TELL YOU. THAT'S THE LINE FOR ME, JUDGE. AND WITH DUE RESPECT, THAT'S GOT TO BE THE LINE FOR THE COURT.

THE COURT: I'M HAVING -- I'M TRYING TO PERCEIVE THAT -- I'M TRYING TO IDENTIFY WHERE, YOU KNOW, THEY CONCEPTUALLY CAME UP WITH A STRATEGY. THEY SAID, OKAY, CONCEPTUALLY WE HAVE GOT TO INCREASE OUR HAND IN TENNESSEE. AND CONCEPTUALLY THEY CAME UP WITH THIS IDEA THAT PART OF WHAT WE'RE GOING TO DO IS WE'RE GOING TO OPT-OUT PEOPLE IN SOUTH CAROLINA -- WE'RE GOING TO OPT-OUT THE PEOPLE IN SOUTH CAROLINA, AND WE'RE GOING TO INCREASE OUR BARGAINING STRENGTH IN TENNESSEE.

NOW THE REALITY OF WHAT HAPPENED THOUGH WHERE I COME INTO PLAY IS THEY INVOKED THE COURT SYSTEM IN SOUTH

CAROLINA. THEY ASKED FOR A CLASS ACTION SUIT TO BE ESTABLISHED. THEY WENT TO A JUDGE. HE APPROVED IT.

MR. ALFORD: AND THAT'S THE PROBLEM. THEY TOOK THAT CLOUT, OKAY, THEY TOOK THAT COLLECTIVE CLOUT NOW THAT WE REPRESENT THIS BIG HERD OF PEOPLE IN SOUTH CAROLINA. AND THEY WENT UP TO TENNESSEE AND THEY USED THAT CLOUT OF A CERTIFIED SOUTH CAROLINA CLASS, LIKE MR. LEATH'S LETTER TALKS ABOUT WHEN HE WAS TAKING THE HARD LINE WITH THEM BEFORE THEY HAD A DEAL. WE'VE GOT THIS SOUTH CAROLINA CLASS, WE'RE GOING TO GO TO TRIAL, AND WE'RE GOING TO WHIP YOU.

WELL, THEN THEY SETTLED, OKAY. AND THE STORY IS, WE'VE ROLLED EVERYONE -- WE'VE MADE THE SETTLEMENT BETTER. AND WE EARNED MONEY BY MAKING THE SETTLEMENT BETTER FOR EVERYBODY, THE POSEY SETTLEMENT'S BETTER.

WELL, HERE'S THE PROBLEM WITH THAT, JUDGE, NONE OF THEIR CLIENTS TOOK IT. AND THEY DIDN'T COME BACK AND THEY DIDN'T TELL EVERYBODY IN SOUTH CAROLINA, HEY, WE'VE APPROVED POSEY, WE'RE GOING TO DO A NEW NOTICE, WE'VE DONE BETTER.

THEY DIDN'T COME BACK AND SAY TO JUDGE KEMMERLIN, HEY, WE CAME BACK WITH -- WE APPROVED A SETTLEMENT, WE GOT PAID A BONUS, WE GOT PAID SIX HUNDRED THOUSAND DOLLARS, WE GOT TWO TWENTY-FIVE MORE COMING THE DAY AFTER THIS CASE GETS DISMISSED. THEY DIDN'T TELL HIM THAT.

AND THAT'S, RESPECTFULLY, JUDGE, I MEAN, I DON'T KNOW WHY YOU'RE STRUGGLING SO HARD. RULE 23 PUTS IT RIGHT IN YOUR -- RIGHT IN YOUR LAP. I HATE TO SAY IT. AND WHAT IT IS IS THOSE FEES WERE RELATED TO THIS CASE. AND THAT'S WHY I WANT YOU TO DIG IT UP. THAT'S WHY.

THE COURT: WELL, I APPRECIATE YOUR ADVOCACY AND PUTTING ME IN THE HOT-SEAT. BUT YOU ARE CONTINUING -- AND IT'S WHERE I'M HAVING TO TRY TO BE SURE I AM CLEAR. WHAT I'M DOING TODAY AND WHAT I'M BEING ASKED TO DO TODAY IS YOU ARE ARGUING -- AND, AGAIN, THEY MIGHT CROSS OVER, BUT YOU'RE STILL ARGUING THE MERITS OF YOUR LAST MOTION AGAINST DRYVIT WHERE YOU WANTED ME TO GRANT SUMMARY JUDGMENT AND TO DECLARE WHAT HAD GONE ON TO BE WRONG.

MR. ALFORD: I AM, AND I'LL -- BUT I'LL TELL YOU WHY, BECAUSE IT TAKES TWO. YOU CAN'T MAKE A DEAL WITH YOURSELF. YOU CAN'T CONSPIRE WITH YOURSELF. YOU ---

THE COURT: WELL, ---

MR. ALFORD: --- CAN'T -- DRYVIT COULDN'T HAVE DONE IT ALONE.

THE COURT: DO I HAVE TO FIND IN ORDER TO PROCEED OR LET'S SAY IF I FIND THAT, OKAY, I WANT TO HAVE ANOTHER HEARING, DO I NEED TO BE CONVINCED THAT THERE WAS MISCONDUCT?

MR. ALFORD: NO. NO, I DON'T THINK YOU DO.

THE COURT: UM-HUM (AFFIRMATIVE).

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

TIMOTHY TREON AND HIS WIFE, JANE TREON, P. JENNINGS SCEARCE AND STEPHEN CHRISTIAN, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED IN THE STATE OF SOUTH CAROLINA,	)	
PLAINTIFFS,	)	2002-CP-07-1377
-VS-	)	TRANSCRIPT OF RECORD
DRYVIT SYSTEMS, INC.,	)	MOTION FOR ATTORNEY FEES (VOLUME ONE OF TWO)
DEFENDANT.	)	

JANUARY 26 - 27, 2011
SPARTANBURG, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J. MARK HAYES, II

A P P E A R A N C E S:

ATTORNEYS FOR PETITIONER:

SUSAN T. WALL, ESQUIRE
HAL FRAMPTON, ESQUIRE

ATTORNEYS FOR RESPONDENT:

GREGORY M. ALFORD, ESQUIRE
ROBERT B. PHILLIPS, ESQUIRE
THOMAS E. WILLIAMS, ESQUIRE

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

EXHIBIT 4

ON THAT ISSUE. AND SO WE DON'T WANT TO UPSET THE APPLE CART FOR WHAT WE'VE BEEN ABLE TO ACCOMPLISH, BUT THAT'S NOT WHAT THE COURT APPOINTED THEM TO DO.

BY FAILURE TO ACT, BY FAILURE OF CLASS COUNSEL TO PERFORM THE DUTIES IN A REASONABLE AND DILIGENT FASHION, I BELIEVE THAT THE COURT WAS NOT ALLOWED TO ENGAGE IN ITS SUPERVISORY FUNCTIONS THAT THE COURT NEEDED TO DO. THINGS WERE HID FROM THE COURT. OR EVEN WORSE, THINGS WERE MISREPRESENTED TO THE COURT.

MS. WALL: WELL, YOUR HONOR, LET ME ADDRESS THAT NOW. AGAIN, THE COURT -- NOW, WE'RE TALKING ABOUT THE JUDGE KEMMERLIN PERIOD OF TIME. THE COURT WAS DEPRIVED OF JURISDICTION FOR A SIGNIFICANT PORTION OF THAT TIME, REMOVAL, APPEAL. AND WE KNOW THAT. I MEAN, THERE IS NO JURISDICTION WITH THE COURT DURING THAT TIME.

THE COURT: WHAT WAS THE ISSUE ON APPEAL?

MS. WALL: THE ISSUE ON APPEAL HAD TO DO WITH THE CREASY'S MOTION TO INTERVENE ---

THE COURT: OKAY.

MS. WALL: -- AND WHETHER IF, IN FACT, BY APPEARING IN THE POSEY ACTION AND SUBMITTING TO THE JURISDICTION OF THE TENNESSEE COURT, WHETHER THEY COULD THEN, AFTER DOING THAT, THEN COME IN AND BECOME A MEMBER OF THE SOUTH CAROLINA CLASS.

THE COURT: I WOULD PROBABLY DISAGREE WITH YOU. AS

WELL, IF THEY THOUGHT THAT THESE ATTORNEYS HAD NOT PERFORMED DILIGENTLY, WELL AS CLASS CO-COUNSEL, WHY WOULD YOU WAIT UNTIL AFTER THE SETTLEMENT IS FORGED? THAT'S INHERENTLY UNFAIR.

BUT, IN FACT, I WOULD SUBMIT TO YOU, YOUR HONOR, MR. GRIMBALL, MR. MULLEN HAVE WORKED ON BEHALF OF THE CLASS. THEY'VE WANTED TO HAVE A GOOD RESOLUTION FOR HOMEOWNERS WITH DRYVIT ON THEIR HOUSE IN SOUTH CAROLINA. THERE JUST ISN'T ANY QUESTION ABOUT THAT. WHAT THIS SEEMS TO BE COMING DOWN TO IS PEOPLE AGREEING WITH EITHER STRATEGY, OR CONCEPTS, OR RESOLUTION IDEAS, AND THEY JUST DON'T AGREE WITH THAT.

NOW, I WOULD LIKE TO -- I DO WANT TO ANSWER THE COURT'S -- IT'S INCUMBENT UPON ME TO RESPOND TO THE COURT. AND I WANT TO DO SO.

THE ISSUE THAT THERE MAY BE SOMETHING HERE THAT ANYTHING WAS KEPT FROM JUDGE KEMMERLIN, YOUR HONOR, I WOULD BEG TO DIFFER ON THAT. I THINK JUDGE KEMMERLIN WAS ---

THE COURT: THE RECORD IS CLEAR. EITHER JUDGE KEMMERLIN WAS LIED TO BY MR. SEEKINGS OR HE WAS NOT TOLD THE TRUTH, SOMETHING WAS MISREPRESENTED. BECAUSE THERE IS A RECORD AND THERE IS A RECORD FROM -- IN THIS COURT WHERE MR. SEEKINGS STOOD THERE AND SAID THAT THESE CASES ARE SETTLED, THAT THIS IS CASE IS SETTLED, THAT WE'VE

THE COURT: ALL RIGHT. I'M AFRAID THAT I'M SEEING YOUR ARGUMENT, THE VALIDITY OF YOUR ARGUMENT AND THE DESIGN OF CLASS ACTION LITIGATION MIGHT BE OKAY, MIGHT BE PROPER IF WE ACTUALLY HAD A STAKE-HOLDER IN THE LAWSUIT AT THAT TIME. WE DIDN'T HAVE A -- THIS LITIGATION -- THE STAKE-HOLDERS SETTLED THEIR CASES. THE LAWYERS WERE MAKING DECISIONS WITH NAMED CLASS REPRESENTATIVES THAT NO LONGER HAD AN INTEREST IN THE LITIGATION.

MY POINT, WE'RE TALKING ABOUT PAYMENT OF A LAWYER FEES. AND I HAVE -- I'M GOING TO TAKE A LOOK AT WHAT YOU GIVE ME. I'M GOING TO CONSIDER YOUR ARGUMENTS, BUT I'M HAVING SOME REAL ISSUES WITH THE WAY THIS CASE WAS HANDLED IN THAT TIME-FRAME.

MS. WALL: I UNDERSTAND.

THE COURT: BECAUSE YOU SAY THERE'S NOTHING -- WHAT WAS THAT WORD YOU SAID, DECIVIOUS?

MS. WALL: I THINK I SAID NEFARIOUS.

THE COURT: NEFARIOUS, OKAY. YOU SAID THERE'S NOTHING NEFARIOUS. I WOULD HOPE THAT THAT IS CORRECT BECAUSE THERE IS EVIDENCE THAT HAS BEEN PRESENTED OVER THE LAST SEVERAL YEARS THAT, IT'S FLOWN AROUND IN HERE, THAT SOMEONE ON THE OUTSIDE LOOKING IN VERY WELL COULD SAY THAT THERE WAS THIS SCHEME AND PLAN TO SETTLE AND BUY OUT THE SOUTH CAROLINA CLASS ACTION LAWSUITS, AND THAT THAT COULD HAVE BEEN ARRANGED BY LAWYERS IN SOUTH

CAROLINA. THERE'S DOCUMENTS THAT SUPPORT THAT CONCLUSION.

I'M NOT SAYING I'M GOING TO COME TO THAT CONCLUSION. AND THAT MIGHT BE ANOTHER REASON THAT WHEN YOU ENGAGE CLASS ACTION LITIGATION AND YOU HAVE A JUDGE, YOU MIGHT VERY WELL WANT TO RUN AND TELL THE JUDGE WHEN THESE INDIVIDUAL CLAIMANTS DO SETTLE THEIR CASES. BECAUSE THEN YOU AVOID THE RISK OF BEING PUT INTO THE POSITION THAT WE'RE IN NOW OF PEOPLE SAYING SOMETHING DOESN'T SMELL RIGHT. SOMETHING'S GONE WRONG.

BECAUSE THERE IS EVIDENCE IN THIS RECORD THAT SOMEONE COULD COME TO THAT CONCLUSION. I KNOW THAT YOU WILL ARGUE WITH GREAT PASSION THAT IT WAS NOT, BUT THERE'S EVIDENCE IN THIS RECORD THAT SOMEONE COULD COME TO THAT CONCLUSION.

MS. WALL: YOUR HONOR, IF I MIGHT ADDRESS THAT. I WILL NOT ARGUE WITH THIS COURT WITH REGARD TO ANY CLASS COUNSEL OTHER THAN MY CLIENTS.

THE COURT: UM-HUM (AFFIRMATIVE).

MS. WALL: THERE IS NOT A SHRED OF EVIDENCE IN THIS RECORD THAT MY CLIENTS, MR. GRIMBALL, MR. MULLEN, HAD -- WERE IN ANY WAY INVOLVED IN ANY AGREEMENT, ANY DISCUSSION OF AN AGREEMENT TO NEGATIVELY AFFECT THE CLASS. THE ONLY EVIDENCE IN THIS CASE IS TO THE CONTRARY.

THE COURT: OKAY. LET ME INTERRUPT YOU. AND I

THAT I, QUITE FRANKLY, I THINK I EVEN MENTIONED TO Y'ALL AT ONE TIME, YOU'VE GOT AN UPHILL BATTLE TO CLIMB BECAUSE I DON'T THINK ---

MR. ALFORD: A MOUNTAIN.

THE COURT: A MOUNTAIN TO CLIMB. AND YOU DID IT. AND WHILE THE SUBSTANCE OF WHAT YOU UNCOVERED IS DISCOMFORTING TO ME SINCE IT DEALS WITH THE LEGAL PROFESSION.

MR. ALFORD: IT'S DISHEARTENING TO EVERYBODY.

THE COURT: YEAH, IT REALLY IS. I MEAN, IT'S SICKENING FROM WHERE I SIT. BUT I THINK Y'ALL WERE THE ONES WHO CARRIED THAT LOAD. SO I WANT TO BE FAIR TO Y'ALL AS WELL.

I'M ALSO OF THE OPINION THAT I BELIEVE, AS I VE STATED, MAYBE NOT PUBLICALLY ON THE RECORD, BUT THE AMOUNT OF ATTORNEY FEES THAT WERE AGREED TO BE PAID BY DRYVIT IN THIS PARTICULAR LITIGATION WILL NEVER PAY ANY LAWYER FOR THE WORK THAT THEY HAVE DONE, AND WILL NEVER PAY THE LAWYER FOR THE WORK THAT THEY'VE DONE, A REASONABLE FEE. I MEAN, EVERYBODY IS TAKING A DISCOUNTED, TREMENDOUSLY DISCOUNTED RATE FOR WHAT Y'ALL HAVE BEEN ABLE TO ACCOMPLISH.

MR. ALFORD: I CAN'T AGREE MORE.

THE COURT: SO I'M TRYING TO COME UP WITH SOMETHING THAT IS FAIR.