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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

Appellate Case No. 2013-001367

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SC Court of Appeals

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

Timothy J. Treon and his wife, 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 2

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Stephen Tucker, Jeaneen Tucker, Charles Davis, Stephanie Davis, 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. Grimbail, 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.

Stephen Tucker, Jeaneen Tucker, Charles Davis, and Stephanie 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.

CIVIL ACTION NO. 2008-CP-07-3145

**PLAINTIFFS' MOTION FOR
LIMITED RELIEF FROM
ORDER STAYING CASE TO
ARGUE MOTION TO COMPEL**

CIVIL ACTION NO. 2008-CP-07-0774

TO: JAMES L. BRUNER, J.D., M. DAWES COOKE, JR., J.D., JOHN A. JONES, J.D., M. ELIZABETH JOWERS, J.D., DANIEL C. LEONARDI, 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 THE DEFENDANTS:

NOTICE

YOU WILL PLEASE TAKE NOTICE THAT as soon a hearing can be scheduled for counsel to heard before The Honorable J. Mark Hayes, II, at a location to be determined by Judge Hayes, Plaintiffs on behalf of themselves and on behalf of others similarly situated in the State of South Carolina, by and through their undersigned counsel, will move for an Order granting limited relief from the Order dated April 27, 2012, temporarily staying all activities in these cases, to allow Plaintiffs to argue their MOTION TO COMPEL DEFENDANT LAWYERS IN DEFENDANT LAW FIRMS TO PRODUCE RESPONSIVE DOCUMENTS, dated, filed, and served on June 10, 2011. Based on events and activities scheduled in the Underlying #1377 Case in the very near future, Plaintiffs respectfully move to shorten the ten (10) day notice requirement and for an expedited hearing on the motion for relief from the stay.

MOTION

This motion is made pursuant to Rules 6(d), 23, 26, 34, and 37, SCRPC, and seeks an Order granting limited relief from the Order dated April 27, 2012, staying activities in these cases, to allow Plaintiffs to argue their Motion to have the Court compel certain of the Original Class Counsel Defendants to produce documents they have been withholding from their former clients for years without any valid basis.

ARGUMENTS

1. Shortening the Time For Hearing On This Motion Is Necessary Because Those Documents Are Needed for Rule to Show Cause Hearing and There Is No Prejudice to Defendants.

Plaintiffs intend to provide to their lawyers in the Underlying #1377 Case any and all documents this Court were to order the certain Original Class Counsel Defendants to produce pursuant to Plaintiffs' Motion to Compel so that those documents could be used in the Rule Show Cause hearing. Plaintiffs also understand that the Court is striving to have the Rule to Show Cause hearing take place either during the last week of September, September 24-28, or the first week in October, October 1-5. Therefore, the typical ten (10) notice requirement set forth in the first sentence of Rule 6(d), SCRCP, will not provide sufficient time to have the motion heard, ruled upon, and if successful, complied with in time for the Rule to Show Cause hearing.

Because the Motion to Compel was filed and served on counsel for Original Class Counsel on June 10, 2011, well over a year ago, and because all parties to the Underlying #1377 Case are, or should be, gearing up for Rule to Show Cause hearing, there will be no material prejudice in shortening the time for this hearing.

Plaintiffs' counsel will make themselves available for a hearing on this motion in Spartanburg, Beaufort, or any other location convenient to the Court and at the earliest date and time convenient for the Court.

2. The Documents Withheld by Certain of Original Class Counsel Are Material to the Court's Factual Determinations Necessary for an Accounting.

A fundamental search for the truth is at the heart of Court's objectives sought in the Rule to Show Cause and Order for Accounting. Plaintiffs believe that the 117 documents

withheld by Defendants, LEATH, BOUCH & CRAWFORD, LLP; W. Jefferson Leath, Jr.; Michael S. Seeking (collectively "LBC Defendants") and the 19 documents withheld by Defendant William Dixon Robertson, III ("Robertson") contain valuable information that would be material, and maybe even critical, to this Court's efforts to ascertain the truth of the events relative to an accounting. Plaintiffs incorporate herein by reference all of their arguments made in the MOTION TO COMPEL DEFENDANT LAWYERS IN DEFENDANT LAW FIRMS TO PRODUCE RESPONSIVE DOCUMENTS, and will not reargue them here. Suffice it to say that none of the LBC Defendants' or Robertson's claims of privilege or protection will withstand scrutiny.

For the benefit of the Court, the tables below identify the documents as described by the LBC Defendants' and Robertson's privilege logs and the patent defects in their respective claims for privilege:

Page	Date	Description	Defect
2	08/16/2002	Letter from Grimball to Leath and Robertson	Claims attorney-client privilege but description reveals no communications with a client
2	01/03/2006	Email with handwritten notes	Claims work product but does not identify sender, recipient, or general nature of content; Patently defective and deficient description.
2	01/07/2003	Portion redacted from email from Leath to Peter Morgan with attachments; inner office communications redacted	Claims work product but Morgan was a third party and not co-counsel; document never was subject to work product protection.
3	09/07/2004	Letter from Robertson to Leath, Mullen, Wylie, Bowen and Grimball	This document was produced by Robertson.

Page	Date	Description	Defect
3	11/29/2005	Handwritten notes redacted, email produced	Claims work product but does not identify sender, recipient, or general nature of content; Patently defective and deficient description.
3	09/18/2006	Letter from Doffermyre to Leath	Claims work product but Doffermyre was a third party and not co-counsel; document never was subject to work product protection.
3	04/30/2002	Letter from Bowen to Russell Miller	Claims work product but Miller is president of Estate Builders, a defendant; document never was subject to work product protection.
3	05/13/2003	Letter from Bowen to Orrin Gresham	Claims work product but LBC Defendants have not identified Orrin Gresham in their discovery responses, but it appears he is a third party and not co-counsel; document never was subject to work product protection.
3	04/29/2003	Letter from Bowen to Orrin Gresham	Claims work product but LBC Defendants have not identified Orrin Gresham in their discovery responses, but it appears he is a third party and not co-counsel; document never was subject to work product protection.
3	08/16/2006	Internal office Email	Claims work product but does not identify sender, recipient, or general nature of content; Patently defective and deficient description.

Page	Date	Description	Defect
3	undated	Three entries for "Contact Sheet," "File folder containing Attorney Notes," and "File folder containing expenses"	Patently defective and deficient description.
4	undated	Interoffice Memorandum	Claims work product but does not identify author, recipient, or general nature of content; Patently defective and deficient description.
4	undated	Nine entries for "Various unsigned draft pleadings", "Handwritten notes / unsigned draft pleading", File folder containing Research", "File folder containing Attorney Notes / Research", and "Settlement Drafts/Attorney Notes"	Fails to identify the content of any of these folders; Patently defective and deficient description.
4	09/24/2002	Letter from Gary Shipman to Leath	Claims work product but Shipman was a third party and not co-counsel; document never was subject to work product protection.
4	undated	Correspondence produced, Post-it notes removed	Claims work product but does not identify date of the correspondence, author, recipient, or general nature of content; Patently defective and deficient description.
5	undated	Settlement Agreement with highlighting and notes	Claims work product but does not identify author or general nature of content; Patently defective and deficient description.

Page	Date	Description	Defect
5	06/27/2003	Handwritten notes on correspondence redacted, otherwise produced	Claims work product but does not identify author of the handwriting or general nature of content; Patently defective and deficient description. LBC Defendants did not produce any correspondence dated June 27, 2003.
5	09/12/2002	Letter from Sam Doak to Leath	Claims work product but LBC Defendants did not identify Sam Doak in their discovery responses or as part of the privilege log; Doak appears to be third-party; document never was subject to work product protection.
5	09/24/2002	Letter from Grimball to Joe Nicholson	Claims work product but Nicholson was a third party and not co-counsel; document never was subject to work product protection.
5	09/25/2002	Facsimile with attachment from Joe Nicholson to Leath	Claims work product but Nicholson was a third party and not co-counsel; document never was subject to work product protection.
5	09/26/2002	Facsimile with attachment from Joe Nicholson to Seekings	Claims work product but Nicholson was a third party and not co-counsel; document never was subject to work product protection.
5	10/03/2002	Letter from Joe Nicholson to Wylie	Claims work product but Nicholson was a third party and not co-counsel; document never was subject to work product protection.

Page	Date	Description	Defect
5	10/04/2002 to 11/22/2002	Nine letters from Allan Thorp to Leath	Claims work product but Thorp was a third party and not co-counsel; document never was subject to work product protection.
5	12/05/2002	Portion redacted from email from Leath to Peter Morgan	No e-mails from Leath to Morgan dated December 5, 2002 have been produced by anyone; Claims work product but Morgan was a third party and not co-counsel; document never was subject to work product protection.
5	12/04/2002	Email from Gary Mason to Leath	No e-mails from Mason to anyone dated December 4, 2002 have been produced by anyone; Claims work product but Mason was a third party and not co-counsel; document never was subject to work product protection.
6	12/05/2002	Portion redacted from email from Leath to Gary Mason	No e-mails dated December 5, 2002 have been produced by anyone; Claims work product but Mason was a third party and not co-counsel; waiver.
6	01/03/2003	Portion redacted from email from Leath to Doffermyre, otherwise produced	No e-mails from Leath to Doffermyre on January 3, 2002 have been produced by anyone; Claims work product but Doffermyre was a third party and not co-counsel; document never was subject to work product protection.
6	01/16/2003	Letter from Allan Thorp to Leath	Claims work product but Thorp was a third party and not co-counsel; document never was subject to work product protection.

Page	Date	Description	Defect
6	01/28/2003	Internal office email, portion redacted otherwise produced	Claims work product but does not identify sender, recipient, or general nature of content; Patently defective and deficient description. No internal LBC office e-mails dated January 28, 2003 have been produced.
6	01/29/2003	Letter from Allan Thorp to Leath	Claims work product but Thorp was a third party and not co-counsel; document never was subject to work product protection.
6	03/04/2003	Internal office email with handwritten notes	Claims work product but does not identify sender, recipient, or general nature of content; Patently defective and deficient description.
6	03/11/2003	Letter from Allan Thorp to Leath	Claims work product but Thorp was a third party and not co-counsel; document never was subject to work product protection.
6	04/24/2009	Email from Leath to Gary Mason / Internal office email	Claims work product but Mason was a third party and not co-counsel; document never was subject to work product protection.
6	10/20/2003	Letter from Joe Nicholson to Leath, Seekings & Grimball	Claims work product but Nicholson was a third party and not co-counsel; document never was subject to work product protection.
6	10/20/2003	Letter from Allan Thorp to Leath	Claims work product but Thorp was a third party and not co-counsel; document never was subject to work product protection.

Page	Date	Description	Defect
6	07/01/2003	Correspondence from Bowen to Leath, Seekings, Grimbail, Bouch and Robertson	This document was produced by Robertson; waiver.
7	08/16/2005	Email from Leath to Doffermyre	Claims work product but Doffermyre was a third party and not co-counsel; document never was subject to work product protection.
7	04/02/2007	Internal LBC Memo	Claims work product but subject to crime-fraud-tort exception.
7	09/16/2002	Memo from Bowen to LBC	This document was produced by Robertson; document never was subject to work product protection.
7	08/28/2002	Handwritten note redacted from page two of letter, otherwise produced	Claims work product but does not identify author of the handwritten note, general nature of content, or identify which of many letters transmitted on August 28, 2002 is being withheld from production; Patently defective and deficient description. Claims work product but.

B. Defendant Robertson's Supplemental Privilege Log

Defendant Robertson's privilege log fails in many places to identify documents by Bates Numbers and fails in many places to describe the content of the documents sufficiently to assess the applicability of the privilege. Plaintiffs do not take issue with Defendant Robertson's claims to confidentiality as to certain social security numbers and Defendant Lawyers' bank account numbers that have been redacted. The following, however, is a list of specific defects:

Page	Date	Description	Defect
2	01/12/2007	Unredacted version of Robertson 00036-00042 Redacted: substance of communications with Crystal (Robertson 00021)	Claims attorney-client privilege but Robertson00036-00042 is a set of tables showing Dryvit settlements from 1999-2002 and makes no reference whatsoever to any communications with Crystal.
2	Undated	Settlement negotiation notes prepared by Robertson (1 page)	Claims Attorney/Client Privilege; subject to crime-fraud-tort exception.
2	04/22/2003	Notes from Dryvit Settlement Meeting prepared by Robertson (3 pages)	Claims Attorney/Client Privilege; subject to crime-fraud-tort exception.
3	04/22/2003	Dryvit Settlement Conference chart (1 page)	Claims Attorney/Client Privilege; no reference to communication with client; subject to crime-fraud-tort exception.
3	11/22/2005	Unredacted version of Robertson 00043 Redacted: information from ethics counsel	Claims Attorney/Client Privilege; Robertson00043 was produced without redaction; the letter to Wylie makes no reference to any "information from ethics counsel"; subject to crime-fraud-tort exception.
3	08/08/2003	Letter from Robertson to Crystal (3 pages) requesting legal opinion regarding artificial stucco cases	Claims Attorney/Client Privilege; subject to crime-fraud-tort exception; allegedly Robertson is seeking ethics advice while representing Class in underlying case and long before his situation with the Horry County class action develop in September 2004; Robertson failed to make any disclosure to the Class of any ethical issues and continued to represent the Class until relieved as counsel in January 2006.

Page	Date	Description	Defect
3	09/08/2003	Letter from Crystal to Robertson providing ethics advice (3 pages)	Claims Attorney/Client Privilege; subject to crime-fraud-tort exception; allegedly Robertson is obtaining ethics advice while representing Class in underlying case and long before his situation with the Horry County class action develop in September 2004; Robertson failed to make any disclosure to the Class of any ethical issues and continued to represent the Class until relieved as counsel in January 2006.

At a minimum, Plaintiffs will seek to have all of the subject documents delivered to the Court for an *in camera* inspection prior to the hearing on the Rule to Show Cause and Order for Accounting.

3. ALTERNATIVE METHODS TO OBTAIN THESE DOCUMENTS HAVE BEEN ATTEMPTED BY PLAINTIFFS.¹

Counsel for Plaintiffs have been communicating with counsel for the Original Class Representative Defendants in an effort to reach an agreement to resolve the claims in this lawsuit against them. As part of those efforts, the Original Class Representative Defendants were requested to 1) agree to waive all lawyer-client privilege and work product protection with regard to the representation of them by the Original Class Counsel Defendants and 2) obtain all of the subject documents on the two privilege logs and

¹ Prior to filing the Motion to Compel, correspondence was transmitted to counsel for the LBC Defendants and Robertson requesting that they withdraw their claims for lawyer-client privilege and work product protection for the documents identified on their respective privilege logs. All of those requests were rejected.

provide them to counsel for Plaintiffs prior to the hearing on the Rule to Show Cause and Order for Accounting. In response to those requests, counsel for Plaintiffs understand that the Original Class Representatives have not been successful and/or are being told they will not be successful in their efforts to get some or all those documents from the LBC Defendants and/or Robertson.

Plaintiffs, as members of the class in the Underlying #1377 case, are the actual owners of the privilege and work product protection. Similarly, the Original Class Representatives are also co-owners of the privilege and work product protection. Given that both groups of clients have removed any argument for claim of privilege, there is no basis for the LBC Defendants and Robertson continue to withhold these documents.

4. Alternatively, the Motion to Compel Can Be Argued in the Underlying #1377 Case.

The interests of the Class in the Underlying #1377 Case and the interests of the Plaintiffs in these two cases are virtually identical. Plaintiffs in these two cases have no objections whatsoever if this Motion Compel is argued by counsel in the Underlying #1377 Case leaving in place the stay imposed by the Order dated April 27, 2012. Plaintiffs would respectfully request, however, that if this Motion to Compel is argued successfully in the Underlying #1377 Case that they be allowed to obtain copies of all documents produced as a result of the Court's ruling.

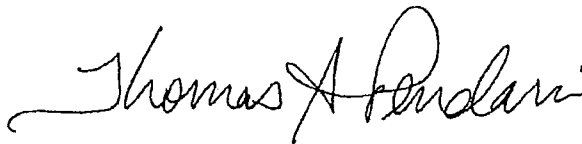
CONCLUSION

Plaintiffs respectfully request an Order granting limited relief from the Order dated April 27, 2012, temporarily staying all activities in these cases, to allow Plaintiffs to argue their MOTION TO COMPEL DEFENDANT LAWYERS IN DEFENDANT LAW FIRMS TO PRODUCE

RESPONSIVE DOCUMENTS, dated, filed, and served on June 10, 2011. Because the hearing on the Rule to Show Causes in the Underlying #1377 Case is scheduled in the very near future, Plaintiffs respectfully move to shorten the ten (10) day notice requirement and for an expedited hearing on the motion for relief from the stay.

Respectfully submitted,

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September 7, 2012

Beaufort, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2002-CP-07-1377

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

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

v.

Dryvit Systems, Inc., ... Defendant.

MOTION TO HOLD APPEAL IN ABEYANCE

Appellants respectfully move the Court to hold the appeal in this matter in abeyance pending a ruling from Judge Mark W. Hayes II on the Appellants' motions¹ to reconsider or amend pursuant to Rule 59(e), SCRCP, which were filed on October 9, 2012. As noted in their Memorandum on Appealability, filed on September 27, 2012, in conjunction with the Notice of Appeal filed of that date, this appeal involves two related and complex class actions. The Honorable J. Mark Hayes, II ("Judge Hayes") presides over both of them. Judge Hayes has issued a Rule to Show Cause in the above-captioned

¹ Appellants William Dixon Robertson III and William M. Bowen filed a joint motion pursuant to Rule 59(e), and Appellants Jefferson Leath, Jr., Michael S. Seekings, and Timothy W. Bouch filed a separate Rule 59(e) motion.

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SC Court of Appeals

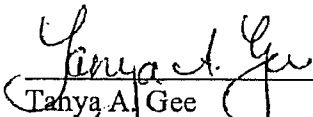
matter to the Appellants, notwithstanding that they are not (and have never been) parties to that action.² This Rule to Show Cause effectively deprives the Appellants of a jury trial in an integrally-related companion case for professional negligence in which Appellants are the defendants. The Appellants timely filed a motion to dismiss the Rule to Show Cause, the hearing for which was held over two days before Judge Hayes on July 18 and 19, 2012. Judge Hayes e-mailed the parties his intent to deny the motion to dismiss, but as of September 27, 2012, no formal order had been filed.

Because testimony for the Rule to Show Cause was set to begin on Friday, September 28, 2012, notwithstanding that Judge Hayes had not then issued a written order, the Appellants filed this immediate appeal in order to preserve their right to a jury trial. *See Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997) (holding that an order denying a party a mode of trial to which the party is entitled by law *must* be appealed immediately and cannot be challenged in an appeal from final judgment).

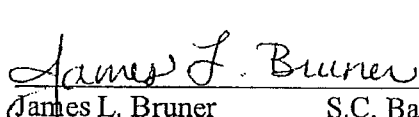
Judge Hayes issued his written order on September 28, 2012 and the Appellants have timely filed motions to reconsider in order to preserve their arguments for appeal. Considering the circumstances surrounding the filing of this appeal, particularly the necessity of filing it when the Appellants did as well as the subsequent necessity to file a Rule 59(e) motion after having timely filed an appeal, the Appellants respectfully request that the Court of Appeals hold the current appeal in abeyance until Judge Hayes has issued an order addressing the Appellants' pending motions for reconsideration. The Appellants will bear the responsibility of promptly informing this Court as soon as an order has been issued.

² The Appellants were original class counsel in this action, but were relieved as counsel by Order of Judge Hayes dated January 18, 2006 and new class counsel were substituted.

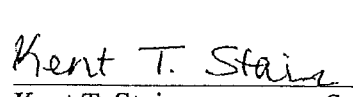
Respectfully submitted this 10th day of October, 2012.


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2002-CP-07-1377

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

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

v.

Dryvit Systems, Inc.,..... Defendant.

NOTICE OF APPEAL

William Dixon Robertson III, William M. Bowen, W. Jefferson Leath, Jr.,
Michael S. Seekings, and Timothy W. Bouch, individually through their respective
undersigned counsel, appeal the Rule to Show Cause Order issued by the Honorable J.
Mark Hayes, II on June 5, 2012, the September 28, 2012 order denying their motions to
dismiss the Rule to Show Cause, and the June 5, 2013 order denying their motions for
reconsideration of the September 28, 2012 order, copies of which are attached hereto
pursuant to Rule 203(d)((1)(B)(ii), SCACR. The Appellants received written notice of
entry of the June 5, 2013 order denying their motions for reconsideration on June 7, 2013.

[Signature block on following page]

June 14, 2013

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STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
)TIMOTHY TREON and P. JENNINGS
SCEARCE, individually and on behalf of
Others similarly situated in the State of
South Carolina,Civil Action No.: 2008-CP-07- 00774

Plaintiffs,

v.

CLASS ACTION COMPLAINT
(JURY TRIAL DEMANDED)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.

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FILED
CLERK OF COURT
SOUTH CAROLINA

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, South Carolina Rules of Civil Procedure to recover monetary and punitive damages for civil conspiracy, breach of fiduciary duty; aiding and abetting breach 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 SCRCF, 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 Dryvit paid the Original Class Representatives individual cash settlements and \$825,000 in attorneys fees.

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.

4. In this Complaint the term "Posey Action" 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.

Parties, Capacity and Jurisdiction

6. This Class Action Complaint is filed and these proceedings are instituted pursuant to Rule 23 of the South Carolina Rules of Civil Procedure. The parties named herein and the subject matter alleged herein are within the jurisdiction of this Court.

7. Defendant Dryvit Systems, Inc. ("Dryvit") is a Rhode Island company doing business in South Carolina and purposefully directing its products into South Carolina. Dryvit was a named defendant in both the Cardamone and Posey Actions.

8. Defendants John and Sally Cardamone (hereinafter collectively referred to as the "Cardamones") 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.

9. Defendants Benjamin T. and Diane M. Clark (hereinafter collectively referred to as the "Clarks") are citizens and residents of 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.

10. Defendants 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 23 SCRCP, and a Court Order, subsequently entered into a lucrative individual settlement with Dryvit and abandoned her representation of the Cardamone class.

11. 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.

12. Unless otherwise indicated, Defendants Cardamones, Clarks, Gianni, and Gordon are hereinafter referred to collectively as the "Original Class Representatives."

13. Defendants John Doe and Mary Roe are unnamed individuals and entities who were participants in and facilitated the abandonment of the Cardamone Class.

14. Named Plaintiffs Timothy J. Treon and P. Jennings Searce were absent members of the Cardamone Class (i.e. not Court Appointed Class Representatives) who intervened in the Cardamone Class Action as named class representatives because the Original Class Representatives, as aided and abetted by the Defendant Dryvit and John Doe and Mary Roe, abandoned the representation of the absent class members interests in favor of lucrative individual settlements with the Defendant Dryvit.

Factual Background

15. Defendant 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.

16. 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.

17. 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.

18. 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.

19. Original Class Representatives instituted the Cardamone Class 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 the Posey action because the Original Class Members claimed that the Posey settlement was wholly inadequate to compensate South Carolina Class Members for their damages.

20. 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 those duties, and have no interest in conflict with other members of the Class.

21. 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.”

22. On September 3, 2003, the Original Class Representative John Cardamone filed an opt out in the Posey Class Action in Tennessee, effectively opting the State of South Carolina (Cardamone Class Members) out of the Posey Class Action.

23. Subsequent to the Judge Kemmerlin’s Order certifying a Class Action in South Carolina and the Opting Out of the South Carolina Class, Dryvit, the Original Class Representatives and John Doe and Mary Roe, deliberately undertook the settlements with the Original Class Representatives in order to eliminate the Cardamone class action.

24. 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 lucrative individual settlements, the Defendants failed and refused to file any notice plan with the Court.

Class Action Allegations

25. This action is brought by the Named Plaintiffs on their own behalf and all other

persons similarly situated, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure, as representatives of the Class defined hereinbelow.

26. The Class of the instant action is comprised of members of the class created by the Cardamone Action.

27. 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.

28. There are numerous common questions of law and fact regarding the wrongful acts and omissions complained of herein.

29. 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.

30. 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.

31. Notice for the pendency and any resolution of this action can be provided by publication of notice to Class Members.

32. 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.

33. The claims of Named Plaintiffs, as the Class Representatives, are typical of the claims of the various members of the Class.

34. The Named 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. The Named Plaintiffs and Class Members envision no unusual difficulty in the management of this action as a class action.

40. Certification is appropriate under Rule 23 of the South Carolina Rules of Civil Procedure.

Common Deficiencies Relating to Defendants' Conduct

41. By undertaking to serve the Cardamone class as its named representatives, the Original Class Representatives owed a fiduciary duty to all unnamed class members.

42. The Original Class Representatives in reaching lucrative individual settlements which Dryvit conditioned on the dismissal of the Cadamone Action, knew or should have known would violate their fiduciary duties, Rule 23 SCRPC and the duties imposed by Judge Kemmerlin's August 30th Order.

43. Upon information belief, the 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 SCRPC and other authority, because such settlements were conditioned on the abandonment and elimination of the Cardamone Action.

44. Cardamone through his counsel agreed to settle his individual case against Dryvit and dismiss the South Carolina Class Action for cash which included a "bonus reflecting Mr. Cardamone's status as a named Plaintiff in the South Carolina Class Action."

45. 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).

46. 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 attorneys and/or law firms who were then representing the *Cardamone* class.

47. On February 5, 2003, settlement conferences were agreed to by *Cardamone* class counsel Michael Seekings of Mullen, Wylie and Seekings. On or about April 22, 2003, Dryvit, members of *Cardamone's* 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.

Common Allegations Relating to Damages

48. 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
(Civil Conspiracy)

49. The foregoing paragraphs are hereby re-alleged as if fully set forth.

50. 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.

51. The damages to the Class are a natural and proximate result of the civil conspiracy between Dryvit, the Original Class Representatives and John Doe and Mary Roe. 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 the Original Class Representatives
(Breach of Fiduciary Duty)

52. The foregoing paragraphs are realleged as if fully set forth herein verbatim.

53. The Original Class Representatives owed a fiduciary duty to all of the unnamed members of the class created by the Cardamone Action.

54. 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 lucrative individual settlements, the Original Class Representatives 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 thereunder, as required by the certifying court and Rule 23 of the SCRCF.

55. 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 lucrative individual cash settlements with the Defendant Dryvit.

56. The aforementioned Defendants further breached their fiduciary duty to the Plaintiffs and class members by failing to fully inform the Plaintiffs and class members regarding the status and proceedings of both the Cardamone and Posey Actions.

57. 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.

58. As a result of the Defendants' aforementioned breaches of fiduciary duty, Plaintiffs and class members have been damaged in an amount to be proven at trial.

59. As a result, Plaintiffs and class members are entitled to the appropriate relief as set forth below.

For a Third Cause of Action as to Defendant Dryvit
(Inducing, Aiding, and Abetting a Breach of Fiduciary Duty)

60. The foregoing paragraphs are re-alleged as if fully set forth herein verbatim.

61. Defendants Dryvit is a sophisticated business entity with extensive experience in EFS litigation.

62. Upon information and belief, John Doe and Mary Roe are sophisticated business people experienced in construction litigation.

63. At all times relevant to this Complaint, the Defendant Dryvit had a significant financial interest in resolving its outstanding liability for alleged deficiencies with its residential EIFS by way of the Posey settlement.

64. The Defendant made certain representations to its shareholders and other members of the public that it had resolved most of its outstanding EIFS residential liability with the conclusion of the Posey action at a time when the Cardamone action was pending.

65. The Defendant Dryvit knew or should have known that the Original Class Representatives owed a fiduciary duty to the Plaintiffs and the unnamed members of the class and that Dryvit knew or should have known that buying off the Original Class Members with lucrative individual cash settlements and the payment of \$825, 000 in attorneys fees to induce them to violate a Rule 23 SCRCF, 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 duties to the absent Cardamone Class members.

66. The Defendants Dryvit, John Doe and Mary Roe knowingly encouraged, and participated both directly and constructively in the breach of the fiduciary duty owed by the Original Class Representatives to the unnamed class members.

67. As a condition of settlement, Dryvit required that the South Carolina Class action case be dismissed or eliminated and at the time it imposed such condition, Dryvit 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 offering lucrative settlements, bonuses and substantial payments to Original Class Representatives' counsel, Dryvit knowingly participated in,

encouraged and aided and abetted Original Class Representatives' breach of their fiduciary duties.

68. Plaintiffs were damaged by the Original Class Representatives' breach of their fiduciary duty to Plaintiffs as set forth in this Complaint.

69. As a result, Plaintiffs are entitled to the appropriate relief as set forth below.

For A Fourth Cause of Action
(Fraudulent Concealment)

70. The foregoing paragraphs are re-alleged as if fully set forth.

71. 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.

72. Defendants had knowledge of material facts that were relevant to the interest of the unnamed, absent Cardamone Class members.

73. Defendants owed a duty to make those material facts and information known to the Cardamone unnamed, absent Class Members.

74. 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.

75. 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

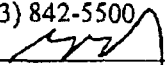
fraudulent concealment were willful, intentional, and wanton, the Plaintiffs and those similarly situated are entitled to an award of punitive damages.

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:

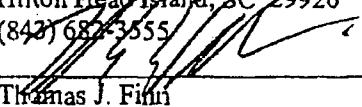
- a. Awarding Plaintiffs and class members special, compensatory and punitive damages, and other damages, for the acts complained of herein, in an amount to proven at trial, plus interest;
- b. Awarding Plaintiffs and class members's attorneys' fees and costs against Defendants, as allowed by law; and
- c. Granting such other and further relief as the court deems just and proper.

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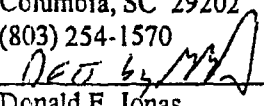
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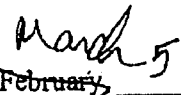


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Donald E. Jonas


February 5, 2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FOR
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	Civil Action Number: 2002 CP 07 1377
John Cardamone and his wife Sally	)	
Cardamone and Benjamin T. Clark and his	)	
wife, Diane M. Clark, and Ramona Gianni,	)	DRYVIT SYSTEMS, INC.'S MOTION TO
and Nathan W. Gordon, and his wife, Jill	)	DISMISS
C. Gordan, 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.	)	

NOW COMES Defendant Dryvit Systems, Inc. (hereinafter "Dryvit"), and hereby moves the Court for an Order dismissing Dryvit from this action on the grounds that Plaintiffs are members of a certified class of homeowners in the case of *Bobby Posey and wife Sabrina Posey, and Dale Teague, on behalf of themselves and all similarly situated v. Dryvit Systems, Inc.*; Civil Action No. 17,1715-IV (Jefferson County, TN), a class action presently pending in Tennessee state court.

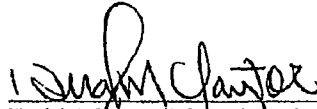
The basis for this Motion is as follows: In this action, Plaintiffs assert claims against Dryvit for alleged damage to their respective homes. Plaintiffs claim that Dryvit's EIFS product that was installed on their homes is defective. Plaintiffs' claims against Dryvit in this case are identical to the claims that were settled in a related class action pending in the state courts of Tennessee, *Bobby Posey and wife Sabrina Posey, and Dale Teague, on behalf of themselves and all similarly situated v. Dryvit Systems, Inc.*; Civil Action No. 17,1715-IV (Jefferson County, TN). Plaintiffs' claims against Dryvit are barred by virtue of the final order and judgment that approved the nationwide class action settlement in *Posey*. Plaintiffs are members of the settlement class in *Posey*. The final order and judgment approving the

settlement – which is entitled to Full Faith and Credit by this Court – bars Plaintiffs' claims against Dryvit under the doctrines of *res judicata* and settlement and release.

This Motion is based upon the affidavits and documents filed herewith in a binder entitled Dryvit Systems Inc.'s Evidence in Support of Motion to Enforce Settlement and Dismiss, the pleadings filed in this case, memorandum in support filed herewith, and the common and statutory law of the State of South Carolina.

This the ²⁰21 day of September, 2005.

WOMBLE CARLYLE SANDRIDGE & RICE, PLLC



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Attorney for Defendant Dryvit Systems, Inc.

1 STATE OF SOUTH CAROLINA)
2) IN THE COURT OF COMMON PLEAS
3 COUNTY OF BEAUFORT)

4 STEPHEN AND JEANEEN TUCKER, CHARLES)
5 AND STEPHANIE DAVIS, AND JOHN DOE)
6 AND JANE DOE, INDIVIDUALLY AND ON) TRANSCRIPT
7 BEHALF OF OTHERS SIMILARLY SITUATED)
8 IN THE STATE OF SOUTH CAROLINA,) OF
9)
10 PLAINTIFFS,) RECORD
11)
12 - vs -)
13)
14 LEATH, BOUCHE, & CRAWFORD, LLP, W.)
15 JEFFERSON LEATH, JR., WILLIAM DIXON)
16 ROBERTSON, III, MICHAEL S. SEEKINGS,)
17 FRANK E. GRIMBALL, MULLEN WYLIE, LLC)
18 FORMERLY MULLEN, WYLIE, & SEEKINGS,)
19 LLC, WILLIAM M. BOWEN, JOHN CARDAMONE,)
20 SALLY CARDAMONE, BENJAMIN T. CLARK,) 2008-CP-07-3145
21 DIANE M. CLARK, RAMONA GIANNI, AND)
22 NATHAN W. GORDON,)
23)
24 DEFENDANTS.)

25 TIMOTHY TREON AND P. JENNINGS SCEARCE,)
INDIVIDUALLY AND ON BEHALF OF OTHERS)
SIMILARLY SITUATED IN THE STATE OF)
SOUTH CAROLINA,) 2008-CP-07-0774
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.)

July 18th and 19th, 2012
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE J. MARK HAYES, II, JUDGE

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25 Transcribed by Pamela E. Green, Circuit Court Reporter

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(There were no exhibits marked or testimony taken
during this hearing.)

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1 effected the entire class.

2 There had been an injunction granted preventing
3 further excavation of this pond that was common property.
4 They had retained that when they filed it, and then part of
5 the settlement was that that injunction was vacated, and
6 then the suit was dismissed. And, so, that was to the
7 detriment, arguably, of the other members of the class.
8 And, so, clearly that was more than an individual
9 settlement. That was a settlement that effected the class.

10 My clients---

11 THE COURT: Which have you, which -- can I finish your
12 sentence?

13 MR. COOKE: Yeah.

14 THE COURT: Which did -- which, in Premium, that's
15 what they -- they did not disclose to the Court. They did
16 not seek prior approval.

17 MR. COOKE: Exactly. And, in fact, it said that the
18 Court innocently, not even knowing that there had been a
19 class action, approved the, signed the Order of Dismissal
20 in that case. And, so, in this case there was -- Rule 23
21 says that a, in order for a class action to be settled you
22 have to go to the Court. It doesn't really say you have to
23 kind of tease this out of Premium Investment to see that
24 even an individual settlement of a class rep might, might
25 require Court approval.

1 Rule 23 doesn't say that. It says settlement of a
2 class action must be accompanied by notice to all class
3 members, and I, I, I would of believed that the reason,
4 that the rational for that was exactly as Your Honor's
5 preamble stated, and that's because you may be taking
6 action that effects the other members of the class, and you
7 have a fiduciary duty to them not to do anything that hurts
8 their interest.

9 Now, the law is replete with, with situations where a
10 class representative has become disqualified for whatever
11 reason. Sometimes they die. Sometimes they lose interest.
12 Sometimes they are found not to have common interest and,
13 and it's a seamless procedure to substitute one and for the
14 other.

15 So, here's the point where I hope I'm not conceding
16 anything that I couldn't, shouldn't concede. But not
17 reading 23, Rule 23, but reading Premium Investment and
18 reading the dictum in there, one could argue that even the
19 individual settlement should of had Court approval because
20 the Court said that even a -- it's sort of disjunctive. It
21 says that you can settle without Court approval if you're
22 not the class rep, if you don't have the fiduciary duty,
23 and if you don't effect the rest of the class.

24 But, Your Honor, I would submit that it would of been
25 an abuse of discretion not to approve that settlement for

1 the precise reason that we've just discussed, and that is
2 that the settlement was an individual settlement. Dryvit
3 wasn't paying any money for the class. They were paying to
4 settle these individual claims in separate lawsuits that
5 these, that these individuals have brought on their own, on
6 their own initiative.

7 THE COURT: So, even if it -- even if they should have
8 gone to Court to seek approval, your argument then is no
9 harm, no foul because it would of been abuse of discretion
10 by me or Judge Kemmerlin not to have approved the
11 settlement if we had been asked?

12 MR. COOKE: Exactly. There would of been no reason
13 whatsoever because none of that consideration for those
14 settlements had anything to do with effecting the class.
15 None of it was designated to be allocated to the class. It
16 was all based on the repair estimates or repair costs that
17 were submitted by, by my clients and, most important, there
18 was nothing done for my client's perspective that effected
19 the rest of the class because substituting a class
20 representative is supposed to be automatic. Virtually,
21 virtually automatic.

22 THE COURT: Even from a Court's perspective?

23 MR. COOKE: Well, the Court has to agree to it and has
24 to find that the new class representative meets all the
25 requirements. But that wouldn't, wouldn't of been a

1 problem, and we found cases where---

2 THE COURT: Well, let me ask you a question on that.

3 It would not have been a problem if the, if me or some
4 other judge who's assigned the class action lawsuit
5 actually finds that that class, substitute class
6 representative has the appropriate interest in the
7 litigation so that they can become that advocate for the,
8 for the class, unknown class or unknown class members.

9 MR. COOKE: Exactly. Exactly.

10 THE COURT: So, it would not necessarily be just a
11 perfunctory thing on the part of the Court.

12 MR. COOKE: Maybe perfunctory wasn't the right word,
13 but---

14 THE COURT: That was probably my word.

15 MR. COOKE: But what, what disqualified our clients
16 was the fact that they no longer had commonality of
17 interest---

18 THE COURT: Right.

19 MR. COOKE: ---with the rest of the class because they
20 had signed a release to release the defendants. So, that
21 makes them a lousy class representative, but they're many
22 others. I think there's a list of 256 summoned in the, in
23 the 1377 class. Any one of whom presumably would of been
24 qualified to be a substitute class representative.

25 So, again -- and, and, you know, my clients have

1 nothing against their lawyers in this case. But, but
2 they -- and I think I -- the lawyers understand we do stand
3 in a bit of a different position here, and that is that,
4 from the time that my clients settled their individual
5 cases, they really had no need for legal representation at
6 that point. They were done.

7 And, so, to the extent that the complaint here from
8 the plaintiffs is that well, this case was allowed to
9 linger for two years before we finally got class reps and
10 somehow we were prejudiced, that was not, with all due
11 respect, was not my client's doing.

12 THE COURT: Because they were represented by the class
13 lawyers, lawyers for the class?

14 MR. COOKE: Well, they, they were represented -- in
15 their minds, they were represented up until the time they
16 had settled their cases, and then they didn't have lawyers
17 anymore. They didn't have, see any reason to need them.

18 As far as they had any reason to believe, they would
19 of been quickly replaced by other class representatives if
20 they had, if that had been needed, and that's why, that's
21 why I don't think that the Court would of had any reason to
22 not approve their individual settlements or their
23 individual lawsuits. Those cases were gonna go to trial.
24 I mean they, they were on the, on the trial docket as
25 standalone cases that preexisted this class action.

1 THE COURT: Were the, were the class representatives,
2 those -- were they not looking to the class, to the
3 attorneys that were handling the class action lawsuit to
4 advise them about issues?

5 MR. COOKE: Well, it happened to be that those were
6 the same lawyers that were representing them in their
7 individual case. And, so, they were up until the point
8 that they were settled and then they went home.

9 THE COURT: Okay. All right.

10 MR. COOKE: And, and it never would of dawned on them
11 that Rule 23 would of applied to them because they had
12 their individual lawsuits that they had filed on their own
13 having taken the initiative to hire lawyers before there
14 ever was a class action. I mean they were, they were
15 recruited to be class reps once the decision was made to
16 bring the class action, but they had already taken the
17 initiative to file their own suit.

18 That actually kind of leads me into what our argument
19 is, but I'm still answering questions that the Court has.

20 THE COURT: And this is informative because -- this is
21 informative to the Court because, from what I've heard over
22 the years, it's sort of being confirmed by, by my
23 understanding that there's really not going to be that much
24 in dispute factually as to what transpired.

25 In these, in these releases that you've handed me that

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1 needed to take a little better, take a look at those
2 allegations and those assertions keenly to be sure that
3 they are appropriate, be sure that they are proper.

4 MR. PHILLIPS: I believe in this case, Your Honor, the
5 class representatives are, are well represented by
6 respected counsel. It is the nature of a Rule to Show
7 Cause proceeding is we put forward our prima facie case.
8 The burden now shifts to them. There's, there's no
9 limitation on what evidence they can put on.

10 I mean it's, it is -- it's a hearing where the other
11 side doesn't get to do any discovery. So, I'm not sure if
12 it's inherently unfair proceeding for them, and certainly
13 for, for people who came in front of this class, came in
14 front of this Court ten years ago represented to the Court
15 that they were gonna be zealous representatives of the
16 class, it's not unduly burdensome for them to have to come
17 to court and explain their actions.

18 MR. FIELDS: Your, Your Honor, I don't want to
19 completely leave the disqualification before I get the full
20 record.

21 THE COURT: That was my -- I apologize.

22 MR. FIELDS: And that's, that's -- I certainly
23 understand, and I'm, and I'm sorry I gave the opening to
24 wind Mr. Phillips up again. I apologize.

25 MR. COOKE: Could I help -- if I can help with that,

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1 MR. COOKE: Among who?

2 I'm sorry.

3 THE COURT: Between your clients and their prior
4 attorneys?

5 MR. COOKE: My client -- I will say that my clients
6 have not waived their right to hold those attorneys
7 accountable. Let me think for a moment as to whether I can
8 be any more specific than that.

9 THE COURT: You know, I've -- documents have been
10 presented to me in this 1377 case that indicates that there
11 was conversations taking place, via e-mail, between lawyers
12 for one side and lawyers for another side, and that these
13 lawyers were going to actually appear in front of me in a,
14 an, in an arena that's supposed to lend itself to being
15 adversarial, but there was already between an agreement
16 between the lawyers, if the agreement was there, then there
17 was already this agreement that this argument was going to
18 be staged in front of me. Therefore, eliminating the
19 filtering process of the adversarial arena in a class
20 action lawsuit.

21 Is there any type of those agreements to where
22 arguments are being presented to me that have already been
23 predetermined by, by lawyers representing one set of people
24 and lawyers representing another set of people?

25 MR. COOKE: No, absolutely not. I mean without,

1 without waiving any kind of privilege, I think I can say
2 that my clients fully expect to be indemnified and held
3 harmless from liability, but, beyond that, there's
4 absolutely no agreement whatsoever.

5 THE COURT: Okay. I mean I sort of expected that, you
6 know. I mean---

7 MR. PHILLIPS: Your Honor, with all due respect to
8 Mr. Cooke, he knows what he's been told. He only knows
9 what he's been told, judge, by people who have undertaken a
10 duty to this class, back in 2002, who had their deal in
11 2003 as this letter sets out. This letter isn't the
12 inventory settlement that, that Dryvit was, Mr. Fields was
13 telling you about. This isn't the normal case where a
14 bunch of lawyers have a bunch of cases and a bunch of
15 clients have opted out of a class action so the defendant
16 cuts things off, and comes in and does an inventory
17 settlement.

18 This is a settlement where the lawyers have a deal.

19 THE COURT: Well, it's going to be interesting,
20 whenever this Court does hear from the lawyer's prior class
21 counsel because I believe, as I indicated in the Rule to
22 Show Cause, there seems to be a, a disagreement as to once
23 the, once the request to Judge Kemmerlin was made to
24 certify the class, as to then how do we then proceed with
25 representing our individual clients, and it, you know, and

1 it could be that one or two of the lawyers thought that you
2 would do X, Y, and Z, and another couple of the lawyers
3 thought you would do A, B, and C.

4 Once the opt out occurred, and Kemmerlin said, okay,
5 we're gonna certify the class in South Carolina, it's gonna
6 be interesting to hear exactly what the lawyers thought
7 they could do with that certification or that
8 acknowledgment by Judge Kemmerlin that he would certify the
9 class, and what they felt like was proper in their
10 relationship to the Court, whether or not they felt like
11 they did have an obligation simply because Judge Kemmerlin
12 said okay, certify, I'll certify the class, prepare me a,
13 the notice plan and begin the process.

14 It would be interesting to see at what stage that they
15 feel like there's obligations under Premium Investment that
16 actually kicked in or whether, as Mr. Fields has, has
17 referenced, whether they felt like that, that they then
18 could use that opt out to go through that inventory list of
19 settlements and not have any obligations to the class, to
20 the class action.

21 I don't know. It's going to be interesting to see
22 what they wanted.

23 MR. PHILLIPS: And that's all true, Your Honor, but
24 let's go back to the timeline of what these class
25 representatives did.

1 September 2002 they get this class certified. They
2 file in August of 2002. They get it certified
3 September 3rd, 2002. They're in Tennessee appearing at,
4 through their counsel, and through their objection, I'm
5 sorry, their opt-out form that they filed, they're
6 appearing in Tennessee the very next month, and then
7 there's a resolution.

8 They have a duty -- we talked earlier about what were
9 their misrepresentations when you are a fiduciary and have
10 a duty to speak, the failure to speak is a
11 misrepresentation. They had a duty, under Court order, to
12 proceed notice. They didn't do that. They had a, they had
13 a duty to reveal what they were doing to the class. They
14 certainly didn't do that given the multiple opportunities.

15 And, so, they then have the power of the class behind
16 them, the class claims behind them, and they go and
17 negotiate and want this Court to believe they negotiated
18 their individual settlements with no reference to that
19 power when this document demonstrates that their
20 settlements were contingent upon this case going away?

21 I mean that's what this case -- this is what it says.
22 This represents a premium.

23 Well, I'll tell you what that premium is, Your Honor.
24 I don't need Mr. Baker's letter to prove that. They paid
25 \$23 a square foot. In Posey, most people were getting a

1 warranty. If you got money, you got six or seven dollars a
2 square foot. So, there's triple the cash value in Posey.
3 You get it now. Not after an inspection and repair process
4 that Posey had. You get it immediately to fix it. So, you
5 get three times the amount of money. You get it
6 immediately.

7 And then what do they do?

8 They come back here, and, and, and without claims,
9 because they have a settlement, and when Mr. and
10 Mrs. Creasy, Harry and Trudy Creasy try to intervene in
11 2002 and 2003, they get blocked that. I mean let's
12 disabuse the Court of the notion that, for some reason,
13 they thought all was well because we got our individual
14 settlements. They knew others were trying to get in to
15 prosecute this case at a time when it would have mattered,
16 but they opposed that.

17 They come back to this Court in 2008 and I apologize.
18 I don't have copies of these because it just came up. John
19 Cardamone and Benjamin Clark filed affidavits in support of
20 Dryvit's motion to dismiss this case. The very thing their
21 attorneys were talking about in e-mails that have been
22 produced to the Court in this letter Mr. Baker wrote. So,
23 you know, it, it doesn't pass the smell test that these
24 sophisticated individuals who have, now that we've seen
25 their settlement documents, they have difficult individual

1 cases, they use the power of this class to settle it.

2 That's a classic conflict of interest, and if I might
3 approach, you know, these are already in the record if I
4 could give you copies.

5 THE COURT: They're not in the notebook?

6 MR. PHILLIPS: I don't believe so, Your Honor. I
7 apologize. The notebook that's entered, just for the
8 record, Your Honor, is just what you instructed. Just
9 materials that are referenced in your work.

10 MR. COOKE: Are those the ones we filed cause we filed
11 affidavits with our copies?

12 MR. PHILLIPS: Those, those were the copies we filed
13 way back before---

14 MR. COOKE: 2008.

15 MR. PHILLIPS: Thank you.

16 THE COURT: And, Mr. Phillips, I appreciate your
17 passion. I've heard your arguments before. I am grappling
18 with not whether those questions can be asked, but in what
19 forum, this or the litigation, should they be asked in
20 regards to the class representatives, class representatives
21 alone.

22 See, the Rule to Show Cause, while I want to be
23 mindful, I want to make that record so that anybody that
24 looks at this case later knows that I did not take lightly
25 the allegations that were made against prior counsel and

1 prior class representatives, to be able to answer those
2 allegations, but also I want to be sure that it's done in a
3 manner that is, that is fair to everyone.

4 The goal, monetarily, out of the Rule to Show Cause is
5 gonna be limited to, in my assessment, to finding where
6 that benefit is. That's where the constructive trust
7 comes. And, so -- you know, if I'm going to -- if I'm
8 going to keep the representatives in when I have a comfort
9 level that if, in fact, allegations are proved against the
10 class representatives, that then there would actually, then
11 also would be a monetary amount that really could not be
12 better taken care of over in the lawsuit. So that's what
13 I'm grappling with. Not -- I don't want you to have, be
14 left with the impression that I do not wish for those
15 questions to be asked of these people.

16 MR. PHILLIPS: I understand, Your Honor, and it's -- I
17 guess our, our, and Mr. Cooke read the pertinent part of
18 your order seeking a constructive trust over the monies
19 they received or sanctions, or sanctions for their
20 misconduct.

21 The Court, in this Rule to Show Cause proceeding, has
22 a different duty than a jury would, different burden of
23 proof, different burden of persuasion, and frankly a
24 motivation that may or may not exist in a class action
25 which may or may not be tried in our lifetime to get to the

1 bottom of what was represented to the Court, and that's the
2 essence of contempt, right?

3 The fact that counsel and, and, and their parties put
4 together a joint statement to a Court is gonna sound fairly
5 logical I would think to a jury in a negligence, in a
6 malpractice case. They're gonna be on the same sheet of
7 music, but they had a duty to the Court and that duty, and
8 the fulfillment or lack thereof has, has molded this action
9 for ten years.

10 I mean this case was filed in 2002. They had a
11 resolution of it in, an agreement in 2002, and the money in
12 2003, and have, and have resisted every effort to, to aid
13 the class, including the filing of affidavits in May of
14 2008 to, to dismiss this case. And, so, that -- and
15 that's -- again, I don't mean to keep rounding back to the
16 same thing, but that is -- this is -- you know, if, if the
17 malpractice case settled tomorrow, then this would never --
18 this issue of what was presented, who knew what, what was
19 presented to this Court, whether there was an effort on
20 behalf of these class representatives to pervert justice
21 for their own means and to use this class to pursue their
22 own benefit, something clearly prohibited, never gets,
23 never gets answered.

24 THE COURT: I will challenge you on that,
25 Mr. Phillips. There will, there will be answers to these

1 questions.

2 MR. PHILLIPS: Your Honor, if the, if the case
3 settles?

4 THE COURT: Sir, they will still be gotten.

5 MR. PHILLIPS: I'm sorry.

6 THE COURT: The other case, if it settles, it still
7 has to have, come through me for some type of approval, and
8 we will still have answers to these questions. These
9 are -- as I've indicated, I think I indicated in the Rule
10 to Show Cause, I still believe that there is a possibility
11 that there might be some global resolution of all of these
12 issues, but that global resolution will not prevent me from
13 having answers to these questions.

14 MR. PHILLIPS: And, and, Your Honor---

15 THE COURT: I already -- see, we already -- I've
16 already heard from Mullen and Wylie -- Mullen and Grimbball.
17 I know what their testimony is, I've watched them and
18 they've been involved in the litigation for, in front of me
19 since 2005. So, I know their positions. I'm comfortable
20 with the settlement that I previously approved, but they're
21 still coming in for the hearing, and they're still going to
22 be testifying. They're still gonna testify and they're
23 going to be subject to questioning by, by any numbers of
24 lawyers. So, we will get answers.

25 Now, we have a gentleman that wants to speak.

1 MR. BRUNER: Thank you, Your Honor.

2 May it please the Court?

3 I'm Jim Bruner. I represent Mr. William Bowen, one of
4 the former class counsel.

5 Your Honor, permit me to speak candidly and freely
6 with the Court. We were talking at lunch about a way to
7 posture this whole situation so that all of the motions
8 that have been presented to Your Honor and the objections
9 for the Rule to Show Cause and the concerns could be
10 addressed. I'm gonna make this suggestion to the Court,
11 and if you'll give me just a second to explain why I think
12 it would address a number of concerns.

13 I believe that all of the Court's concerns, and to be
14 honest with you, I, I share your concerns. They're
15 legitimate questions that need to be answered. I think
16 they can be answered in the malpractice case. I call that
17 the Tucker case, and I believe that it would be prudent for
18 the Court to simply withdraw the Rule to Show Cause and for
19 the defendants to agree that the claim, with respect to
20 disgorgement of fees or for a constructive trust over fees,
21 and that the claim against the former class representatives
22 for a constructive trust, can be asserted in that case.
23 Those are the very same claims that Your Honor is going to
24 be considering in a Rule to Show Cause hearing, whether you
25 should impose a constructive trust up front.

1 Let me suggest, Your Honor, with all due respect, that
2 in that forum, as you yourself stated earlier this morning,
3 we have confidence in rules of due process. You expressed
4 confidence in due process taking place in that case.

5 Frankly, Your Honor, a number of the respondents to
6 the Rule share that confidence in that proceeding, and it
7 is one of the primary concerns they have about the
8 proceeding before the Court in a Rule to Show Cause.

9 As, as I have listened to Mr. Alford and Mr. Phillips
10 make their arguments to you, they are arguing the very same
11 facts, the very same case, that will be, in fact, argued
12 and presented in the Tucker case. It's -- it is not that
13 the former class counsel and the class representatives do
14 not want to answer the questions. They want to be
15 comfortable that they will be afforded due process when
16 they do.

17 In addition, as you just pointed out, if the, the
18 Tucker case were to settle, it's still got to be approved
19 by you and you are still entitled to and going to have
20 answers to any questions you have about what took place
21 while they were class counsel, and, frankly, none of these
22 lawyers are trying to hide any of that, but this case has
23 been going on for seven years under these class counsel and
24 all you've heard is one side of the story.

25 I believe that if you, if you think about it, step

1 back and think about it, you will address all of these
2 defendants' concerns about due process and procedure and
3 jurisdiction if you simply allow those questions to be
4 litigated in the Tucker case. You're the judge in that
5 case and you will certainly approve any settlement, if
6 there is one.

7 I will also point out to Your Honor that in the
8 present posture, that is to say with a malpractice case
9 pending and now a Rule to Show Cause proceeding pending,
10 the posture of the case, the posture of the matter for
11 resolution is impossible. I agree with you -- one of the
12 first things you said this morning is you thought the thing
13 should be settled. I agree with you a hundred percent.
14 The present posture does not provide for that.

15 THE COURT: One problem with that.

16 MR. BRUNER: Yes, sir.

17 THE COURT: I've been assigned both cases.

18 MR. BRUNER: Yes, sir.

19 THE COURT: My assignment and my knowledge of matters
20 both cases and comments of my mine that relate to the
21 evidentiary evidence that I've seen in one case or the
22 other got called into question so much that a motion to
23 have me recused was filed --

24 MR. BRUNER: Yes, sir.

25 THE COURT: -- claiming that somewhere the litigants

1 have lost confidence in my ability to be fair and
2 impartial. I have stayed that other case because of that
3 motion and I have scheduled the Rule to Show Cause, and
4 when I move forward with the Rule to Show Cause I am the
5 one that will make the decision in the Rule to Show Cause.
6 It will be more efficient. It will be faster and it will
7 get resolved. That way I can move forward in my return
8 back to the class action, the malpractice suit, the breach
9 of fiduciary suit, and then I can move forward with that,
10 and then whatever decisions I make in this case then can be
11 resolved, can be taken a look at by some other Court.

12 They could say no, Judge Hayes was wrong or Judge
13 Hayes was right, but at least the process then, if I'm
14 gonna be attacked as being, you know, as complicating the
15 process of making the process seem unfair, impartial to
16 someone, then I want to act in a way that I give assurances
17 that I am, in fact, acting fair and impartial.

18 I do not know these lawyers that are litigants. If I
19 do, I don't know how I know them. They very rarely appear
20 in front of me, if ever they've appeared in front of me. I
21 do not know the lawyers presently in this courtroom. Y'all
22 are from another part of the state. The only way that I
23 really know y'all is that y'all are presently in this
24 courtroom or in these cases and you've been in these cases.

25 I cannot think of another situation where there would

1 be another judge that's so far removed from the actual,
2 anything that would be improperly acquired knowledge, you
3 know, improperly acquired knowledge in this case than
4 probably me, but I don't want to be put into a situation
5 where my work and my effort in these cases is going to be
6 argued to be impartial and unfair when nothing has been
7 pointed out to me that says I have somehow acquired the
8 knowledge that I have gained or the information has been
9 presented to me in a way that has not been scrutinized and
10 sanctified by the process itself.

11 I do not mind that lawyers or litigants don't like me.
12 I don't mind being asked to take myself off of a case if
13 there is some type of improper, improper reason, you know,
14 improper motive on my part or somebody thinks I have
15 financial interest in it or I have some personal gain in
16 it. I don't mind that at all, and trust me, a case of this
17 magnitude, other than being, having other judges come back
18 and scorn me, I would not mind handing it off to someone
19 else, but there is also a duty that I cannot do that as
20 well.

21 So, I don't want to be put back into that situation to
22 where I've been asked to recuse myself, and that because
23 somehow they think that I've had some preconceived notion
24 as to what, or idea of what I'm going to do in the Rule to
25 Show Cause, I mean cause I haven't ruled on the Rule to

1 Show Cause, then they want me to be recused in the other
2 case. I've got to do one or the other, and this is the
3 most efficient way to do it is to just do the Rule to Show
4 Cause, get it over with, let the chips fall where they may
5 as to what the outcome is, and let an Appellate Court
6 decide, and then move back to, then move back to the
7 professional liability cases.

8 So, that's why we're here is because---

9 MR. BRUNER: I'm talking about---

10 THE COURT: ---is because I was put in a situation
11 where I had to make a call to what's the most efficient use
12 of the Court's time, and now you're now telling me oh,
13 let's stop what we're doing right here and let's go back to
14 the other side.

15 MR. BRUNER: Well, with all due respect, Your Honor, I
16 did not ask you to recuse yourself, but I understand why
17 that motion was made. However, I think there's a
18 possibility that there will not be an objection to Your
19 Honor continuing as the trial judge in the former case.

20 Might I suggest that you might be subject to more
21 criticism basically hearing the case nonjury and making
22 your decision on your own than you would simply presiding
23 over a jury trial in the other case?

24 THE COURT: Well---

25 MR. BRUNER: I'm just suggesting that.

1 THE COURT: Well, but see, whatever decisions I would
2 make in this case is subject to review quicker by an
3 Appellate Court, and they could say whether or not I was
4 right or whether or not I was wrong.

5 MR. BRUNER: Well, I'm just suggesting that -- I mean
6 we're looking at having a couple of days of hearings on
7 motions. We're looking at the possibilities of appeal.
8 We're looking at an appeal from a Rule to Show Cause
9 decision.

10 You know, we're -- I don't -- this is the problem I
11 have with this case. I can't see an end in sight.
12 However, if it's, if it's one case, and it's the Tucker
13 case, and all the answers, the answers, the questions that
14 you want asked are asked and answered in that case, you
15 still have the ability, if you think the conduct was
16 contemptuous, you still have the ability to bring lawyers
17 back before you to address that.

18 The problem these, that these parties are having in
19 the Rule to Show Cause is they feel like that they are
20 being subjected to a summary court marshal to forfeit money
21 without due process. They have a fundamental problem.

22 THE COURT: But you see, we were, we were -- if we
23 were where you are or where you want me to go, we were
24 there a year ago. We were there a year ago. We were
25 moving forward.

1 MR. BRUNER: I agree with you. A year ago right here
2 in this courtroom.

3 THE COURT: That's right. I was here.

4 MR. BURNER: And I agree. I agree. I'm not
5 responsible for the joint and several neuroses of my
6 co-counsel. All I can tell you is, in trying to figure out
7 how to compose this whole matter so that it is capable of
8 being addressed in the ultimate resolution, this is what
9 occurred to me. I can tell you, and I, and I'm not happy
10 about it one bit, that in the present posture, there is no
11 ability to resolve the whole problem.

12 THE COURT: And I---

13 MR. BRUNER: Not as you say. You're going to review
14 any settlement. You're going to get answers to your
15 questions, and that's fair enough.

16 THE COURT: I, I appreciate it, Mr. Bruner.

17 MR. BRUNER: Yes, sir.

18 THE COURT: We were there a year ago.

19 MR. BRUNER: Well, judge, let's go back there.

20 THE COURT: And then what, what is this year done?

21 It's further delayed this process --

22 MR. BRUNER: Yes.

23 THE COURT: -- because -- it's further delayed this
24 process. We need to move on. I will make decisions,
25 right, wrong, you can take me on appeal, and let an

1 Appellate Court tell, tell me I am right or wrong, but I
2 have to make these decisions.

3 MR. BRUNER: And that's, that's what I am asking you
4 to think about is whether, in fact, you do. I, I agree
5 with you that, that you want questions, want answers to
6 certain questions and that's fair enough, and in the end,
7 you're gonna get that, in one process or the other.

8 I am suggesting to you that the most efficient process
9 right now is to put it all in Tucker. We will allow them
10 to make their claims in Tucker, and, and let's get on with
11 it. I mean that's, that's what I would like to see here.

12 THE COURT: I mean for, from when we were in Tucker,
13 decisions were made that those claims then would be with,
14 withdrawn. I mean the only thing that I see that has
15 changed from last year is that now we're here closer to be
16 making a decision and now you want me to back up and go
17 back to where we were a year ago, and actually undo some of
18 those things that we've actually done in Tucker.

19 MR. BRUNER: So that everything can be addressed in
20 one proceeding, correct. That's, that's exactly what
21 I'm---

22 THE COURT: And that's where we were a year ago.

23 MR. BRUNER: Well, I mean, judge, in all fairness, we
24 didn't ask the plaintiff's lawyers in Tucker to withdraw
25 their claims. What we were raising was the question of how

1 many people were now making a claim as to a certain set of
2 funds, and you had already indicated, well before the
3 hearing a year ago, that you were gonna entertain a Rule to
4 Show Cause.

5 So, it wasn't -- the only thing that's really changed,
6 judge, is one, a motion, a motion for recusal was made and
7 you took it under consideration and you denied it, and the,
8 the Rule to Show Cause has been issued. So, I mean
9 there's, there's really no --.

10 THE COURT: I had made the decision --.

11 MR. BRUNER: That's a big surprise to us.

12 THE COURT: I had made the decision to withhold any
13 ruling of the Rule to Show Cause in order to allow
14 professional, professional liability litigation to do
15 itself. You know, to run its course. And because that I
16 had withheld this decision, and someone thought that I had
17 pre-decided the case for the Rule to Show Cause, there was
18 some reason I should be disqualified. If, because of me
19 withholding a ruling in the Rule to Show Cause raises
20 concern to a litigant, then fine, bring that to my
21 attention. We will now stay the professional liability
22 cases, and we will come back to the Rule to Show Cause, let
23 the chips fall where they may, get it over with, and then
24 that's done, and then we'll move back to the, to the
25 professional liability lawsuits.

1 MR. BRUNER: Well, I'm certainly not gonna argue with
2 you, judge. I've got all respect for you and in your
3 ability to be fair. I just thought this was a solution to
4 all of these issues that I was hearing raised this morning.
5 Some of which I raised myself.

6 THE COURT: And, and if, if, if that were a direction
7 that I wanted to send this, I could not do it based on a
8 motion by one side. I would have to hear that there were
9 agreement to that. Otherwise I'll put the Court, me, into
10 a situation to where I'm hearing evidence, I'm making
11 comments about evidence, which I do in case after case
12 against every trial that lawyers come in front of me, and I
13 don't make in front of the fact finder. I suggest as to
14 what evidence might indicate to me and I will face another
15 motion of disqualification based on me doing nothing but my
16 job.

17 So, before I send the case back into that posture, I
18 would need that there will be some type of agreement that
19 that is the best thing to do in the case.

20 MR. BRUNER: Well, to be honest with you, I just
21 thought about this over lunch. So, I haven't had a chance
22 to talk with any of these lawyers over here about it,
23 whether they agree to it.

24 THE COURT: And it's not a bad idea.

25 MR. BRUNER: Yeah.

1 THE COURT: But if that were an agreement, then I
2 would, there would need to be a comprehensive agreement
3 that simply because I was in the Tucker case that I
4 couldn't make the decisions that had to be made in this
5 1377 case so that I would actually wear two hats as that
6 judge at the same time so that I can fact, I can address
7 the issue of contempt once I've heard, if there were going
8 to be contempt issues.

9 It makes sense to me.

10 MR. BRUNER: Yeah.

11 THE COURT: I mean -- yes, sir, Mr. Stair.

12 MR. STAIR: Kent Stair, Your Honor.

13 As the Court is well aware, I was the person that made
14 the motion to recuse, and I will tell you the history of
15 that very quickly.

16 THE COURT: I think I know the history. I was there.

17 MR. STAIR: Well, I would tell you I was arguing, and
18 I thought doing a decent job, and at the end of the day you
19 told me that I had lost credibility or I had no credibility
20 because of what you had heard over the years, and that was,
21 of course, my first opportunity to appear before the Court,
22 and I must tell you it's hard for me to spend a day trying
23 to let the, let the Court understand, for the first time in
24 seven years, a side of the story, to then be told that, in
25 the end, they're not making it easy on me, Mr. Stair, cause

1 you've lost credibility, you have no credibility because of
2 what I've learned, and that was what compelled me to move
3 for your recusal, and I think I would of been
4 irresponsible, as a lawyer, had I not done that.

5 Now, the 1377 Rule to Show Cause didn't have anything
6 to do with it. It was my concern that you had heard seven
7 years of arguments obviously, and it didn't matter what I
8 was gonna say. I didn't have credibility.

9 Having sat here and listened today to Mr. Phillips and
10 Mr. Alford give you their version of things, I can
11 understand the burden that you have had for seven years
12 hearing one side of the story, and why you might think what
13 you might think, and it's frustrating. Mr. Bruner has made
14 a suggestion that we take it back and we go in one forum
15 where due process is all heard in one place, and I will
16 tell you, as -- to have you be the judge, jury, and
17 executioner in a case is not gonna relieve my concerns
18 about your ability to be fair.

19 THE COURT: You don't think I have the ability to be
20 fair?

21 MR. STAIR: I think that you're trying very hard to be
22 fair, Your Honor, but I, to be honest with you, I don't
23 think you have the ability to be impartial. I don't know
24 whether fair is the right word.

25 THE COURT: Define impartial.

1 MR. STAIR: You can look at things fairly and hear
2 them objectively and not be predisposed to your decisions,
3 and---

4 THE COURT: You do not believe I can do that in this
5 case?

6 MR. STAIR: Based on the comments that you've had in
7 the past, no, sir, I believe that's impossible.

8 THE COURT: What comment?

9 MR. STAIR: Well, we put them all in our motion to
10 recuse and we itemized them quite extensively and just the
11 history---

12 THE COURT: So, you rely upon that motion?

13 MR. STAIR: Well, that's, that's the motion I relied
14 upon as far as what, what your -- and it's---

15 THE COURT: Because I just want to be sure. Because
16 there is nothing in your motion that says that I have done
17 anything outside of the courtroom, that I've acquired
18 evidence except that has been presented in the courtroom,
19 and that any opinions that I've expressed in the case have
20 been nothing but based upon that which has been presented
21 to me.

22 MR. STAIR: Yes, sir, and, and---

23 THE COURT: And, and---

24 MR. STAIR: Yes, sir.

25 THE COURT: And under the rules of ethics, that does

1 not equal that the judge needs to recuse himself especially
2 in a case of this, cases of this nature where there has
3 been this much work done.

4 MR. STAIR: Your Honor, if I might, I, I disagree with
5 your interpretation of what is required as it relates to
6 the decision of impartiality---

7 THE COURT: All right.

8 MR. STAIR: --and I do think if in the course of---

9 THE COURT: Okay. Go ahead.

10 MR. STAIR: But the point is, if I might---

11 THE COURT: Well, I just wanted Mr. Bruner to know.

12 See, Mr. Bruner, we cannot go back.

13 MR. STAIR: Well, no, I'm going to make a suggestion
14 here in a moment, but I want to finish with, with your
15 question.

16 As it relates to us in this case, the Rule 1377 case,
17 you have been the recipient of seven years of ex parte
18 conversations relative to us. You've got a plaintiff and
19 you've got a Dryvit defendant who you would never engage in
20 or allow to have ex parte conversations with or between,
21 but with us having been to the outside, and you having
22 heard what you've been hearing today and, and for seven
23 years, it's essentially been an ex parte conversation.

24 THE COURT: Well, I disagree with your classification
25 of it being ex parte when ex parte is something that is not

1 on the record. It's not subject to people being present.
2 Everything that I've heard, as far as I know, has been on
3 the record. And, so, I disagree with your classification
4 of it being ex parte.

5 Now, give me your suggestion if you would cause we
6 need to move on with the proceeding.

7 MR. STAIR: My suggestion might be, and let me go back
8 and say I do not question the effort of the Court to be
9 fair and impartial. I think you have been burdened with
10 one side for so long you simply don't have that ability is,
11 is my assessment of things.

12 But, Your Honor, here's my suggestion. My suggestion
13 is that if we can adjourn for the moment, I can check with
14 my clients to see if we could withdraw the motion for
15 recusal in the other case, and allow you to proceed
16 because, again, we want a fair and impartial hearing is all
17 we want. And if I can have them withdraw that and let's
18 proceed, then that may solve the problem.

19 THE COURT: I cannot step down, but you may talk to
20 your client at any break that we have, present that to
21 Mr. Bruner, your co-counsels or whatever you would like,
22 and let me know about it. We have to proceed with this
23 proceeding.

24 Mr. Bruner, I'm afraid that Mr. Stair's position is
25 what, being placed in the other litigation, is why I do not

1 see a way that we can go back there.

2 MR. BRUNER: Well, perhaps, if he, if he can resolve
3 that situation with his clients, we can have a further
4 discussion about it.

5 THE COURT: Yes, sir, Mr. Phillips.

6 MR. PHILLIPS: Your Honor, I want to take a little of
7 exception to the ex parte characterization of the
8 proceedings from last -- well, since 2005. The fact of
9 that matter is that Mr. Stair's clients and all of the
10 people who are subject to this Rule to Show Cause came into
11 court in 2005 and asked to leave. They were more than
12 welcome and Dryvit would have preferred and asked often for
13 them to participate in the proceedings that happened after
14 that.

15 So, nobody has been deprived any opportunity to
16 participate, since 2005 to today, in these proceedings that
17 was involved in the Rule to Show Cause. They had every
18 opportunity to do so.

19 Two, one lawyer chose to do so. Mr. Grimball was here
20 throughout the time, entire time period and did participate
21 and he was a party to all of the proceedings and all of the
22 conversations that were had. So, I think it's a bit unfair
23 to the participants in the proceedings for the last seven
24 years to refer to what has happened as being ex parte. It
25 was anything but that.

GAP IN TRANSCRIPT BASED ON
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1 are fully prepared to answer all of those questions. But
2 if, if the relief that's being asked is shown up here in
3 six months time with no discovery, and not even be a party
4 to this case, and we'll let you know then if you have to
5 give back all of the money that you got, and, and also
6 maybe be sanctioned, we just don't believe that comports
7 with due process.

8 As I said, if I thought that would be the end of
9 everything, one way or the other, maybe my clients would be
10 willing to live with it, but it, but it's not because the
11 other case is still going on, and nobody in this courtroom
12 can give an authoritative opinion about what effect, if
13 any, Your Honor's ruling and this would have on that case,
14 and you---

15 THE COURT: And it, and it won't. At this stage it
16 won't be. That's something that will happen in the future.

17 MR. COOKE: But---

18 THE COURT: What I am looking for is that if I -- is
19 that we will go back to the same situation we were a year
20 ago.

21 MR. COOKE: Well, that's true.

22 THE COURT: And I think your -- didn't your co-counsel
23 join in in wanting me to be disqualified?

24 MR. COOKE: I don't recall.

25 Okay. Yeah, we did. We did. We joined it, but Your

1 Honor has overruled that motion.

2 THE COURT: All right.

3 Yes, sir, Mr. Alford, briefly.

4 MR. ALFORD: Yes, sir, briefly.

5 They're talking about due process in the other case
6 and all that. That case is what, four and a half years
7 old?

8 If there's no discovery done in it, I mean they've
9 known about those claims. They've known about the
10 disgorgement type claim. They've had the ability to do---

11 THE COURT: Well, I signed a -- well, I signed a
12 scheduling order that was advocated by Mr. Stair's position
13 that he wanted limited discovery limited to, just to the
14 class issue.

15 MR. COOKE: Yes, sir.

16 MR. ALFORD: But to say that they weren't aware of the
17 claims and didn't know about them for a long period of
18 time, I respectfully don't agree with it, and there was
19 discovery prior to the Court entering that order.

20 THE COURT: All right.

21 MR. ALFORD: Months.

22 THE COURT: Okay. I'll take a look at it. I think
23 I've got the representative's positions.

24 All right. Let me find -- tell you what. Let me step
25 down and take a quick break. We've been at it for about an

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1 Mr. Robertson is named as a defendant in the legal
2 malpractice case. He is not a party here. Although he was
3 one of the original class counsel, who was relieved by this
4 Court, I believe that the Court had the hearing in December
5 of '05.

6 I think because of discussions about the proper
7 wording of the order, the order may not have been signed
8 until January of '06, but -- and it is not the intent of
9 Mr. Robertson nor do I think of the other brethren that I
10 have, had heard today on our side to suggest that the Court
11 does not have a right to the answers to the questions.

12 It's the procedure that is being followed by the
13 Court, and I'm not suggesting that the Court really hasn't
14 been placed in the unenviable position of overseeing the
15 products liability case, the 1377 case, for low these many
16 years, and the Court has been extremely tolerant of the
17 parties attempting to think that there might be a
18 resolution, and then going backwards, and, again, I think
19 they're probably lots of fits and starts in litigation, but
20 this is clearly something that has gone on a long time, and
21 the Court has heard a lot, but it has not heard from
22 Mr. Robertson, with the exception of his affidavit that has
23 been previously filed in the, the Treon case, and I just
24 want to highlight, again, and I think, again, the Court has
25 already heard the argument and ruled.

1 So, I don't want to reiterate or repeat unnecessarily,
2 but the Rule to Show Cause states that it is an order for
3 account, and in the second paragraph, the Court says the
4 plaintiffs seek an accounting of any attorney's fees paid
5 to or otherwise received by original class counsel because
6 of their status as class counsel in the present matter.

7 The second sentence in that second paragraph states
8 plaintiffs also seek an accounting of any benefits paid to
9 or otherwise received by original class representatives
10 because of their status as class representatives.

11 The third sentence says the plaintiffs also seek to
12 have any fees and/or benefits received by original class
13 counsel and original class representatives placed in a
14 constructive trust for the benefit of the class, and I have
15 to echo what I think Mr. Cooke said. If that were the end
16 of it that might be one thing, and, again, I'm not -- it's
17 not, it's not the Court's doing what, who gets filed and
18 who gets sued and named in what suits. You don't have any
19 control over that, Judge Hayes, and I understand that.

20 But here we are, and, yet, what I have heard
21 repeatedly from Mr. Phillips and Mr. Alford very
22 passionately, this is a contempt proceeding, Your Honor.
23 In October we're gonna have a contempt proceeding. We have
24 a prima facie case of contempt.

25 Now, I have read the order and Rule to Show Cause, and

1 no where do, does it say that you've already made the
2 decision that these, that these class representatives and
3 the class counsel should be held in contempt. And, so,
4 they've got to come in and tell themselves, convince the
5 Court why they shouldn't be in contempt, and, yet, that's
6 what I've heard today. And that, I think, Your Honor -- I
7 know the Court is making every effort to be fair and to, to
8 wait to decide these things, but then the question becomes
9 where is it going to be decided, how is it best gonna be
10 decided, and, and my fear, Your Honor, and, is that, on
11 October 1st, assuming that the class representatives come
12 and the class counsel, original class counsel is here,
13 there is no summons and complaint so that there are, that
14 are a set of allegations that are in contention. There
15 will be no discovery. I understand, on Premium, under
16 Premium Investment, that perhaps that's, that's not a
17 right, and, yet, if they are going to be presumed to be in
18 contempt, I've got to go back and tell my client you're
19 already presumed to be in contempt. Judge Hayes has
20 already decided that.

21 Our goal, on October 1st, is to convince the judge
22 that you shouldn't be held in contempt. That's entirely
23 different than what's stated in the Rule to Show Cause,
24 which is you seek an accounting. You want to know who got
25 paid in what action, what did the original class

1 representatives of the Court, in its discretion, decides to
2 include in that. That's entirely different, Your Honor.

3 And, so, you know, what are the issues?

4 There is no complaint. There's no allegations that we
5 know that would be asked.

6 Is Mr. Phillips simply or some counsel, on behalf of
7 the plaintiffs, going to be allowed to simply launch into
8 whatever set of questions and lines of questioning that
9 they desire?

10 Is it going -- is the focus going to be a contempt?

11 Is it going to be the accounting?

12 And, and there have been many questions about the
13 burdens of proof.

14 Your Honor, I think, if this were a civil, a typical
15 civil action or a criminal action, the parties submit jury
16 charges. Everybody knows, going into the trial, whose got
17 the burden of proof, whose got the burden of persuasion.
18 It's just not really clear to me, and I would submit that,
19 at the least, Your Honor, there needs to be some additional
20 briefing, and/or input regarding what is the proper
21 procedure if the Court determines not to utilize the civil,
22 the typical civil action.

23 I know sometimes, for an accounting, or in a rule, in
24 a civil action the, the parties know what the issues are,
25 and, and then flesh out what will be the burdens of proof.

1 Are witnesses to be called?

2 Are -- is the plaintiff entitled to simply bring any
3 witness that decides to testify?

4 If this -- as the, as I understand, the Court is very
5 concerned about imposing a constructive trust if it
6 determines that that's appropriate, and that, in dealing
7 with attorneys fees, that is typically in any class action
8 and any action whereby statutory right or by contract
9 attorneys fees are at issue, that is the Court's decision.
10 I agree with the Court in that.

11 But does that mean -- normally that's, that's a
12 question of Court's questioning of the submissions by the
13 counsel for attorneys fees, but, but I am getting the
14 sense, and if this is a contempt proceeding, you know,
15 there may be no scope whatsoever on the, on the expanse of
16 questioning, on the numbers of witnesses, on the identity
17 of witnesses.

18 I'm not aware of any proceeding where no one knows who
19 the witnesses may be.

20 I mean does the same right exist with Mr. Robertson?

21 He can bring anybody he wants, and, without any notice
22 to the, to the plaintiffs, without notice to the Court so
23 that you have absolutely no idea who the witnesses are, who
24 might be called, what the length of it might be?

25 All of those questions, Your Honor, are not

1 insurmountable. I understand that the Court has very broad
2 supervisory powers over the proceedings before it. You can
3 set the rules. I would submit that we have not.

4 Certainly the, the Rule to Show Cause hasn't, hasn't
5 fleshed all of that out, and in the arguments that we've
6 all participated in and listened to today, there certainly
7 seems to be a difference of opinion on what would take
8 place on October 1st if the Court decides to do that.

9 There is, conversely, if the Court chooses to let the
10 civil procedure within the legal malpractice action and
11 breach of fiduciary duty, and I understand that there has
12 been a decision by Mr. Pendarvis not to seek a disgorgement
13 of fees, but there is nothing that would prevent the Court
14 from allowing whatever scope of investigation into the fees
15 to be done in that context and in that venue were that
16 being done, Your Honor, and I understand you, you have
17 previously raised with Mr. Stair that there was a motion to
18 recuse. The Court's already ruled on that.

19 So, that, that case will move forward, and within that
20 context, and with the Rules of Civil Procedure setting
21 forth what the parties do, the Court will be there and can
22 set the limitations and give the parties guidance, and I
23 would just again, Your Honor, submit that, you know, based
24 on the, the transcript of this hearing today, I think there
25 has been a, highlighted a genuine passionate disagreement

1 about what it is that the Court wanted to do by issuing,
2 issuing its Rule to Show Cause and order for accounting,
3 and I just state for the record, Your Honor, Mr. Robertson
4 has no intention of in any way trying to flaunt the Court's
5 authority over him as former class counsel.

6 I believe that the Court has not heard all of the
7 evidence. It certainly has not heard from Mr. Robertson
8 live. He wants to do that, Your Honor, but just as his
9 counsel, we have raised these procedural and, and very,
10 very legitimate, Your Honor, in my opinion, in our opinion,
11 they're legitimate, but they're non-insurmountable. I have
12 confidence that they can be dealt with, but we would just
13 ask for the Court's wisdom and guidance on those issues.

14 THE COURT: All right. Mr. Phillips, before you
15 address this, the more substantive aspects of what we're
16 doing, I have a general agreement with counsel that, for
17 Mr. Robertson, that, that we need some rules for how the
18 hearing would be conducted, what witnesses would be called.
19 Given the number of lawyers that would be participating, I,
20 I think that, that it would be a wise approach to actually
21 set out a game plan for how, for what's going to be dealt
22 with at the hearing.

23 Also, if there's, if there is a way or a mechanism
24 that the hearing could be streamlined by actually doing
25 some discovery prior to the hearing, I would be inclined to

1 look upon those things as favorable.

2 I mean do you have any problem with maybe working out
3 some of the details that will lead to that hearing?

4 MR. PHILLIPS: No, Your Honor, and, and, you know, the
5 procedure, the procedure is, the procedure is that the
6 Court issues a Rule to Show Cause haling parties, obtaining
7 jurisdiction over parties, haling them into Court to answer
8 certain questions.

9 We are, for lack of a better word, prosecuting it on
10 behalf of the Court. I mean this is the Court's Rule to
11 Show Cause, and, and, and we are ready to run forward with
12 it with whatever procedure the Court would like.

13 I mean it is that the -- the procedure -- the, the --
14 Mrs. McWilliams questions are questions applicable to this
15 side of the aisle also because, having put forward the
16 prima facie case, then it is our obligation to respond to
17 the case put on by those parties that are brought before
18 the case, the Court.

19 So, discovery, authentication of documents, you know.
20 It is -- recall that in this matter class counsel is not
21 here, original class counsel is not here not for the
22 efforts of existing class counsel to get them here. We
23 filed motions. We've, we've issued subpoenas. They're not
24 here because they don't want to be here.

25 The Rule to Show Cause is the way to get them here to

1 answer these questions. We're ready. If, if the Court
2 says I'm just gonna have everybody show up and tell their
3 story and have existing class counsel cross-examine them,
4 that's fine. If you want to have discovery, if you want to
5 establish the procedures, just makes my job easier.

6 THE COURT: I do not want just the lawyers to show up
7 with their clients and then just go at it. I don't want
8 that.

9 MR. PHILLIPS: It, it is -- but, Your Honor, it is --
10 and, again, in our response, a Rule to Show Cause, a Rule
11 to Show Cause is the equivalent of a summons. It tells the
12 parties what to do. It is, to the extent that the Court
13 scheduled this hearing three days, I believe we discussed
14 it at the last telephone conference that okay, we'll get
15 together, we'll have three days, and we'll flesh out the
16 procedure of how we will go forward. So, that's, that's --
17 that has sort of been contemplated.

18 It is -- frankly, Your Honor, looking at the
19 malpractice case, I see a motion to compel documents. I
20 see a motion to compel that lists documents that we haven't
21 seen in this case, which is helpful to the Rule to Show
22 Cause. I see Mr. Pendarvis and company in a malpractice
23 case looking for documents that would be helpful. And, so,
24 I'm all for having their motion to compel heard. Let's get
25 the documents out there. I mean we have a document -- we

1 have sufficient documents to prove our prima facie case.
2 To the extent they're other documents available in the
3 other case that would further prove our case, fine, and
4 this Court is -- this Court has a week to do, to conduct
5 this hearing, and however you would like to do it.

6 THE COURT: Counsel for -- is it Dixon Robertson?

7 MRS. MCWILLIAMS: Yes, sir, Your Honor.

8 THE COURT: Counsel for Mr. Robertson has pointed
9 that, in your arguments to me today, and you've used the
10 term contempt, but the Rule to Show Cause is phrased in the
11 terms of an accounting of 825, accounting for all fees,
12 settlement in the case of original class counsel,
13 accounting for all benefits received by original class
14 representatives to show why the Court should not require
15 all fees and benefits, if any, to be paid and for the Court
16 to be ordered in a constructive trust for the class.

17 I purposely wrote it that way in order to try to
18 delineate what the Rule to Show Cause was attempting to do
19 versus the professional litigation that is being done by
20 Mr. Pendarvis.

21 MRS. MCWILLIAMS: In fact, it's in the final four --
22 excuse me for interrupting, Your Honor. The final four
23 things you say at the end of the order, what you're gonna
24 ask about.

25 THE COURT: So, I, you know, I recognize that, that

1 the Court is being, the Court is -- you, you're sort of
2 acting as the prosecutor for the Court because this is the
3 Court's motion. But I want you to be aware that that's --
4 that I have limited the Rule to Show Cause to that. Thus
5 being the monetary relief that I would order is, I believe,
6 if I order it, it's not going to be, lap over into the
7 legal malpractice claim.

8 MR. PHILLIPS: Well, I don't believe, again, Your
9 Honor, and I go back, and I don't want to belabor the point
10 I've already made is that the contempt proceeding -- and a
11 Rule to Show Cause, that's what a Rule to Show Cause is.
12 Come to court, say why you shouldn't be held in contempt
13 for a particular conduct.

14 Your court -- Your Honor does differentiate four
15 specific remedies, I would -- I read them as remedies in
16 there, but I would also address Your Honor's attention to
17 Page 10 of the order, which several copies have been thrown
18 to me by co-counsel to point out that, again, with regard
19 to this Court's obligation and power under Brandt versus
20 Gooding, you say quote -- I'm quoting at the top of Page
21 10. "Additionally, the appearance of original class
22 counsel in this matter allows this Court to examine, and,
23 if necessary, to correct conduct that is calculated to
24 obstruct, degrade, and undermine the administration of
25 justice." Brandt versus Gooding.

1 THE COURT: And also reference in there the fact that
2 my desires that we want to make a record of this case so
3 that these questions that have been raised can be answered
4 because there, the questions, in my opinion, are serious
5 questions that somebody's got to, need to answer them, and
6 in the record of this, of 1377, somebody comes back and
7 takes a look at the record, I want them to be able to have
8 those answers, regardless of what they are, have the
9 answers.

10 MR. PHILLIPS: And I don't believe that the Court's
11 order limits your, the remedies that you have. You've put
12 in here it's contingent. The Court has, you know, contrary
13 to assertions in the motion to recuse and elsewhere, we
14 know, having, having been in front of you for so many
15 years, Your Honor, that you are cautious. You don't make
16 up your mind until you hear all the evidence, and you get
17 to read all the pleadings.

18 And, so, as essentially your prosecutors in this case,
19 and on, certainly on behalf of our class who want
20 resolution of this, they don't want this to drag on
21 forever. They want us to come here. We've developed a --
22 we have developed, in the teeth of Dryvit's opposition over
23 the years, a theory. The -- it's -- the documents say what
24 they say. What happened happened. The case wasn't
25 prosecuted for three years. The attempt of others to come

1 in and take over the prosecution of the case were rebut and
2 rejected by people who didn't want to prosecute the case.

3 So, we know what happened. And if Mr. Robertson
4 wanted to be here, he had every opportunity in the world.
5 Mr. Grimball was here. We couldn't get them to come
6 voluntarily. And, so, we tried to get, to drag them there
7 and they fought those efforts. And now they want to say
8 well, you haven't heard the real side of the story.

9 Well, now we are, with whatever procedure the Court
10 wants to have. But, again, it is -- there are more
11 documents available. They've been developed in the
12 malpractice case. The classes, although not identical, are
13 similar enough that I wouldn't see any legal objection to
14 transferring the evidence that they developed in that case
15 to this Rule to Show Cause, and I would ask the Court, as,
16 as part of scourging the procedure to do this, hear Mr.
17 Pendarvis' motion to compel.

18 Let's get all the documents. Let's do this one time.
19 Let's conserve some judicial resources for a while for,
20 for, for exchange because we've been burning them
21 extensively over the last seven years trying to get through
22 the, get to the truth of this matter.

23 Your Honor, we, we wanted, as the Court knows, we had
24 motions against the Mullen Wylie group, and it was the
25 Court, for its own reason, has put us on this path. Now

1 the Court is haling people into court. We're ready. We'll
2 do it however the Court wants to, and it is -- and I
3 believe the rule is sufficient as to what remedies are
4 available to you.

5 The other part of it is, Your Honor, as to the due
6 process claims, a Rule to Show Cause is the functional
7 equivalent of a summons. That was held by our Court of --
8 well, our Court of Appeals noted, in Ex Parte: South
9 Carolina Department of Revenue, that the Supreme Court said
10 exactly that in Citizens, and First Palmetto State Bank and
11 Trust Company.

12 So, it can be, but it needs all of the elements of a
13 summons. That is something that is curable because, again,
14 there's -- there was no procedure in the rule, specific
15 procedure in the rule, the type of specificity now craved
16 by Mrs. McWilliams, and, fine, Your Honor. We don't -- we
17 agree and we can have that discussion. We have three days
18 up here. Everybody wants to push this thing forward on
19 this side of the table.

20 So, let us -- let's, let's amend the order, let's get
21 the procedure set forth, we'll serve it again, and we will
22 get this thing done in October.

23 THE COURT: All right. What I would -- I, I mean I
24 think your argument is valid as far as, you know,
25 developing the process more. What I would like, if y'all

1 would discuss it during the breaks that we have, and
2 suggest that if, if, that if we'll -- that if we are going
3 to go forward with the Rule to Show Cause in October, as to
4 what you, either of you or anybody, what you would
5 anticipate that I would need to or that y'all would need to
6 do that possibly I need to set up some grounds rules for
7 it.

8 You mentioned Mr. Pendarvis' motion to compel. I will
9 pull that from that back and see what it is. I have stayed
10 that litigation except for the partial settlement, and I
11 indicated that we would move forward with that in the
12 professional liability case. Maybe if you would point out
13 what parts of Mr. Pendarvis' motion to compel that you feel
14 like you might need, maybe they will agree to it, and we
15 don't have to do a motion to compel, we don't have to do a
16 hearing. But if you feel like there is something, and they
17 don't want to give it to you, then we would have to discuss
18 this as to whether or not we would require this as well as
19 I, you know, for the people that are representing the class
20 representatives, you might want to explore the possibility
21 of having class representatives, as opposed to appearing,
22 possibly appearing by de bene esse. Possibly offering that
23 to counsel to have them deposed as opposed to having them
24 brought up there.

25 Just a suggestion. I don't know. They might actually

1 want them up here. There is always some value for a Court,
2 if the Court is gonna be a fact finder, to actually eyeball
3 the witnesses because that's, you know, the way the witness
4 acts on the witness stand, conducts himself is always a
5 benefit in determining the credibility of witnesses.

6 But if that's something that possibly the attorneys
7 would agree to, I, and y'all feel sufficient to present
8 them that way, I will do it that way. So, whatever y'all
9 would feel appropriate in that matter.

10 MRS. MCWILLIAMS: May I be heard, Your Honor?

11 THE COURT: Uh-huh. (Affirmative).

12 MRS. MCWILLIAMS: First, the, the whole idea of simply
13 picking and choosing what the plaintiffs want from the
14 civil action, legal malpractice action to help them build
15 their case against Mr. Robertson and the others highlights
16 the very point that we've made.

17 In that case, the parties get to exchange discovery.
18 They've gotten -- and if, if they're motions to compel,
19 those sorts of things, then there's a process there.

20 Here, what I've just heard is, although all day the,
21 some of my co-counsel, defense for my, for my co-counsel,
22 counsel for my codefendants, Your Honor, I apologize, has
23 suggested let's just use that forum. It sounds now that
24 that's what Mr. Phillips wants, but he only wants it for
25 what he thinks may help him.

1 THE COURT: Well, do you want us to go back to the
2 other forum?

3 MRS. MCWILLIAMS: Well, Your Honor, at least in that
4 venue, yes, Your Honor, I think we have a procedure. I see
5 no reason why that case has to continue to be stayed.

6 THE COURT: I'm sorry. We've been there---

7 MRS. MCWILLIAMS: I understand that.

8 THE COURT: ---a year ago, and did you not join in the
9 motion in wanting me to be disqualified?

10 MRS. MCWILLIAMS: I did, I did join in that motion,
11 Your Honor.

12 THE COURT: Well, I throw my hands up because, because
13 it was because I had not made a decision in the Rule to
14 Show Cause that I was being questioned that somehow I've
15 made up my mind. And, so, the, the -- not being presented
16 any information that is consistent with the rules that
17 pertain to, to disqualifying a member of the judiciary,
18 especially one that has done so much work in these cases,
19 but then I decided what the remedy would be to let's stay
20 the professional liability case, let's come over here and
21 get the Rule to Show Cause done, whatever it be.

22 I cannot say we're going back to the professional
23 liability cases. That would be a waste of time. It would
24 be inefficient, and it's also uncalled for. It would be
25 wrong to that class of people in 1377 to say, like I have,

1 you sit over there and wait while we're gonna go over to
2 the professional liability cases and we're gonna have those
3 cases resolved and you're gonna have to sit back and wait.

4 I had that class to sit and wait telling them you
5 don't have, you're not gonna have to be available to make
6 these decisions because I want to have that process
7 engaged. I want that process to be used in a professional
8 liability case. But then you want me to be disqualified
9 because I haven't made the decision in the, in the Rule to
10 Show Cause cases that you think because I'm withholding
11 some decision that then I must have pre-decided this case.

12 I have not pre-decided the Rule to Show Cause.

13 MRS. MCWILLIAMS: I understand that, Your Honor, and I
14 respect that decision. That's the decision that you make
15 when I -- it is not a motion lightly made.

16 You know, there, in fairness, there were statements in
17 the hearing on the initial Rule to Show Cause where the
18 Court likened my client to Timothy McVeigh. Said I don't
19 know why we have to have a rule.

20 Why did we have, give Timothy McVeigh a trial?

21 Everybody knew he was guilty.

22 THE COURT: I beg your pardon?

23 MRS. MCWILLIAMS: Well, Your Honor---

24 THE COURT: I used Timothy McVeigh?

25 MRS. MCWILLIAMS: You did and I think that was just an

1 example, Your Honor, and I'll be happy to show you the page
2 and line.

3 THE COURT: And I referenced your client to be Timothy
4 McVeigh?

5 MRS. MCWILLIAMS: You did not reference my client.
6 You said I don't know why we're sitting here worrying about
7 a Rule to Show Cause because I think I know what happened.

8 Now, that was -- I think that was just color, Your
9 Honor, and the point of it is we have obligations as
10 lawyers. They are not motions not lightly made, but when
11 they're made, the Court decides it. You've decided.
12 You've said I do not -- I have not made up my mind. I am
13 going to give everybody a fair trial.

14 That's fine. That's the assurance -- that's what we
15 need. That's what we go forward with, and the only reason
16 I have -- you asked me do you want to go back to the
17 malpractice. It's because Mr. Phillips just suggested
18 well, Your Honor, we'd like you to go ahead and hear Mr
19 Pendarvis' motion even though they've been, part of his
20 co-counsel has been disqualified in that action. They
21 can't participate. If they want to participate, it's the
22 melting of the actions, Your Honor.

23 Again, I am completely sympathetic. I know it was not
24 of this Court's making who got sued in what action, who's a
25 defendant, who's not a defendant. The Court oversees these

1 cases to administer justice. I understand that, judge, I
2 respect that, and I know that's what you're trying to do.

3 All I'm trying to do is to make the point that it is
4 extremely difficult to know, you know, there's --
5 Mr. Phillips has said again this is a Rule to Show Cause
6 and they ought -- you know, they've been held in contempt,
7 and they have to come in and prove that they're not in
8 contempt. He's used that word against just now.

9 That is not what, just in the language of the rule, I
10 just want to make it clear for the record we maintain that
11 neither Mr. Robertson nor any of the defendants have, at
12 this point, already been concluded by the Court to be in
13 contempt. As, as I think has been made clear by Mr.
14 Cooke's argument this morning, and the brief they
15 submitted, the Rule to Show Cause, as an animal, doesn't
16 exist anymore. It's still around. It's still occasionally
17 appropriately used. The Court the, deemed that it was
18 appropriate here, but, you know, to suggest that it's
19 always mean, you're already in contempt, and get in here
20 and tell me why you're not in contempt, that is -- I did
21 not read your order that way.

22 I read that you wanted an accounting essentially. You
23 want to know the questions you, you, you've listed there.
24 And, so, I just want to make sure, are, are we entitled to
25 rely on what this Court has read, written and issued, and I

1 understand that you, you took the draft that was given to
2 you and crafted it, but that's not what I've heard today.

3 It's a very different case, Your Honor, if somebody's
4 already in contempt of court as a -- remember, these are --
5 some of these defendants that will be responding to your
6 Rule to Show Cause are already officers of the Court, and
7 if they've already been deemed to be in contempt, I think
8 the Court's got to tell us that because I think that is
9 entirely different. That is not within your order, and I
10 didn't hear that from the Court today.

11 So, I just want to be sure that I am, I'm making the
12 record, and I don't mean to be arguing with the Court or
13 with counsel unnecessarily, but I think that's a very
14 important distinction, and the Court's decision or
15 suggestion that the parties work together for some sort of
16 procedure I think is a, is a great idea, and we will
17 certainly follow the Court's direction on that.

18 But it is entirely different context to say --
19 certainly it is within the Court's power always to
20 administer what, if there's been any obstruction or attempt
21 to undermine justice. I think that's true in any case. I
22 think that's, that's true in any case. That's within the
23 Court's power, and, of course, in that case, Brandt v.
24 Gooding, it wasn't a very serious deliberate attempt to
25 recreate evidence that didn't, had not existed. In fact,

1 you -- he gave it to John Freeman as his expert to try to
2 hoodwink everybody, and, you know, I would submit that that
3 is not what has gone on here.

4 But I just want to be clear, and, again, I'm not
5 trying to argue with Your Honor unnecessarily, and I
6 apologize if I am, but it is a different thing to read the
7 Rule to Show Cause to be the accounting that the Court has
8 stated it wants, and then to hear that no, you know, it
9 could be expand. We might want to open up the discovery
10 from the malpractice case and bring things there.

11 You know, we haven't been in this case. My client's
12 not a party to this case. I'm sure there's been a great
13 deal of discovery. It's probably all related to Dryvit,
14 but, you know, we don't, we don't have any of that
15 discovery.

16 Are we going to -- if the Court -- we'll do what the
17 Court wants to do, and my client is prepared to obey the
18 directive of the, of the Court, and I want to be clear
19 about that.

20 I just would, as his counsel, respectfully, I'm trying
21 to get arms around the scope, the procedure, because I
22 think that's what the Court intended for us to do. But --
23 and, and I'm happy to work with opposing counsel to say
24 here's the things that I think we need. They can tell me
25 what we need, what they need from us, and we can go from

1 there.

2 Happy to do that, Your Honor, but it is -- it's an
3 ambitious and daunting task to have it all done in time by
4 October 1st, but if that's, if that's the Court's will,
5 that is the Court's will---

6 THE COURT: I have set---

7 MRS. McWILLIAMS: ---and we will do it, Your Honor.

8 THE COURT: I have October as the dates. I do wish
9 for y'all to work together, everybody to work together, to
10 determine what has to be done prior to October in order
11 that we can try to meet those October dates. I will --
12 also not only is this a Rule to Show Cause in a lawsuit,
13 I'm exercising my powers under Rule 23. The Rule 23, I
14 believe that the part of my research I ran across the
15 federal manual that relates to the conducting and the
16 obligations of a Court and its role in class action
17 litigation. And, so, I'm trying to also be sure that the
18 process, when it's been accused of being manipulated and
19 used and not being honest with, I'm trying to be sure that
20 that's not taking place, and simply because a judge, in
21 performing his Rule 23 obligations, asks those questions
22 when he is being given information from which one could
23 reasonably infer that he is being taken advantage of, I do
24 not see that that creates a situation where the judge then
25 has predisposed himself to deciding, in fact, that it has

1 occurred.

2 In fact, I believe that the judge has a duty to ask
3 those questions. I would like for y'all to talk about what
4 it is that you believe that you do need because, even
5 though Mr. Phillips says you've got a week scheduled, yeah,
6 that's right, Mr. Phillips. I've got only a week
7 scheduled. You know, I don't want everybody to bring
8 everything in and all of a sudden we have a month long
9 proceeding.

10 It very well could be that we could, that y'all
11 discuss and it could be streamlined down and maybe we could
12 do it in a day's time. You know, because, again, I
13 don't -- I've heard so much facts and the Rule to Show
14 Cause is so narrow, it's focused on those things I've
15 listed in there, that there actually might not be that many
16 disputed facts. Now, there might be a dispute as to what
17 is the conclusion from those facts, but it might be that
18 there's not that many disputed facts.

19 I know, Mr. Phillips, you want to argue and, and you
20 do so with great passion. You want to argue about the
21 conduct and what's inferred from that conduct.

22 It may be that the actual conduct is not contested.
23 But the inference of -- they may very well say that's not a
24 bad conduct. You're inferring something bad when they want
25 me to refer something positive. It might not be that we

1 have to have that lengthy of a procedure, but I don't know.
2 That's what I would like for y'all to discuss. Especially
3 since we're all here at the same geographical location.
4 Anyway, that's what I would like for y'all to do.

5 Throughout this last several years I know Dryvit and
6 1377 class counsel have engaged in discovery. There are
7 massive -- there are numerous documents that I would think
8 you would want to have presented in this proceeding.

9 You being Mr. Phillips.

10 MR. PHILLIPS: Yes, Your Honor.

11 THE COURT: Authentication of the documents. You
12 know, I---

13 MR. PHILLIPS: Yes.

14 THE COURT: Probably I would suggest that y'all talk
15 as well---

16 MR. FIELDS: Funny you should mention that.

17 THE COURT: Yeah.

18 Y'all talk. I know he's given you documents through
19 discovery. They might have, might have some -- they being
20 the counsels for the representative counsels for the
21 lawyers who might have disagreements as to authenticity or
22 what those are or the validity of those documents.
23 Probably want to get that out of the way also.

24 MR. PHILLIPS: Your Honor, we have. We've taken the
25 first step and talked to Mr. Fields, and gotten an

1 affidavit from Mr. Nota that authenticates the documents
2 produced in this, in this case.

3 Again, our, our goal, as class counsel, is come up
4 here and to seek the Court's guidance on the procedure at
5 the hearing. Our thought is, by an order, that we could
6 serve on the, the other parties, the defendants, to the
7 Rule to Show Cause, and see which one of those documents
8 they want to contest the authenticity of.

9 They've been accepted by this Court by order. Mr.
10 Nota has given us an affidavit reaffirming the, the
11 authenticity of the documents and how they were obtained.
12 And, so -- and, again, that was what we contemplated coming
13 up here was to get, to, to streamline the process, Your
14 Honor, cause -- and I don't mean to make light of it. I
15 know it's a significant amount of the Court's very busy
16 schedule.

17 And, so, when it comes to these matters of evidence
18 and whatnot, we have already had discussions with Dryvit
19 about that and happy to have them with the, the counsel for
20 the parties to the Rule to Show Cause.

21 THE COURT: I think you probably would want to because
22 eventually, you know, they're the ones that will have
23 objections or not objections --

24 MR. PHILLIPS: Right.

25 THE COURT: -- if y'all have an agreement to them.

1 Do I need to see that now?

2 MR. FIELDS: I had intended to hand this up at the
3 time that my motion was being heard. There is a paragraph
4 in the affidavit that does specifically address the issue
5 that we're talking about, and I was sitting here wondering,
6 given that, obviously we're gonna be back here tomorrow,
7 whether you would want this tonight -- okay. I will save
8 it.

9 THE COURT: No, I had rather not.

10 MR. FIELDS: Okay.

11 MR. PHILLIPS: Your Honor, just if I might---

12 MR. FIELDS: And we are prepared to address that issue
13 as, as part of our motion.

14 THE COURT: Okay.

15 MR. PHILLIPS: Your Honor, if I might, one thing to
16 correct the record. It is -- Mrs. McWilliams has said and
17 I've heard it over and over again today, it is -- the Rule
18 to Show Cause proceeding is not something we've crafted out
19 a whole cloth. I mean it exists. It's still applicable in
20 South Carolina although it is used mostly in Family Court
21 proceedings now where it is specifically addressed in their
22 rules.

23 But it does require not a finding of contempt as
24 Mrs. McWilliams suggested. It finds -- we have to perform
25 the prima facie basis for it, and that's exactly what they

1 did in Brandt versus Gooding, an allegation of contempt is
2 not enough. There has to be a prima facie showing, and I
3 believe I've been saying that all day. There is been no
4 finding of contempt. There's been finding of a prima facia
5 showing.

6 Your Honor, and, again, with -- Mrs. McWilliams has
7 suggested they may want to call witnesses. That's fine.
8 If there's documents, my, my only thought about referencing
9 Mr. Pendarvis' documents is that they might be, you know,
10 if they're gonna call witnesses, it might be helpful to
11 have all the documents related to this issue, and I have a
12 copy. He provided me with a copy of his motion to compel.
13 To save the Court's budget, it is rather lengthy. So,
14 instead of you printing it out, if I might approach, I can
15 give you a copy of it.

16 THE COURT: Do I already have that, Mr. Pendarvis?

17 MR. PENDARVIS: I believe so, Your Honor.

18 THE COURT: All right.

19 MR. PHILLIPS: It might very well be in a Court file
20 down in Beaufort.

21 THE COURT: Do they have a---

22 MRS. McWILLIAMS: I don't have it with me here, Your
23 Honor. I'm sure if it's been filed in the Tucker case, I'm
24 sure I have it. I don't have it with me. I'm not
25 prepared, not prepared to argue it.

GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 agreement", on Page 22, Paragraph 6 says that "this action
2 and all claims, rulings, and motions against the settling
3 defendants are dismissed with prejudice, but the Court
4 shall retain exclusive and continuing jurisdiction of the
5 action of all parties in the settlement class members to
6 interpret and enforce the terms, conditions, and
7 obligations of the settlement agreement consistent
8 herewith."

9 It is our position that, by that order, this case is
10 being concluded except for the purposes of the Court's
11 oversight of the settlement, which I understand is part of
12 the subject of Mr. Fields' presence here today, but the
13 point, from our position, would be that this case is over
14 and the Court jurisdiction is limited to that which is
15 dealing with the oversight of the settlement and does not
16 include what we're seeing here, which is bringing other
17 parties into the Court and having them show cause why they
18 should not forfeit financial sums of theirs.

19 And, so, we say, for the Court's order alone, that
20 there is no jurisdiction. Beyond that, there simply is no
21 jurisdiction that this Court has over nonparties to the
22 action to hale them into court by Rule to Show Cause and
23 subject them to a forfeiture of funds, and there's no
24 jurisdiction in this case for that to happen for the
25 reasons I think others have discussed, and we would, we

1 would join in that.

2 We did look at the three points that the Court raised
3 in support of the jurisdiction and do not feel that any of
4 them show that this Court has jurisdiction over the subject
5 matter of what's it's attempting to do. And, so, for that
6 reason, we contest the jurisdiction.

7 There has been some subject discussion over the money
8 and the source of the money, and I know part of the order
9 suggesting the existence of jurisdiction was for an
10 accounting of funds, and we contest and show that the funds
11 that are in issue are funds that were clearly not obtained
12 in connection with this litigation, but instead was from
13 litigation of the Posey case, and yesterday I listened to
14 Mr. Phillips go on and on and on about all of the reasons
15 why it was involved in the case.

16 And just so the Court can understand our position
17 better, I would like to recite to it or site it to
18 Mr. Dofflemeyer's affidavit, which you discussed yesterday,
19 but it's attached as the first exhibit I think to the
20 document that we had filed in this case of the notice, and
21 it somehow, I think, has been overlooked or ignored. But I
22 think it's fundamental to what we're talking about. And
23 like Mr. Cooke yesterday wanted the Court to have some
24 understanding of the position of his clients, I'd like for
25 the Court also to have an understanding of our position and

1 why we don't think the funds that are in issue are funds
2 that are subject to an accounting in this case, and it
3 really comes from an affidavit that was placed in the
4 Court's record I think as a part of the motion to show
5 cause, and it's -- the beginning of it is the first ten or
6 eleven paragraphs are Mr. Dofflemyer introducing himself,
7 and I regret that the Court does not have the pleasure of
8 knowing Mr. Dofflemyer.

9 He is one of the outstanding lawyers that you'll ever
10 like to meet in the country. He's honest. He's
11 straightforward, and he is given the affidavit in this case
12 as to the funds that are in issue, the \$600,000, and in
13 Paragraph 12 he's talking about the Posey case, and he says
14 that the settlement was, of course, subject to approval.
15 And in Paragraph 13 he says the settlement was
16 preliminarily approved by Judge Sloan in 2002.

17 Paragraph 14 he says "at the fairness hearing, lawyers
18 from South Carolina raised certain objections to the
19 settlement agreement and presented strong arguments as to
20 why the terms of the settlement agreement, as previously
21 negotiated and preliminarily approved, should be revised to
22 make proposed settlement more favorable to the members of
23 the class. As a result of those and others objections and
24 arguments presented at the hearing, Judge Sloan withheld
25 his approval of the settlement agreement pending further

1 negotiations between class counsel and Dryvit."

2 Paragraph 15. "A group of the South Carolina
3 attorneys, led by Leath, participated actively and
4 effectively in the negotiations with Dryvit that followed
5 the initial October 1 fairness hearing. The South Carolina
6 lawyers were knowledgeable about the issues and very
7 effective advocates for special -- and was living in
8 abstinence to the proposed settlement. As a result of
9 their efforts, working in conjunction with Mr. Mason and
10 me, substantial enhancements to the settlement were
11 achieved. These included, as I recall, increasing the cash
12 out recovery from \$6 to \$7 per square foot for eligible
13 recipients, adding provisions to deal with the emerging
14 issues of mold, making it easier for class members to
15 obtain cash out if they preferred rather than repairs under
16 warranty. These are some, but not all, of the issues with
17 which respect to the involvement of South Carolina counsel
18 made material and highly beneficial enhancements to the
19 settlement ultimately approved by Judge Sloan."

20 Paragraph 16. "The settlement agreement, as revised,
21 was presented to Judge Sloan. After due consideration and
22 further hearing, he entered an order of judgment granting
23 final approval of the settlement on January 14th, 2003. In
24 his order Judge Sloan awarded attorneys fees and expenses
25 to co-lead counsel and counsel for the class in the amount

1 of eleven million six hundred thousand dollars."

2 Paragraph 17. In Paragraph 15 of his order, a copy of
3 which is attached as Exhibit A, Judge Sloan acknowledged
4 the efforts of those attorneys who worked diligently.
5 Following the October 1, 2002, hearing, Judge Sloan stated
6 "these negotiations and discussions have resulted in an
7 enhancement of the rights and options of class members and
8 a substantial increase in the value of the benefits made
9 available to persons who made claims under the settlement."

10 Back to Mr. Dofflemyer. "While Judge Sloan did not
11 refer by name to the South Carolina counsel who worked with
12 Mr. Mason and me to secure these enhancements, I can state,
13 without qualification, that the attorneys most responsible
14 for securing the enhancements were the South Carolina
15 counsel."

16 Paragraph 18. "In recognition of their very
17 substantial contributions to improving the settlement
18 agreement, Mr. Mason and I agreed to share with the South
19 Carolina counsel, led by Mr. Leath, \$600,000 from the
20 attorneys fees awarded to class counsel. In my opinion,
21 their contributions to the settlement agreement fully
22 merited this amount."

23 Paragraph 19. "In summary, the South Carolina
24 attorneys, led by Jeff Leath, provided extremely valuable,
25 professional service to the Posey class, which resulted in

1 significant enhancements to the terms of the settlement
2 agreement. Their efforts directly and significantly
3 benefited the class and justified their receiving \$600,000
4 from the court awarded attorneys fees."

5 And, so, from that, Your Honor, we, again, submit and
6 suggest that the money that's in issue is not money that
7 was ever subject to the jurisdiction of this Court, and the
8 Court cannot exercise jurisdiction to have an accounting of
9 it or hale it into Court and take it from these people and
10 distribute it to the class members.

11 There was also, of course, the question of the class
12 representatives, and I think Mr. Cooke yesterday did an
13 excellent job, as he always does, of enlightening the Court
14 as to positions perhaps the Court had not heard before.
15 And as to -- in supplement of those positions, I would say
16 that the affidavit of Mr. Nota that was previously filed in
17 this case is also significant as to where the money that's,
18 that's involved in that came from and went to and what it
19 was.

20 It was marked confidential. And, so, I did not
21 include it with the submissions to the Court. I talked to
22 Mr. Fields yesterday to see what the purpose of the
23 confidentiality was. I think he said, as, as far as Dryvit
24 was concerned, it could be released as, from its
25 confidentiality subject to the individual people,

1 Cardamone, Clark, and the other people involved, if they
2 did it, and I think probably everyone is in agreement it
3 can be distributed. But I didn't want to do that until I
4 had everyone's permission.

5 MR. FIELDS: Your Honor, there's some descriptions in
6 the affidavit, if I'm remember correctly, of some of the
7 settlements that are confidential. There are parties to
8 those settlements who aren't here. So, it would probably
9 protect Mr. Stair if he was ordered to provide you a copy
10 of that, but Dryvit has no objection.

11 THE COURT: All right. You may consider yourself
12 ordered.

13 MR. STAIR: Thank you, Your Honor.

14 If I might approach the bench.

15 The affidavit I've got does not include the
16 attachments to the affidavit. I'm afraid I can supplement
17 those, but it gives the heart of the affidavit, and the
18 point of the affidavit is, again, Mr. Nota, who is, of
19 course, with Dryvit, supporting what Mr. Cooke said
20 yesterday, and on Page 3 of his affidavit, Paragraph 1, he
21 starts out by saying prior to the filing of this case, this
22 case being the Cardamone case as we call the case we're in
23 here today, August 12th, 2002, the Cardamone's, Clark's
24 Gianni, and Gordon filed and litigated separate lawsuits
25 relating to the respective houses as follows, and then

1 Mr. Nota gives the variety of information about each of the
2 settlements, and then he goes over to Subparagraph E on
3 Page 5 and he goes on and says "Dryvit, and the other
4 defendants, sued in these afore lawsuits litigated these
5 individual cases involving individual houses owned by
6 Cardamone's, Clark, Gianni, and Gordon, and then they say
7 all four cases were evaluated on their respective merits
8 including case specific damages, size and location of the
9 homes, claims, defenses, experts, and parties involved, and
10 damages evidence."

11 And then I moved to Subsection E, and that's not to
12 suggest the rest of it couldn't and shouldn't be read, but
13 Subsection K, excuse me, says that Dryvit is not paid any
14 compensation to counsel for the Cardamone's, the Clark's,
15 Gianni, and Gordon in connection with the settlements of
16 their individual cases or in connection with this case or
17 the Posey case, and then he goes down to Subsection L.
18 "None of the settlements paid to the Cardamone's, Clark's,
19 Gianni, and Gordon were "attempts to buy off the class
20 representatives to stop the Cardamone case class from going
21 forward from, until Posey could become final."

22 And, so, again I think this just reinforces what Mr.
23 Cooke was saying is that they were individual cases, and I
24 think Mr. Fields said the same thing that were settled in
25 due course and did not involve the case that we're here for

1 today.

2 The point that is also important, as it relates to the
3 settlement of those claims, is found in the order that,
4 that Mr. Alford gave the Court yesterday and cited it for a
5 reason that I must confess I did not understand. But there
6 is another important part of the order, and this is the
7 order of December 5, 2005, and the significant part is it
8 shows that there was a hearing held on that date, and that
9 the Finkel and Altman firm were there. The Alford and
10 Wilkens firm were there. Mullen Wylie Seekings were there.
11 Leath, Bouche, Crawford were there. The William -- Dixon
12 Robertson there.

13 And on the second page, critically, middle part of the
14 first main paragraph says "lastly, at the hearing, current
15 class counsel, which are, of course, the class that we over
16 here on this side of the room represent, current class
17 counsel informed this Court that the current class
18 representatives have resolved their claims against Dryvit.
19 Therefore, the current class representatives do not have a
20 personal stake in this litigation and do not adequately
21 represent the interest of the intervenors. Therefore, this
22 Court finds that it is appropriate for the Court to grant
23 the motion to intervene and requests for the intervenors to
24 be substituted as the named class representatives."

25 You did, of course, yourself suggest yesterday that

1 the recollection of this, but I think it's important
2 because, as I sit here and I, I listened to, to
3 Mr. Phillips, it would be as though no one told the Court
4 about settlements and the like, and, yet, on that occasion
5 they told you that the individual cases had been settled,
6 and no one at that time said well, you can't do that
7 because of Premium Finance, you can't do that because of
8 deals and so forth, that's contrary to the law. It was
9 acknowledged, accepted, and to the satisfaction of all went
10 on.

11 And, so, again, we just state that A, there's not been
12 the nefarious conduct that has been suggested. But beyond
13 that, the issue of subject matter jurisdiction, who haled
14 these people back into court to have them account for
15 things that bare no relation to this case really is just
16 something we think is well beyond the jurisdiction of the
17 Court notwithstanding the, the previous order of the Court
18 that has concluded the case with the exception of the, the
19 proceedings with Mr., with Mr. Fields.

20 And that, Your Honor, is, in essence, the subject
21 matter jurisdiction contentions that we have. We go next
22 to personal jurisdiction, and we loop personal
23 jurisdiction, insufficiency of process, and insufficiency
24 of service together. I have always tried to figure out how
25 they're different, and I have not yet accomplished it

1 sufficiently. And, so, I will put them together. And my
2 understanding of things is that Courts can only acquire
3 jurisdiction over people to become involved in matters of
4 forfeiture, and issues of, of similar nature through
5 service of a summons and process that brings them into
6 court, and that, of course, has not happened here.

7 What has happened is the Court has issued a Rule to
8 Show Cause and significantly said in the order that it
9 would be served pursuant to Rule 4. Rule 4, of course, is
10 premised upon process which includes summons and a
11 complaint, and what happened in this case was not the
12 issuance of a summons or a complaint.

13 It was a letter that was written by Mr. Alford's
14 secretary, excuse me, paralegal, and was delivered to each
15 of my individual clients. I have attached a sample of one
16 to the document that I filed the other day, and I think the
17 sample is Exhibit C, and it's a letter to Mr. Lee, the one
18 I've given, Dear Mr. Lee, enclosed please find a copy of
19 the Rule to Show Cause and order for accounting in the
20 above referenced matter. This order is being served upon
21 you as the original class counsel. Pursuant to this order
22 you are required to appear before Judge Hayes on October 1,
23 2012, in Spartanburg County. Thank you for your attention
24 to this matter. Sincerely, and it's signed by Amanda
25 DuBose, paralegal.

1 THE COURT: You said that was C?

2 MR. STAIR: That should be C, yes, sir. It's, it's a
3 letter that then attaches the Rule to Show Cause.

4 THE COURT: I've got --.

5 MR. STAIR: Might I approach and see if I can help you
6 with it?

7 THE COURT: Yeah. Thank you.

8 MR. STAIR: Yes, sir.

9 Yeah, the -- C is the combination of the letter and
10 then the Rule to Show Cause that was attached.

11 And then D, Exhibit D to the pleading is the return of
12 service, and it's by the process server who indicates that
13 he served that same letter on each of my three clients and
14 that is the extent of the service. And we feel that, for a
15 legal action involving summons to court for the potential
16 forfeiture of money, and for other legal purposes such as
17 are being invoked or attempted to be invoked by the rule,
18 it requires a true summons that advises you to come to
19 court, you've got 30 days to answer.

20 It has a complaint that is attached and the, the
21 significance of the complaint I think has been made
22 apparent by the conversation of yesterday. When
23 Mr. Phillips continuously referred to this action as an
24 action for contempt, I turned to Mr. Bruner and said is
25 there anything in the Rule to Show Cause about contempt

1 because I can assure the Court I had read it a number of
2 times, and at no point did I have the impression that there
3 was an action for contempt taking place.

4 And while I was asking him that question independent
5 of me, Mrs. McWilliams was up here raising the point that
6 she was not aware of it being a contempt action, and,
7 frankly, I think the Court had not interpreted as a
8 contempt action, and yet we have Mr. Phillips insisting
9 that it is an action for contempt, and I think that is one
10 of the reasons why a defendant being haled into court to
11 answer for whatever it is they should be answering for
12 should be advised of what it is they're being charged with,
13 if you will.

14 And, so, we have a document I think that, as you
15 noted, does not speak in terms of contempt, contempt. We
16 have a document that Mr. Phillips insists, as a prosecutor,
17 is his duty to prosecute as a matter of contempt, and if
18 nothing else, that's a good example of why what we need in
19 this case is a summons, a complaint, and we need due
20 process and process so we all know what it is we're coming
21 to the courthouse for, and getting together and drawing up
22 witness lists and doing perfunctory discovery and things
23 like that doesn't solve the problem. I think there's just
24 a fundamental due process problem involved here.

25 I would also note, and this is something I did not

1 realize until I woke up this morning and had a chance to
2 think about all of this, as Mr. Phillips went on and on and
3 on about what he saw in the Posey case and what he saw in
4 front of Judge Kemmerlin and what he did and how he was
5 treated, it become perfectly apparent to me that he is no
6 longer capable of being the prosecutor in the case. He
7 must be a witness in the case, and I think he has
8 disqualified himself by his own statements of factual
9 knowledge of the issues involved.

10 And, so, since I'm making a special appearance for
11 jurisdiction and the like, I will not, at this time, move
12 for his disqualification. But I think it is something that
13 he and the Court need to consider because I don't see,
14 based on what he said yesterday, how he can be a prosecutor
15 when he clearly needs to be a critical witness in the case
16 by his own statements.

17 So, we do contest and do not waive the requirements of
18 summons, process, and service, and we do not do those as
19 Mr. Alford would say for delay. Seems he's incapable of
20 suggesting we have any other motive in life but delay. We
21 do. We have actually ourselves justice in mind and we
22 think justice requires appropriate process, due process,
23 and civil process, and the like. And, so, we insist upon
24 those matters being adhered to.

25 The next item is a matter of venue under South

1 Carolina Code 15-7-30. A venue for a civil action against
2 an individual and certainly one where the forfeiture of
3 their funds is at stake must be where it must be, and
4 according to the code, it is either in the county or the
5 residence of the defendant or in a place where most of the
6 activity, the substantial activity giving rise to the cause
7 of action took place.

8 As I have represented to the Court in my pleading and
9 will represent and state to you today, my clients are all
10 residents of Charleston County, and they have their
11 primary, if not only place of business, in Charleston
12 County. None of them are residents of Spartanburg. None
13 of them have any place of business in Spartanburg, and
14 nothing that is involved here took place in Spartanburg,
15 and really the only I think attachment to Spartanburg in
16 this case is His Honor's presence here, and we don't think
17 that can circumvent the requirements of venue.

18 And, so, we do insist that venue, in an action of
19 forfeiture of funds be in a place that is recognized by the
20 State, South Carolina, and it is not Spartanburg. So, we
21 contest and object to those.

22 We have, continuing on with our 12-B motions, a
23 failure to state a claim, and simply stated, we just don't
24 think and actually we don't think -- we cannot conceive of
25 a claim that allows someone to be haled into a place that

1 is not of the right venue to answer to people whose cases
2 are dismissed in a process that puts the burden of proof on
3 them and, and, and does it in front of someone who has been
4 in the case for seven years, in our absence, and, of
5 course, I have addressed that issue on a prior occasion.

6 But the, the, the statement that Mr. Phillips made
7 yesterday was really mind-boggling to me as I sit here and
8 try to equate justice and due process and what's taken
9 place. He said "a prima facie case has been presented and
10 now the burden shifts to them."

11 Well, think about that. I mean, again, it's a case
12 that's been going on for seven years, and I will tell you
13 this has been my first experience with Mr. Phillips and
14 listening to him, and he's quite, as the Court says,
15 passionate in his arguments, and I can understand that if
16 the Court has been listening to he and Mr. Alford for seven
17 years, I don't say this lightly, carry on, but talk like
18 they did yesterday, and you've heard it for seven years, I
19 can understand why you have a difficulty understanding our
20 side of the case because they present theirs---

21 THE COURT: I take exception to that comment. I don't
22 have a difficulty understanding your case.

23 MR. STAIR: Okay. All right. Thank you, sir.

24 But I can understand why, having heard their
25 arguments, you might have whatever thoughts you might have,

1 but the thing is, is to then say that they have presented,
2 in our absence, a prima facie case, and now the burden
3 shifts to us, and as Mr. Alford just a moment ago said, you
4 know, that the rules are different, the evidentiary rules
5 are different, the requirements of persuasion of evidence
6 is different, and so forth, they shouldn't be different
7 though. Because even in a criminal case where a Grand Jury
8 indicts someone in the absence of the defendant, the
9 defendant is then afforded all the rights of due process
10 and indeed the prosecutor has to prove their case beyond a
11 reasonable doubt.

12 Now, I'm not suggesting, in this case, there has to be
13 a proof beyond a reasonable doubt, but the point is is the
14 burden of proof still must necessarily remain upon those
15 people seeking to take money from another citizen, and the
16 fact that we are attorneys, as opposed to non-attorney
17 citizens doesn't change the rules of due process or
18 process.

19 And, so, really I just don't see how anyone can
20 comport with the concepts of due process and fairness
21 calling us in and telling us we have the burden of showing
22 why the money shouldn't be taken, or to expand it to what
23 Mr. Phillips said yesterday, why we don't have the burden
24 to show why we shouldn't be held in contempt, should not be
25 held in contempt. Those burdens should not be on someone

1 in our position at this time or place.

2 And, so, the issue of jury demand has been discussed
3 and I didn't speak to it because I had not yet made my
4 appearance, and, again, I think Mr. Cooke has it right.
5 The jury issue is one of many, many, many, many issues or
6 problems with the process that is outlined, and it can't be
7 cured by saying let's impanel a jury because I assume
8 Mr. Alford envisions the jury being told that the burden of
9 proof is upon the defendants to show what happened and that
10 alone is a problem. But, again, there's a more fundamental
11 problem with the process that goes way beyond the jury.
12 Although that is part of the issue.

13 We have, as a part of our failure to state a claim,
14 asserted a Statute of Limitations defense, and, again, this
15 is assuming there is a claim being asserted, which we don't
16 think could and should be done. I think, on its face or
17 within the body of the complaint, it demonstrates that it
18 would be subject to the jury or the Statute of Limitations.
19 The Court incorporates the order of January of 2009 in
20 which it denied Dryvit's motion for summary judgment, and,
21 of course, within that is the litany of issues and concerns
22 that are the subject of this proceeding here, and that was
23 more than three years prior to the issuance of the Rule to
24 Show Cause.

25 And, so, if we were to accept the Rule to Show Cause

1 as a summons and complaint, which we do not, but if we
2 were, it would have been issued at a time more than three
3 years after clear knowledge of whatever the issues are or
4 are alleged to be had occurred. And, so, we would state
5 that, on its face, the, the pleading is deficient in that
6 respect.

7 There is the issue of, next, of the indispensable
8 party as 12(b)(7). Mr. Fields would of addressed that
9 yesterday and apparently suggested that, in this
10 proceeding, in the beginning and before it was dismissed,
11 they must have raised the same issue as it relates to us,
12 and apparently he indicated they had been less than
13 successful. If nothing else though, it, it, I think,
14 demonstrates the, something other than absurdity and is
15 making the suggestion, and our point would be is that the
16 Rule to Show Cause is premised upon an agreement between us
17 and Dryvit.

18 We vehemently deny the existence of the agreement or
19 agreements that are stated in or suggested in the order.
20 But if we're going to go to a trial on the issue of an
21 agreement, we do feel that all parties to the alleged
22 agreement should be there. And, so, in this case I
23 understand that Dryvit has now been released and dismissed
24 and cannot be brought back into the case, and, therefore---

25 THE COURT: I don't believe that's correct. I know he

1 has filed a motion. They've not been released.

2 MR. STAIR: All right. All right. Okay. All right.
3 I'm just working off the Court order that I was referring
4 to earlier.

5 So, in any event, we, we do think the indispensable
6 party issue is a, a factor and a reason for dismissal.

7 And then, finally, covering all of the bases of 12(b)
8 1 through 8, Subsection 8 deals with the other pending
9 action, and that would, of course, be the Tucker claim that
10 Mr. Bruner has addressed and I think everybody has
11 addressed, and I have attached a copy of the complaint.
12 And as the Court will see, the Court, I think the Court
13 knows, the Tucker claim, as filed against us, included all
14 of the elements that are included in the Rule to Show
15 Cause, and the Tucker case is attached as Exhibit E, but,
16 of course, I think the Court is aware of it, and I would
17 anticipate the Court saying, if it hasn't, the disgorgement
18 and the like being removed from that case and placed in
19 this case.

20 And before I answer that question directly, I will
21 sort of hop on board with Mr. Cooke who says that the
22 problem with having two claims going against this
23 addressing fiduciary obligations and conspiracies and
24 malfeasance and the like is that there is a, an extreme
25 risk of multiplicity of recoveries that may be defined in

1 different ways, but may be really a multiple duplicative
2 recovery. In other words, somebody's gonna be talking
3 about something in one case and something in the other, and
4 a monetary amount's going to be applied to it, and the
5 concern is, is that the verbiage is gonna get lost in the
6 shuffle and we're gonna get hit twice for the same amount
7 of money.

8 And, so, I agree with Mr. Cooke that that is a
9 problem, and I agree with Mr. Bruner that the resolution of
10 that problem would be to take it all back to the Tucker
11 case.

12 But getting more specifically to your question about,
13 anticipated question, about the \$600,000 and the light
14 being shifted from the Tucker case to this case, therefore
15 it's no longer in the Tucker case, I must express a concern
16 that I think should be shared by all, and that is whether
17 or not those claims have been properly and successfully
18 taken from the Tucker case, and I say that because, if I've
19 learned nothing else from this case, I have learned
20 everybody reads Premium Investment in a different way, and
21 Premium Investment I think could be read by somebody to be
22 critical of what took place in the Tucker case, and I would
23 simply give the Court my recollection of what occurred and
24 it's subject to being in the record.

25 But my recollection was we were -- I was standing

1 literally in the same spot as I stand today arguing against
2 the class certification, and I, among other things, argued
3 that Mr. Treon, in the, Mrs. and Mrs. Treon and Mr. Scearce
4 had a conflict, as class representative, because they were
5 also class representatives in this case, the cardinal case,
6 which I was arguing the Tucker case at the time, and at
7 that time I said, you know, they're seeking, in each case,
8 the same \$600,000, they're seeking \$600,000, and I
9 suggested that there was a conflict involved in that, and
10 the next morning counsel for the Tucker's came in, and, and
11 announced that they had pondered things overnight, and to
12 resolve my problems with conflicts, they were withdrawing
13 or agreeing to withdraw Scearce's and Treon's from the case
14 as class representatives and would withdraw the \$600,000
15 and whatever else came out with it and, and let that go
16 back to the Cardamone case, and they may have filed a
17 pleading subsequently to accomplish that. I think they did
18 and I don't have it in front of me, and I haven't studied
19 it.

20 The concern that I think I would have in letting that
21 stand as an accomplished fact is that I think it could be
22 subject to the criticism that, that act alone is a
23 violation of the Premium Investment case because what
24 happened was, without seeking Court approval, a class is
25 claimed, that being the Tucker's claim, which had been

1 established with the \$600,000 and so forth in it, was
2 compromised by having that taken out of it because that
3 really was the heart of their case and for it to be
4 taken---

5 THE COURT: They might disagree with you on that
6 point.

7 MR. STAIR: Well, I, I -- what I'm telling the
8 Court -- oh, on the heart of the case?

9 THE COURT: Yes, sir.

10 MR. STAIR: Okay. Well, actually I think the Court
11 has spoke to the issue of damages at the last hearing, and
12 we'll let the record stand on that. But, you know, we'll
13 all disagree. I can imagine that when I sit down the
14 disagreements among the parties is not going to stop.

15 But as it relates to the Premium Investment case, the
16 sentic, or someone seeking in hindsight to criticize class
17 action generally might say that the Tucker claim was
18 compromised in an inappropriate way, and, in fact, that may
19 be back in the Tucker case or might become a problem.

20 And, so, I can't let it linger with the idea that it
21 is no longer in that case, therefore it's all in the Rule
22 to Show Cause case because I'm concerned that that may not
23 be the case. To me, again, the solution that I think would
24 be good for everybody is to take the case back to Tucker,
25 take the \$600,000 back to Tucker, and let there be a case

1 of a due process with Tucker go forward, and I'm, I'm happy
2 to tell you I'm on the verge of concluding.

3 But I listened yesterday to the conversation that we
4 had about my motion to recuse, and I heard you on more than
5 one or two or three occasions say that it was because you
6 had not made a ruling or had failed to make a ruling or
7 something on the Rule to Show Cause, and if that is the
8 Court's perception of what I was doing, then we miss
9 communicated, and I apologize for, to that.

10 I really had no thought of the Rule to Show Cause and,
11 and its relation to the motion for recusal together, and
12 I'm sorry that I didn't communicate my position better if I
13 didn't.

14 But, again, we think that the remedy here that
15 satisfies all these problems would be to return the case to
16 Tucker and then, as you say, Mr. Pendarvis and I can argue
17 over all of this as long as we want to, but we'll be
18 arguing over it in a proper forum using proper process, and
19 we would urge that on the Court.

20 But that is the completion of my motion, and we ask
21 that the Rule to Show Cause, as it relates to my clients,
22 be dismissed, quashed, whatever the Court wants to call it,
23 and I appreciate the Court's attention.

24 THE COURT: Let me ask you a question---

25 MR. STAIR: Yes, sir.

1 THE COURT: ---if you will.

2 MR. STAIR: Yes, sir.

3 THE COURT: Your -- you referenced the prior order in
4 your argument about Dryvit being an indispensable party.
5 My understanding to the subsequent -- what Mr. Fields has
6 filed asking Dryvit to be relieved is that Dryvit is still
7 part of this case. I think -- if your argument, if I
8 understand correctly, goes to the ramification or the reach
9 of that prior order in that Dryvit could not be held
10 responsible for any financial determination that I or
11 somebody might make in the---

12 MR. STAIR: That would be my interpretation of that
13 prior order, yes, sir.

14 THE COURT: Okay.

15 MR. STAIR: Yes, sir.

16 THE COURT: I just, I just -- as you spoke, I was
17 thinking okay, we're not on the same wave, but I think we
18 are.

19 MR. STAIR: Okay. Thank you, Your Honor.

20 THE COURT: Yes, sir.

21 MR. PHILLIPS: Your Honor, Sam Phillips. I'm just
22 gonna address Mr., address opposing counsel's arguments in
23 the order in which he raised them.

24 As to the order, the order dismissing Dryvit did not
25 hit upon other parts of the case. It was only as to the

1 settling defendant who is Dryvit.

2 This Court in previous orders, including the order
3 letting Mr. Stair's client out, this Court retained
4 jurisdiction. We passed the order up November 20th of 2006
5 order where on Page 3 the Court handwrote into the order
6 that he was releasing original class counsel except to the
7 extent that unless otherwise ordered by the Court to
8 return.

9 So, this Court still has jurisdiction over original
10 class counsel, and the Court will recall that it was
11 original class counsel, when they were asking to withdraw,
12 specifically Mr. Robertson, he wanted the Court, he wanted
13 to maintain his ability to appear in front of the Court
14 regarding to attorney's fees. And, so, the Court merely
15 granted what opposing, what original class counsel asked.

16 So, they're still, they're still contingently part of
17 this case and could be held back by this, this Court
18 without the, the Rule to Show Cause.

19 However, let me -- as to the Dofflemyer affidavit,
20 Mr. Dofflemyer affidavit, Mr. Stair read the part where
21 Mr. Dofflemyer says, as I recall, and he tells about the
22 story. Well, Mr. Dofflemyer doesn't really recall the deal
23 memo, e-mail dated April 22nd, 2004, where \$600,000 was
24 promised to original class counsel from Posey class counsel
25 and an additional 225,000 was promised from Dryvit upon the

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1 it can be cured or how it can be cured, I just -- I think,
2 I think, I think I'm being duplicitous if I stand here and
3 try to use that as some sort of collateral advantage here.
4 So, I just didn't want my silence to be taken as some sort
5 of agreement that it can be fixed in anyway.

6 THE COURT: Well, I would welcome any suggestions you
7 would have on fixing it because obviously it was serious
8 enough Judge Dukes, someone brought it to the Judge Dukes'
9 attention. Judge Dukes addressed it. I respect his order.
10 I'm trying to work within the parameters of what he has
11 seen.

12 And, so, if you have any ways of wanting me to address
13 it, I will be more than happy to hear it. I'm not gonna
14 ask you to respond to Mr. Phillips' two suggestions
15 because Mr. Phillips, I haven't made a ruling. He hasn't
16 formally asked me to do that. I've not asked someone else
17 to do that. You can do that at the appropriate occasion,
18 but your client also needs to understand that, you know,
19 based on the information that's been given to me, I've got
20 obligations I have to deal under Rule 23. I intend to
21 follow those obligations as, have, asked, either I ask the
22 question or have someone on my behalf ask the questions
23 cause I've got to get some answers.

24 MR. COOKE: I understand.

25 I just was making a point that, you know, the ethical

1 things are completely separate from litigation, and I think
2 it would be wrong for me to even, you know, to suggest
3 something that's purely self-interested. Oh, yeah, you
4 know the easy thing would be to have them dismiss my
5 clients. Well, that's nice, but that's not what you're
6 asking me.

7 THE COURT: But if that's what you wanted me to do.

8 MR. COOKE: Well, okay, since you asked.

9 MR. BRUNER: I think you answered the question. When
10 Judge Dukes disqualified one, he disqualified the whole
11 team. So, I don't think any of them can prosecute.

12 THE COURT: Well, I don't want to---

13 MR. BRUNER: Well, I think you can ask -- you got
14 questions and you can ask the questions.

15 THE COURT: I don't want to get into y'all arguing
16 again the interpretation of Judge Dukes' orders. They say
17 what they say. I've read them both.

18 I will say Judge Dukes order that amended his original
19 order can be read in a way that it will leave this issue of
20 conflict of any of those lawyers that it applied to for
21 purposes of 1377. I understand that there's some, there's
22 an argument that also can be made that well, that argument
23 also -- the argument was that well, no, that amendment that
24 Judge Dukes made really only focused in on the dismissal of
25 Dryvit in that litigation. I understand that argument as

1 well.

2 So, I, I've read his argument. I've read his orders.
3 They say what they say, and I think I can, I think I can
4 interpret those orders. So.

5 MR. BRUNER: But I think if you ask the questions.

6 THE COURT: Me?

7 MR. BRUNER: Sure. You know exactly the questions
8 that you want answered, and, and you're certainly qualified
9 and capable of asking those questions and asking
10 penetrating questions.

11 THE COURT: Maybe qualified and I'm competent to
12 answer those questions?

13 MR. BRUNER: I think so. But, but that avoids this
14 whole problems. It avoids the whole issue.

15 MR. ALFORD: Your Honor, I just wanted to make one
16 point. Mr. Phillips was not, is not subject to Judge
17 Dukes' order. He doesn't suffer under, under that. And,
18 and when Judge Dukes was analyzing it, honestly the fact
19 that I didn't like it, now I would like to give him a hug
20 and a kiss, but that would probably be inappropriate, for
21 getting me out of that.

22 But he didn't, although they asked him to, they moved
23 to have that conflict extended to Mr. Pendarvis, and he
24 said no.

25 Mr. Phillips wouldn't be any different. In other

1 words, the -- extending that thing out doesn't go to
2 Mr. Phillips. And, so, while -- I don't know if Mr. Bruner
3 meant to include Mr. Phillips when he said one's out, all
4 are out. Mr. Phillips isn't effected at all by that order.

5 THE COURT: Okay.

6 MR. ALFORD: So, so, from our prospective, and it is
7 true he did do all the work, from our perspective, that's
8 how we were gonna solve that problem anyway, to avoid that
9 very argument.

10 THE COURT: All right. Well, I will take a look at
11 that. That is an issue that I have some, causes me to have
12 some pause that I want to take a look at and be sure that
13 it's addressed in a, in a proper fashion and as properly as
14 I can address it. And, so, I appreciate everyone's input
15 on that.

16 I'm -- again, I'm not gonna issue any decisions today.
17 Not for any other reason, y'all didn't file your paperwork
18 till the last minute, and I still haven't had a chance to
19 go through it. Much of the paperwork was filed last
20 minute, and I still wanted to do that.

21 But also want to thank everybody for attending, also
22 for, for your work on being here today. It is a privilege,
23 from where I sit, to have lawyers that are as qualified and
24 competent as the ones that are in this room that I had a
25 privilege to be with for the last two days.

1 I anticipate hopefully I'll make a decision as soon as
2 I can. In the event that we are proceeding, I would
3 anticipate that I would like some briefing from counsel
4 related to the law. I believe that Mr. Fields explained
5 that, in his belief, that the, this law and especially in
6 South Carolina, as it relates to these types of
7 settlements, these types of settlements being the class
8 action settlements that, at the same time, you have
9 these -- Mr. Fields, help me with that term.

10 MR. FIELDS: Inventory settlement.

11 THE COURT: Inventory settlements. The law in South
12 Carolina is either nonexistent or, or not, just
13 nonexistence.

14 I'm still -- and, again, I appreciate the lawyers
15 participating and I appreciate y'all answering some of my
16 questions because I am still of the opinion that many, if
17 not all of the significant facts that are going to this,
18 that is gonna relate to this Rule to Show Cause, that many
19 of those facts are not going to be disputed. The
20 inferences from those facts I think will be greatly
21 disputed.

22 The facts that you wish for me or the, or a jury to
23 infer I think will be hotly contested, but the underlying
24 facts of that, the South Carolina Court was engaged and
25 requested to certify class and a South Carolina judge

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the
Seventh Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Beaufort County, South Carolina, on the 18th and 19th day
of July, 2012, as reported by Linda Moffitt and transcribed
by myself to the best of my ability.

I do further certify that I am neither of kin, counsel
nor interest to any party hereto.

August 20th, 2012

PAMELA E. GREEN, Court Reporter

1	STATE OF SOUTH CAROLINA	)	
2	COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS
3			
4	Stephen and Jeaneen	)	
5	Tucker, et al.,	)	TRANSCRIPT OF RECORD
6		)	2008-CP-07-3145
7	Plaintiffs,	)	
8	-vs-	)	
9		)	
10	Leath, Bouch & Crawford,	)	
11	LLP, et al.,	)	
12		)	July 21 and 22, 2011
13	Defendants.	)	Spartanburg, South Carolina
14			
15	Timothy Treon and P.	)	
16	Jennings Searce	)	TRANSCRIPT OF RECORD
17	individually and on behalf	)	2008-CP-07-0774
18	of Others similarly	)	
19	situated in the State of	)	
20	South Carolina,	)	
21		)	
22	Plaintiffs,	)	
23		)	
24	-vs-	)	
25		)	
26	Dryvit Systems, Inc., et	)	
27	al.	)	
28		)	JULY 21 and 22, 2011
29	Defendants.	)	Spartanburg, South Carolina
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ORIGINAL

B E F O R E:

HONORABLE J. MARK HAYES, II, JUDGE

1 A P P E A R A N C E S:

2 I. GREGORY HODGES, ESQ.
3 WILLIAM J. HUNTER, ESQ.
4 CHARLES A. KRAWCZYK, ESQ.
5 THOMAS A. PENDARVIS, ESQ.
6 TIMOTHY D. ROBERTS, ESQ.
7 THOMAS E. WILLIAMS, ESQ.
8 Attorneys for the Plaintiffs

9 KENNETH C. ANTHONY, JR, ESQ.
10 JAMES L. BRUNER, ESQ.
11 ROBERT E. FIELDS, ESQ.
12 JAY JONES, ESQ.
13 DANIEL C. LEONARDI, ESQ.
14 KENT TAYLOR STAIR, ESQ.
15 SUSAN TAYLOR WALL, ESQ.
16 TYLER P. WINTON, ESQ.
17 Attorneys for the Defendants

18
19
20
21 Margaret A. Woods
22 Circuit Court Reporter
23
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25

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1 the dates so that we all of a sudden are thrown off of
2 November but we're perfectly fine with adding days to the
3 various dates, there's no problem with that at all and the
4 second thing is we also agree with what Mr. Pendarvis said
5 with for purposes of this settlement as to the five
6 requirements that he set out for the Court including
7 numerosity, typicality and so forth.

8 THE COURT: For the purpose of this settlement.

9 MS. WALL: Yes, sir, only.

10 THE COURT: Yeah, because it -- and I -- the reason I've
11 asked for that, I I heard her correctly the first time, I
12 wanna be sure the record is clear because I do not -- if I --
13 my approval of the settlement is not conditioned or affected
14 by the fact that I have subsequent decisions to make regarding
15 the certification of class in this case, if I approve this
16 settlement and we go with the settlement class, that will have
17 no bearing on the issues that I have to subsequently make on
18 the other motions that we're gonna do that relate to class
19 certification favorably or unfavorably, just they will have
20 no bearing to them. Alright. Anything else before I ask 1377
21 lawyers a question? Alright.

22 MR. STAIR: Yes, Your Honor.

23 THE COURT: Yes, sir.

24 MR. STAIR: I'm not a 1377 lawyer. Well I'm Kent Stair,
25 I'm with Carlock, Copeland & Stair outta Charleston and with

1 my associate Tyler Winton and Ken Anthony here we represent
2 Leath, Bouch, Crawford, Jeff Leath and Mike Seekings and as
3 you will hear when we get to the motion for class
4 certification I have some extraneous objections to that and I
5 don't want anything that takes place here to undercut or act
6 as any kind of combination of what's taking place with the
7 settlement because I don't think the class in this case here
8 is appropriate in any circumstance and I wanna advise the
9 Court of that ---

10 THE COURT: But you're ---

11 MR. STAIR: '--- but ---

12 THE COURT: --- not taking a position on the settlement
13 class, ---

14 MR. STAIR: The settlement *per se*, ---

15 THE COURT: --- are you?

16 MR. STAIR: --- the settlement *per se* does not bother us
17 if that's what ---

18 THE COURT: Okay.

19 MR. STAIR: --- they wanna do but as I've listened to
20 this one thing I would like to note, and I will be talking
21 about when it's my turn to talk, is there's been a lotta
22 reference to this court and this court and this court and in
23 doing so they're referring to you as the Court in the 1377
24 case and I would like, it's gonna be a difficult task that
25 we're all gonna have but in our case you're the judge in our

1 case and you're not the judge in that case and so when we talk
2 about this court, I think in this case we need to be talking
3 about you in our case and not you in that case and I realize
4 that's gonna be a difficult task but the record in this case
5 is not the record in that case and the plaintiffs in this case
6 are not the plaintiffs in that case and I've got other
7 observations about the settlement but I think they're
8 really -- and would you like to hear those? I don't ---

9 THE COURT: Well and if if you anticipate that you're
10 aware that you, your client or anyone that you represent would
11 have an interest in objecting to the settlement at some ---

12 MR. STAIR: Okay.

13 THE COURT: --- point in the future, I would like to be
14 able ---

15 MR. STAIR: Alright.

16 THE COURT: --- to hear that.

17 MR. STAIR: Alright. My thought here is that a recovery
18 in this case, which is what I think has been negotiated, is a
19 recovery that should stay in this case. Whoever it is that's
20 left in this case should be the beneficiary of the recovery in
21 this case and it appears to me as though what's happening is
22 there's being a recovery negotiated in this case that will
23 leave this case and go to another case and I think that's
24 inappropriate.

25 THE COURT: But where do you see that 'cuz I don't, I

1 don't read it that way?

2 MR. STAIR: Well as I understand it what they're asking
3 is that the Court in 1377, and and I, if you don't mind me
4 speaking of you in the third person, ---

5 THE COURT: Sure.

6 MR. STAIR: --- if that judge -- well here, here, just
7 kinda I'll be relatively straightforward about it.

8 THE COURT: Alright.

9 MR. STAIR: You're the judge in this case and we've got
10 people in this case who want to have a class certified in this
11 case which we're gonna oppose but whatever it is they're
12 seeking a recovery in this case. If they were to become a
13 class, I would think it would be incumbent upon you as the
14 judge in this case to keep whatever recovery they get in this
15 case and not let it go to some other case. Now if I might can
16 step to the other side you're in -- judge in the 1377 case and
17 you may like to have the recovery over there for that class
18 and I think that is a matter of interest to you in that case
19 as opposed to you in this case and what I see happening here
20 is I'm concerned that because you're the judge in both cases
21 they may be taking you here and using you there or vice versa
22 and I we just need to keep the distinction and so it does seem
23 to me that if these plaintiffs are able to recover money
24 against the defendants in this case that it would be incumbent
25 upon you and them to keep that money in this case and some of

1 these terms of agreement where they agree or agree not to
2 object to the money going to another case I would suggest to
3 be an improper procedure but, uh, ---

4 THE COURT: Te -- and explain to me why that's
5 improper.

6 MR. STAIR: Well the classes are different. I mean, I'm
7 going to be noting that as we talk later today and so the
8 class here should keep what it gets here and it should not go
9 elsewhere and if it is allowed to go elsewhere then I think
10 the class here has been deprived of whatever recovery it
11 should get here understanding I'm gonna suggest there's no
12 class here but it seems that we're doing in this case -- well,
13 well actually I think a good example is ---

14 THE COURT: Well I thought and m -- alright, I'm trying
15 to figure out why you are taking a position that deals with
16 distribution of the proceeds and you're offering an argument
17 that's -- that -- that's from what I've read in the arguments
18 that ya'll, that your side has presented on class
19 certification that you're now gonna argue that the classes are
20 different because if I understand your class certification
21 positions the classes are the same and that, and that anything
22 that's happened in the other litigation has taken care of any
23 of the damages that's being caused by the cl -- by by these
24 people over here really they should not have any typa claim
25 and now you wanna take the position that the classes are

1 different?

2 MR. STAIR: The classes -- the class in thirteen seventy
3 se -- the class that is presented here that they are seeking
4 to form here, yes, it is different than the class that is over
5 there ---

6 THE COURT: Okay, I ---

7 MR. STAIR: --- and I'm not suggest ---

8 THE COURT: --- and I'll make a note a that so ---

9 MR. STAIR: Okay, ---

10 THE COURT: --- I I will ---

11 MR. STAIR: --- I will, I will, I will, I will help you
12 with my argument as to why they're different ---

13 THE COURT: Alright.

14 MR. STAIR: --- but I will also tell ya that I don't
15 think that money is owed in the other case either so so we're
16 not, uh, ---

17 THE COURT: Well and and that's why I'm wondering what
18 what position you have to want to talk about the disbursements
19 of these settlement funds as a way -- 'cuz I asked you to
20 please speak if you anticipated your client or you were aware
21 of someone objecting to this settlement in the future. Do you
22 follow me?

23 MR. STAIR: I I I I think I do but I'll I'll do the best
24 I can. What I really -- what I'm suggesting here is that we
25 have a case of our own is here, we call it Tucker, we call the

1 other case Cardamone, I can't keep up with the numbers so ---

2 THE COURT: Um-hum.

3 MR. STAIR: --- if we can do that and we're the defendant
4 in the Tucker case and as defendants in the Tucker case we're
5 looking to you as the judge in the Tucker case to deal with
6 this case and the motion before us at the moment in our case
7 that's of interest to us which is the one I will address later
8 today is our motion for class certification. I will oppose
9 that and I will oppose it because I would say that the
10 plaintiffs in this case, the named plaintiffs in this case,
11 the punitive plaintiff seeking to have a class have not shown
12 that there is a class to be had here that they can represent
13 and one of the reasons I will show that is because the basis
14 of their argument here is that the classes are identical, that
15 there has been a class certified in the other case therefore
16 it should be certified in our case is the judic -- judic --
17 judicial estoppel and I will suggest and and show that the
18 class there is not identical to the class they're seeking to
19 form here, it is clearly not identical and so you can't use
20 that as the argument so they otherwise therefore have to show
21 a Rule 23 showing which they can't do, the end result of which
22 is going to be, I think, that there's not gonna be a class
23 certified in this case. Now we're gonna then be left with
24 six, seven plaintiffs suing us in this case. We obviously
25 still have the other case and I'm not unaware of the show

1 cause interest in the other case and so we'll address that but
2 that's not really before us today so my role here is to simply
3 suggest that a class for settlement or for any other purpose
4 to me there just doesn't seem to be a class in this case and
5 and what I don't want you to do is have a settlement class and
6 it be suggested that we did not note our feelings that that's
7 not an appropriate thing to do ---

8 THE COURT: Okay.

9 MR. STAIR: --- and as far as the settlement I guess if
10 somebody's gonna pay money in this case we'd wanna have credit
11 for it in this case and then I guess I would also note, if I
12 might change my hat around a little bit and look down the
13 road, if through this settlement in this case the Mullen folks
14 are given some relief from the show cause in the other case,
15 we will suggest in that other case if the occasion ever arises
16 that we should get the same relief, that they should not be
17 excused and us not be.

18 THE COURT: Why not?

19 MR. STAIR: Well I I -- we don't think that it would be
20 proper for them to be relieved that ---

21 THE COURT: Well unfortunately you have not sat through
22 these hearings that I have sat through for the past several
23 years and and able to form a factual foundation for issuing
24 the rule to show cause.

25 MR. STAIR: Yeah.

1 THE COURT: I see that the roles of the lawyers that are
2 going to be issued that are gonna be frankly brought into
3 court to the rule to show cause will have a different factual
4 basis.

5 MR. STAIR: Again, that's in that case and we're here
6 today in this case and ---

7 THE COURT: Alright, and and ---

8 MR. STAIR: --- again, ---

9 THE COURT: --- I, and I recognize ---

10 MR. STAIR: --- yeah, and and the point is that the
11 record in that case I have, you're you're correct, I have not
12 been involved in that case so I haven't had the benefit that
13 you as the judge in that case have had. I've only got the
14 benefit of the record in this case.

15 THE COURT: Okay.

16 MR. STAIR: Yeah.

17 THE COURT: And what my -- and in asking the questions of
18 you, and I apologize if I, if I'm asking them with a tone that
19 seems direct but I I have an interest in monitoring this case
20 that has been assigned to me as well as 1377 that has been
21 assigned to me as complex litigation to try to manage these
22 cases in an appropriate manner. When I first got 1777 in 2006
23 and I was asked by the lawyers to take it and the judge
24 assigned it to me, I would never have comprehended that this
25 case and the collateral matters would have still been going on

1 so I have to take some responsibility for the way that I have
2 managed those cases. This has cost the State of South
3 Carolina in judicial resources and court time an extremely
4 large amounta time ---

5 MR. STAIR: Yes, sir, well ---

6 THE COURT: --- and I intend to be sure that everyone is
7 treated fairly, given an opportunity to be heard appropriately
8 and I will make the decisions that I am called upon to make
9 and that's the reason I want to know and try to get a feeling
10 and anticipate will this settlement be contested at some point
11 in the future or are lawyers doing what the lawyers need to do
12 and properly are doing being sure their client's protected on
13 the record but I want to know if there's any real possibility
14 that the settlement is going to be contested.

15 MR. STAIR: No, I don't think the settlement they're
16 talking about will be contested by us.

17 THE COURT: Okay.

18 MR. STAIR: We we we will suggest that that the money
19 that is paid in this case should stay in this case ---

20 THE COURT: Okay.

21 MR. STAIR: --- if we're in this case.

22 THE COURT: Alright.

23 MR. STAIR: And and I understand your role in all the
24 other cases but we do look to you in this case to be our judge
25 in this case and not the judge in that case.

1 THE COURT: And and my decisions that I will make on
2 class certification and the issues that are now that hopefully
3 we're gonna do today and tomorrow are -- will not be affected
4 by the decision on approving or disapproving this settlement
5 as a class settlement, I've made that very clear to the
6 lawyers and and when we met in the back when we were talking
7 about it and I want it to be very clear on the record that
8 neither side will benefit nor be prejudiced by the fact that
9 this settlement if it's approved as a class settlement will go
10 forward not knowing those are separately.

11 MR. STAIR: Thank you, Your Honor.

12 THE COURT: Thank you. Alright, let me ask Mr. -- 1377
13 lawyers.

14 MR. WILLIAMS: Yes, sir.

15 THE COURT: Alright, you understand about I want you to
16 put on the record your representation that's been made to me
17 as to how ya'll view the rule and what the terms of this
18 settlement because my I understanding is ya'll have had no
19 participation in in negotiating this settlement between the
20 parties that are presently before me, that's that's correct?

21 MR. WILLIAMS: That's correct, Your Honor. We have
22 discussed 'cuz the rule to show cause was part of it just like
23 we were at mediation ---

24 THE COURT: Um-hum.

25 MR. WILLIAMS: --- we have discussed, you know, the rule

1 to show cause aspect of the settlement and I think our
2 position has always been that it's of course a a court
3 enforcement action that our role is more as prosecutors and
4 that it it really goes to the integrity of the court system
5 and the rules that have been violated.

6 In regard to the money, you know, we re -- do represent
7 the class and to the extent that money could come, you know,
8 the money could come back to the class, I mean, we would like
9 an opportunity to, you know, maybe brief that at some point
10 should the Court issue the rule, issue the rule to Mullen and
11 Mr. Grimball and then give them credit for for, you know, for
12 the money they paid, you know, those are so many contingencies
13 that we we we may wanna address it in he future but we would
14 not object to to the settlement. We we may wanna address
15 whether the Court intends to move the money back, I know they
16 want the credit for the money for their clients should ---

17 THE COURT: And ya'll would like the credit for your, for
18 your side so, I mean, that's not really an issue that I have
19 to decide for purposes ---

20 MR. WILLIAMS: Exactly, Your Honor.

21 THE COURT: --- of approving the settlement though.

22 MR. KRAWCZYK: Your Honor, if I may, Charlie Krawczyk,
23 I'm here for the Finkel Law Firm. I think -- I agree with
24 what Tom said that the only thing I wanna -- we wanna make
25 sure we had a clear record as the attorneys of 1377 that

1 Section 6 of the settlement does refer to some portion of
2 1377, that while we don't object to it we just wanna make sure
3 that the record reflected that we we're, like he said, going
4 to preserve the rights afforded to the class members of 1377
5 and that we also agree with Mr. Pendarvis's and and defense
6 counsels' assessment of Your Honor's ability to know and
7 understand the facts in 1377 and the malpractice action so
8 that the Court can make that decision as it sees fit.

9 MR. PENDARVIS: And, Judge, I wanna be clear we are, we
10 have been aware of these settlement negotiations, I mean,
11 we're involved, I mean, we -- we're in mediation so I mean,
12 I'm not saying that we have not negotiated with Ms. Wall at
13 all or anything like that but we've been aware of settlement
14 negotiations between these parties and the rule to show cause
15 and all that.

16 THE COURT: I mean, I I understand, I'm not real sure
17 what they are but I understand that there've been allegations
18 of conflict that have been raised against various counsels, I
19 wanted to be sure that that none of those issues of conflict
20 will be raised as part of this approval of the settlement.

21 MR. JONES: I don't see how you, how you ---

22 MR. WILLIAMS: Your Honor, well ---

23 MR. JONES: May I I speak to that question first? But I
24 think you need to know the background here. I -- Your Honor
25 has not been involved in everything that's goin' on in this

1 case and let me just by way of background explain what has
2 happened.

3 THE COURT: On the settlement?

4 MR. JONES: Well it's gonna affect I think possibly the
5 settlement because I think you need to under -- understand if
6 they're saying they're preserving their rights to go after
7 this same pot a money that is a problem because I don't ---

8 THE COURT: You have ---

9 MR. JONES: --- think they can do that. They have been
10 disqualified from 3145 ---

11 MR. WILLIAMS: No, 1377.

12 MR. JONES: --- and in 774.

13 MR. WILLIAMS: Your Honor, they ---

14 MR. JONES: They have not been ---

15 THE COURT: Wait, wait one at a time. The court reporter
16 can't take down ---

17 MR. JONES: --- they have not been disqualified from
18 1377, they are still class counsel in 1377. What happened and
19 Mr. Williams while part of Mr. Finn at one time worked for one
20 of the defendant law firms. I guess it was the summer of '09
21 we discovered through looking at part of a file that Mr. Finn
22 had actually represented the Cardamones in their individual
23 lawsuit that they filed before they became a class represent
24 ---

25 THE COURT: And I read that. Let me, let me stop you for

1 for one moment before we go down -- chase a rabbit down a
2 trail that has -- that I might have very little to do with
3 what we're doing here today as part of this settlement
4 hearing. I am simply being asked to approve this settlement.
5 This settlement has a term in this that relates to a potent --
6 that a rule to show cause that I have indicated in another
7 lawsuit that I intend to issue. That rule to show cause is
8 being issued because there have been some allegations backed
9 up with some factual information that lawyers have engaged in
10 conduct that involved me, this court, in making
11 misrepresentations that has resulted, potentially I could
12 conclude, resulted in this court goi -- chasing rabbits down a
13 litigation trail that has lasted for three, four, five, years,
14 that information that this court had been -- had known of
15 originally maybe we would not be here even today. Now that's
16 where the rule of show -- rule to show cause stems from. I am
17 being addre -- I'm being asked as part of this settlement to
18 simply say that these lawyers who have stepped up to the plate
19 and have worked in this -- on the other lawsuit for all those
20 years, participated in developing that record, that have
21 actually engaged in negotiations of the settlement in the
22 other lawsuit which are the people that were actually injured
23 by the Dryvit product and could could then assert claims,
24 claims that would have not gone forward but for the work of
25 the other lawsuit, I am simply being asked that if I issue

1 that rule to show cause and they are made part of that rule to
2 show cause that I will not charge them or or give them some
3 credit in some form or fashion for the pittance amount of
4 money that is being addressed as part of this settlement.

5 MR. JONES: I understand that and and I don't take issue
6 with your position, I certainly appreciate where where you are
7 in all this, however I don't think you can simply ask the
8 question without understanding you can't just -- what they're
9 asking is to preserve their right to get this money. What
10 Mr. Kent ---

11 THE COURT: But I'm not ---

12 MR. JONES: --- Stair ---

13 THE COURT: --- saying they're gonna get any money.

14 MR. JONES: What Mr. Stair was saying is he has concerns
15 that that money stay in this, in this case.

16 THE COURT: Alright.

17 MR. JONES: If it goes to the other case, what they've
18 done is stepped across the bounds of their 1377 case back into
19 a case in which they've been disqualified from ---

20 THE COURT: But do you see that ---

21 MR. JONES: --- for the same money that they were asking
22 from initially before they were disqualified.

23 THE COURT: But do you see that as a reason for me not to
24 approve this settlement?

25 MR. JONES: I do if they're gonna, ---

1 THE COURT: Uh, ---
2 MR. JONES: --- if they're ---
3 THE COURT: --- do you?
4 MR. JONES: --- gonna do that. I I I think I would have
5 a problem with that. Now I'm gonna have to ---
6 THE COURT: I problem with me approving the settlement or
7 a problem with them making that request?
8 MR. JONES: With -- well it's part and parcel. I don't
9 know if you can separate the two out.
10 THE COURT: I don't have to approve a request. I guess
11 my point of my question aren't -- isn't what you're bringing
12 up an issue that is left better to be addressed in the future
13 in the event it happens?
14 MR. JONES: Well, if it happens, Your Honor, I don't -- I
15 won't have grounds I don't think to address that.
16 THE COURT: Why? You just said you're you're reserving
17 your right to address that in the future.
18 MR. JONES: I reserve my right, specifically I reserve
19 not waiving the disqualification. I didn't reserve my
20 right -- I don't have any right in 1377 on behalf of my
21 clients, they're not in 1377. As for -- they're ---
22 THE COURT: You know ---
23 MR. JONES: --- the former class representatives.
24 THE COURT: Do you see what I'm trying to do with this
25 case? You understand why we are here?

1 MR. JONES: Yes, Your Honor.

2 THE COURT: I very well may decide to do that rule to
3 show cause hearing, not approve this settlement, require
4 everybody to come in and we will find out what the class
5 representatives knew and did not know before I approve any
6 settlement of this case.

7 MR. JONES: I'm not trying to ---

8 THE COURT: You want me ---

9 MR. JONES: --- be a stick in the mud, Your Honor, ---

10 THE COURT: --- to do that?

11 MR. JONES: --- I'm simply tryin' -- I have to protect my
12 clients' interest. My clients have been sued, were sued by
13 their former attorney.

14 THE COURT: Your client was prior class representative.

15 MR. JONES: That's correct and they were sued by their
16 former attorneys for settling their individual lawsuit which
17 they ---

18 MR. WILLIAMS: I've ---

19 MR. JONES: --- represented ---

20 MR. WILLIAMS: --- I've gotta object to that, Your Honor.
21 They were never their former attorneys.

22 THE COURT: So prior class representative wish, I wanna
23 be sure I understand, that a settlement hearing, in this
24 settlement hearing prior class representatives wishes me not
25 to approve this settlement?

1 MR. JONES: I don't wish you not to approve the
2 settlement, I take exception to 1377 counsel reserving their
3 right to go after the money which is money from this case ---

4 THE COURT: But is that not something we could take up at
5 a later time?

6 MR. JONES: It very well be and if it, if it, if it
7 pleases Your Honor I request maybe a five minute break. I
8 would like to discuss this with with defense counsel if if
9 you're so inclined.

10 THE COURT: Sir, you're fixing to convince me that I do
11 not need to approve this settlement ---

12 MR. JONES: I I'm not ---

13 THE COURT: --- and I believe that that would be a, in my
14 humble opinion, that would be a strategic mistake on your part
15 for your client and that would also I think be a mistake on
16 what my role is which is try to bring some closure to this
17 litigation for the members and potential members of a class
18 that is presently in front of me under Rule 23.

19 MR. JONES: I I agree with you a hundred percent. I'm
20 trying -- I I don't wanna hold anything ---

21 THE COURT: I will ---

22 MR. JONES: --- up.

23 THE COURT: --- step down and allow you that opportunity
24 because I want you to be comfortable with what you're
25 advocating for.

1 MR. JONES: And and perhaps I'm misunderstanding what's
2 being asked and that's why I'd like to clarify this before we
3 go forward.

4 THE COURT: Alright, we'll step down for say about till
5 twelve o'clock.

6 MR. JONES: Thank you.

7 (Whereupon, a recess was taken.)

8 THE COURT: Alright, go back on the record.

9 MR. JONES: Your Honor, I simply misunderstood what was
10 being asked or or said. We have no objection too so...

11 THE COURT: Alright, don't let my tone act as a chilling
12 effect on your advocacy for your client.

13 MR. JONES: It doesn't, Your Honor, I appreciate it.

14 THE COURT: Alright, because I generally want to know
15 because part of what I I see my job under these types of cases
16 especially when I'm approving a settlement is that I'm gonna
17 have a hearing down the road to where people are gonna come in
18 and they're gonna have an opportunity to object to this
19 hearing and so if I I, if I have to address things, I'd like
20 to know about 'em now or at least get some feel for 'em and
21 get a feel also for whether or not, you know, this -- we --
22 that these lawyers have negotiated out the ten-day, I mean,
23 the ten opt out numbers whether or not that's realistic,
24 unrealistic, do we expect people to actually challenge the
25 settlement so I, you know, I ask these questions, I ask them

1 sternly and the reason I especially in this case my demeanor
2 may be a little bit more stronger what I typically like for it
3 to be is that I hope the lawyers understand my view on the
4 legal profession and the role of lawyers in our community and
5 how much high regard I actually have for the judicial system
6 and the, and that role that lawyers, both plaintiff and
7 defense lawyers play to the successful operation of of our
8 legal system and how important our legal system is to the
9 protection of our -- the basic core of our democracy found in
10 our Constitution and when lawyers are accused of deviating
11 from the standards of professional conduct, my skin crawls, I
12 get uncomfortable and then when they -- when those types of
13 allegations that are brought before me I take them with a high
14 degree of sensitivity and I have tried in my role when I got
15 this case to structure a judicial strategy that will try to
16 see to it that everybody is treated fairly but also afford the
17 lawyers an opportunity to have some control over how those
18 issues are going to be addressed and if we have to address
19 them in open court, air all the dirty laundry, even though
20 that dirty laundry may prove not to be what is alleged it is,
21 it's still going to be dirty laundry, that those people
22 outside of the legal profession that when they hear it they
23 may not understand it and the legal profession will not stand
24 in as high regard after that is aired than before. So this
25 case is just a -- I'm just a little bit involved, I'm

1 connected in this case. I would like to see this case
2 resolved one way or the other, preferably with the parties
3 having some control over the resolution of it but if it does
4 not it will not. Alright, but please don't -- do not any --
5 don't don't -- any lawyer please do not let my tone if I take
6 a sharp tone with you, don't let that prevent you from being
7 the advocate that you're hired to be, the advocate that that
8 you, that that you should be so I apologize for my tone.
9 Alright. Anything else on -- yes, ma'am.

10 MS. WALL: Yes, sir, I just wanted to make sure that the
11 record is clear here because I was listening to other counsel
12 reference things such as when they were looking at Section 6
13 in the 1377 issue rule to show cause, I heard words like
14 allocation, credit. Let me make sure that and I know that the
15 Court does understand this but I'd like to put it again on the
16 record as it's written in the second paragraph, In fact, as a
17 condition precedent we're requesting that the Court either
18 decline to issue because it has not yet done so, decline to
19 issue a rule to show cause as to the settling parties known as
20 Mullen Wylie or in the alternative not to impose any monetary
21 sanctions against Mullen Wylie, so I'm I'm repeating that for
22 the record simply because I'm hearing about credits and
23 allocations and I don't know how that would come into
24 anything, Your Honor. This settlement is premised on the
25 principle that the remaining monies in the policy are to be

1 paid and nothing more, Your Honor. Thank you.

2 MR. WILLIAMS: Your Honor, just, for the 1377, I mean, our
3 understanding was that the defendants are paying 475,000 into
4 a pot a money. Part of the settlement is a, you know, is tied
5 to the rule to show cause and to the extent that the Court at
6 some point issues a rule and they get a credit for that money,
7 you know, that's the way it would happen and it would be
8 noticed in that regard and, ya know, that's how it would be
9 handled to the extent that the Court ever issued, you know,
10 issues or, you know, issues a ruling on on that money so...

11 MS. WALL: Again though, Your Honor, this this
12 contemplates very clearly and states that this court will not
13 award a monetary sanction against Mullen Wylie and the purpose
14 behind that of course is because Mullen Wylie is paying in
15 a -- into a settlement while denying liability for all of the
16 reasons that we've set forth before the Court here this
17 morning.

18 MR. WILLIAMS: Well I -- all I wanna tell ya is you can
19 recognize that they paid the money into the 475,000 and so the
20 1377 people would know that there's some, when I say a credit
21 that the Court has recognized that they've settled and and
22 paid money, I mean, but we don't know know what's gonna happen
23 in the future so, I mean, we have no objection to the
24 settlement but but once again we don't -- we believe it's up
25 to the Court on the rule to show cause.

1 THE COURT: Alright.

2 (Pause.)

3 THE COURT: Alright, let me -- let's have a quick brief
4 discussion about Paragraph 6, alright, and the rule to show
5 cause. Not to -- maybe maybe I read par -- the second
6 paragraph a little bit too quick, alright, my view on the rule
7 to show cause is similar to that which Mr. Williams says is
8 that the rule to show cause is an arm of this court to address
9 issues that this court believes needs to be addressed that so
10 I still have that as an option in 1377, I've indicated to the
11 lawyers that that I may do that but where Mullens and Wylie is
12 different from the other part, say the other defendants in
13 this case is that we have actually had the hearings involving
14 Mullens and Wylie and Frank Grimbball and I know what their
15 involvement was they -- and I -- they they were vigorously
16 opposed, they were cross-examined, they were subject to the
17 screening of the judicial process so I -- I'm a -- I'm well
18 aware of the things that they did based on what has been
19 provided. Now the only thing I have not heard is that maybe
20 the co-defendants view and well he's more responsible than I
21 am or he did that or he didn't tell me that, you know, I've --
22 I'm sure I have not heard those arguments but I am, I am
23 comfortable in in removing Mullens and Wylie and Frank
24 Grimbball out of the rule to show cause process as a, as a
25 party even though that I know that they would still be part of

1 it because factually they have a lot of information that well
2 that some people may find would be significant to a
3 determination on the rule to show cause. And I know
4 Ms. Ms. Williams is is -- has talked about terms of al -- of
5 allocation of credit or or Mr. Williams talked about that as
6 well. I was, I was envisioning that if in fact and if I do
7 the rule to show cause and my understanding under the rule to
8 show cause there has been a request that I I bring in the the
9 lawyer fees that were allegedly paid inappropriately to those
10 lawyers to bring them back into the Court and put them in some
11 type of special trust then to be spread out to other lawyers
12 that if in fact I did -- included the fees allegedly received
13 by Mullens and Wylie that I was going to, that I was going to
14 do a math mathematical calculation that would have actually
15 shifted money from this settlement here over into the 1377
16 case representing those fees, that's what I was envisioning
17 doing and the reason that I was -- di -- had no problem with
18 this particular settlement. The positions that I've heard
19 concerning the conflict issues I think that they will still be
20 ripe in a -- at at any future time, that in the event that
21 occurs and ya'll wish to advocate for a position that says no,
22 don't put that money over there because and then you wanna say
23 something about a lawyer having a conflict but that might be
24 even more appropriately addressed that even if you convince me
25 on the conflict issue just for me not to allocate that

1 particular amount of money going to that particular lawyer who
2 had the conflict because the allegations that stem from 1377
3 and that are contained in the rule to show cause I don't
4 believe I can ignore if they actually come to a hearing 'cuz
5 those allegations involve misrepresentations to the Court and
6 I have, fortunately for me I have never been given the
7 opportunity to other than Mullens and Wylie been able to hear
8 what the counter arguments are as to why those representations
9 or lack of representations that were made to me are not true,
10 are not -- or did not mean what it is what others have said
11 that they mean so I've had that benefit that I don't have to
12 come to and I've not come to any of those types of conclusions
13 so it might be better that if you wish to raise those issues
14 of conflict that you direct it to a particular lawyer and say
15 he should not receive that particular money than to say that,
16 I should not have the ability to tell the plaintiffs in this
17 particular case that they need to take a certain amount of
18 money and put it into 1377 when that money represents lawyer
19 fees that this court was never asked to approve, that this
20 court has seen documentation that suggests that lawyers in
21 fact took lawyer fees that should have been approved through a
22 class action by this court whether it be me or Judge Kemmerlin
23 or some other court once the class had been certified or the
24 request for the class to have been certified and being granted
25 by the Court and that work was done and those lawyer -- and

1 those lawyers received money for work that they did. I don't
2 think under Rule 23 and also me as as a judge whose got
3 obligations to Rule 23 can say that I'm not going to address
4 those issues and I think for purposes of this settlement I
5 think I can -- I I I I feel comfortable enough to say that if
6 Mullens and Wylie gets into that Rule 23 and and issues that
7 relate to those payment of those fees I can look to this
8 settlement amount as a source to pay that money into that
9 trust so to speak that I would set up under the rule to show
10 cause. Anybody wanna comment?

11 MR. WILLIAMS: And that's fine with -- I mean, that's
12 fine with us, Your Honor. I don't know about...

13 THE COURT: Alright. I know ya'll wouldn't want me to do
14 that because ya'll want me to use the money -- see, see they
15 want me to use the money to actually set it -- put it into an
16 account to help pay for the litigation that they want to have
17 against ya'lls clients so...

18 MR. PENDARVIS: Well what we're talking about there's
19 still gonna be and let's assume and again, this is as as
20 stated in the first paragraph of Section 6 it's in the Court's
21 discretion how this happens, the plaintiffs are not gonna
22 object. In the event the Court were to do that, there's still
23 gonna be money remaining in the trust account and assuming the
24 Court -- my understanding the monies that were allegedly paid
25 to Mullen Wylie defendants were about a hundred and twenty-one

1 thousand?

2 MS. WALL: A hundred and twenty-two thousand four hundred
3 and thirty-four dollars.

4 MR. PENDARVIS: Thank you very much. And and so so that
5 would, if there's a \$475,000 payment, there still sho -- will
6 be funds in the account for litigation matters and and
7 hopefully we'll see spend that kinda money there'll be some,
8 you know, some things to distribute and we'll see what happens
9 with the claims against the remaining defendants but ---

10 THE COURT: What the lawyers spent in 1377, that's a drop
11 in the bucket.

12 MR. PENDARVIS: Okay, well we'll see, we'll see how that
13 goes but it -- it's not like, it's not as though that the
14 entire fund is gonna be moved over is my understanding
15 that -- of the parameters of that.

16 THE COURT: Alright, anything else on the settlement?

17 MR. PENDARVIS: One, one tiny housekeeping matter, Your
18 Honor. In the event the Court does approve the settlement,
19 I'd like then the order to include a provision that allows the
20 monies to be placed in an interest-bearing trust account, not
21 in a standard IOLTA trust so that the interest could be
22 accruing in favor of the class.

23 THE COURT: Alright. Yes, sir, Mr. Stair.

24 MR. STAIR: Very briefly. I'm not in 1377 and so I agree
25 with the Court. I think when a show cause is issued in the

1 future in that case if that is done then I will react and
2 respond to it then because at the moment I don't know if it
3 will be done and what it will do if it's done so I'll reserve
4 my thoughts until then and I was wondering when you, again,
5 you say this court and this court, were you talking about the
6 Court in this case as you are or in the 1377?

7 THE COURT: Fortunately from where I stand and I think
8 for the lawyers here that once I was assigned 1377 by Judge
9 Gregory and then I was assigned these cases by my good friend
10 from Walterboro, ---

11 MR. PENDARVIS: Judge Buckner.

12 THE COURT: --- Judge Buckner, the Court's identify
13 merged into one. Under Rule 23 with there being class
14 actions, the -- my authority would come from the rules and my
15 obligations to also work within the parameters of Rule 23. I
16 think the only distinction, and please correct me if you
17 believe otherwise, the only distinction between 1377 and these
18 cases would be anything that happened in 1377 prior to that
19 December the 2005 or 6 ---

20 MS. WALL: Yes.

21 MR. PENDARVIS: 2005.

22 THE COURT: --- 2005 hearing because right after that was
23 when Judge Gregory gave it to me and and then also anything
24 that happened in these cases prior to the order that Judge
25 Buckner signed assigning me these cases use of the term

1 "court" would mean me. Anything that happened prior to those
2 orders being issued then the Court would would mean things
3 that happened in the circuit court but not in front of this
4 particular judge at all.

5 Now I told the lawyers in chambers when we were trying to
6 see where we were -- where they were on the settlement hearing
7 I asked them to please make a record and reference things that
8 happened before this court, meaning happened before me,
9 because I believe, unless I hear objection from someone in
10 this courtroom today, I am able to make decisions regarding
11 the approval of the settlement in -- based upon the knowledge
12 that I have in the other cases as well beca -- in the 1377
13 cases, the hearings that I've been exposed to, arguments that
14 have been placed by the lawyers, because my understanding is
15 these issues that are contested in these two cases that we
16 will address both class certifications consolifica -- and
17 consolidation on stem from the matters that came from 1377 and
18 so I am going to incorporate the records of those prior
19 hearings that were conducted in front of me by reference unless
20 I hear an objection from someone.

21 MR. STAIR: Not to the issue of the settlement but to the
22 issue of class certification I would object to that because I
23 think they have to show in this case a class in this case and
24 they can't do it from the other re -- I wasn't in the
25 other ---

1 THE COURT: Okay.

2 MR. STAIR: --- record, I don't have the benefit of the
3 record.

4 THE COURT: So for purposes of the hearing related to the
5 settlement, you have no objection to me incorporating my
6 knowledge in the other case.

7 MR. STAIR: I do not.

8 THE COURT: Alright, because as Mr. Fields who's joined
9 us that represented Dryvit and Mr. Fields in the back of the
10 courtroom, we need to make a record because at some point in
11 the future we don't know when someone might actually come in
12 and want to challenge this settlement and I want to be clear
13 that for purposes of this settlement what is the basis of my
14 knowledge because since we ha -- we're not calling any
15 witnesses as part of this hearing to convince me as to the
16 reasonable -- the the reasonableness of the hearing, I mean,
17 of the settlement or the fairness of the settlement or the
18 adequacy of the settlement I'm basing, I I I intend to approve
19 the settlement but I intend to approve it not based just upon
20 lawyers coming into court and making arguments to me but upon
21 my very intrical knowledge of the facts that underlie in this
22 case, my knowledge of the fact that I know that these lawyers
23 that are asking me to approve this settlement they have worked
24 tirelessly in trying to get the settlement done, I have
25 been -- my email box has been inundated with emails back and

GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 those claims, fraudulent concealment and other claims that are
2 asserted in the amended complaint, those claims don't require
3 proof of an attorney client relationship. The fact that they
4 created this class, started this process, created absolute
5 fiduciary duties from those attorneys to all members of the
6 class they define. If some person acquired a structure after
7 they were relieved as counsel, that doesn't change the fact
8 they left the class. When they, when they departed from the
9 case, when their duties pursuant to that order were
10 terminated, they left an incomplete record, they did not tell,
11 they did not disclose to the Court and to the parties and to
12 the class what really had taken place and therefore
13 individuals that acquired a qualifying structure after those
14 attorneys left we believe still have a claim based on the
15 fiduciary relationship that they -- that these defendants
16 started when they began the class action in 2002.

17 THE COURT: As part of the issue of determining whether
18 to certify a class or not whether it be in the claim against
19 the lawyers or claim against the class representatives, is the
20 Court obligated at this juncture then if I in fact certify
21 it, do I also then define the parameters of the class at this
22 time?

23 MR. PENDARVIS: I think Your Honor can rely on the the
24 language in the pleadings and can qualify that original class
25 definition and these two lawsuits when they were filed in 2008

1 can be adjusted as it was in the underlying case a little bit
2 to to to accurately state what claims are available and what
3 class members have a right so my -- to answer your question,
4 no, does not have to be done at this point. I believe that
5 the pleading itself will be sufficient and if there needs to
6 be some more specific qualifying language that needs to be
7 included in notice, that's certainly something the parties and
8 the Court can address before notice is transmitted to to class
9 members ---

10 THE COURT: Okay.

11 MR. PENDARVIS: --- if the Court so certifies this
12 class.

13 THE COURT: Let's let's let's have a discussion and in my
14 comments I'm looking for answers, I'm looking for help on how
15 to resolve this so please don't take from my comments I have
16 anything, I'm predisposed to rule one way or the other.
17 Your -- I mean, I'm I'm left with the impression based upon
18 your arguments and filings that I've reviewed that your case
19 of legal malpractice and claims against this class
20 representative stem completely from the actions that were
21 taken by by the class representatives and prior class counsel
22 when they started the South Carolina opt out lawsuit,
23 re -- got the judge to say he's going to certify class and
24 then in your words dropped the ball and didn't do anything,
25 allowed the Tennessee case then to go through their court

1 systems and and and and get finalized and then, and then came
2 back down to South Carolina and tried to say it's res -- the
3 Tennessee court is *res judicata* to South Carolina because they
4 they got there first. I I know defense counsel says I I -- he
5 doesn't agree that I can rely upon prior records but I also
6 can't ignore what has been represented to the Court and I say
7 "the Court", to me, in prior hearings by lawyers in cases
8 similar to. I had a defense lawyer one time, a civil defense
9 lawyer, representing a trucking company that was involved --
10 representing a trucking company and the truck driver that had
11 hit a person on the highway over in -- out on the highways and
12 in criminal court, the lady was charged with felony DUI
13 causing great bodily injury and she came to court and appeared
14 in front of me and acknowledged that she had used cocaine,
15 cocaine was in her system and that she was intoxicated at the
16 time of the accident and I sent her to prison based upon those
17 representations and then in a separate, one subsequent civil
18 matter where the insurance defense lawyer representing her and
19 the insurance company came to court and said, Your Honor, we
20 understand those representations were made to the Court before
21 you but we intend to challenge those at the subsequent civil
22 hearing, I don't operate in that fashion that I will allow
23 those blatant factual contradictions to exist in a court when
24 people come in front of me, whether they're made by lawyers or
25 by litigants.

GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 these lawsuits but the claims that we're talking about are for
2 breach of fiduciary duty, civil conspiracy, fraudulent
3 concealment; all of those claims are not subsumed in a legal
4 malpractice claim by any stretch and also don't require the
5 type of proof of actual damages that the legal malpractice
6 claim gets and again, we're not conceding the malpractice
7 claim doesn't have actual damages for each subclass but those
8 -- that legal malpractice claim is not the only claim asserted
9 in these amend -- in this amended complaint.

10 THE COURT: See, I I I have a genuine concern that based
11 on again what I know that has gone on before and what I
12 believe is viewed your basis of this lawsuit as being the
13 lawyers opting out, Tennessee coming down to South Carolina,
14 gettin' a class certified and then sitting on it and doing
15 nothing waiting for the Tennessee court to run its course and
16 then engaging in what is alleged to be conspiratorial
17 conversations with Dryvit so that they actually don't do
18 anything waiting for the Tennessee court to actually get
19 it's -- get everybody approved and then come down to South
20 Carolina and say, Oop, yo, it's over, we can't do anything so
21 and everybody come, wantin' to come to court and agreein', ya
22 know, Judge, it's -- you're right, you know, it's it's over
23 with in Tennessee, you you know, they can't do anything that
24 that being where the bad stuff is. Then it seems to me that
25 if you're going to have a class action litigation based upon

1 that type of conduct, it's going to have to have some damages
2 that are substantial, more than just nominal. I mean, I'm I'm
3 really not excited, feel -- do not feel a compelling reason to
4 move forward with certifying a class when there is just
5 nominal damages then all I'm doing is creating a class action
6 lawsuit where potentially the lawyers might get paid. I want,
7 if I'm gonna certify a lawsuit and one that stems from that
8 prior conduct where it appears that the class has already
9 received compensation for the damages that they would have
10 suffered as a result of of the Dryvit being bad on its house,
11 I wanna know that those damages, you know, where are those
12 damages. So far I'm I'm hearing that if the allegations are
13 proved to be correct, that the lawyers and the class
14 representatives that first handled the South Carolina lawsuit
15 actually used the class action litigation in a way that they
16 were trying to simply enhance a value in the Posey case up in
17 Tennessee, I think that's wrong, when they actually had no
18 intentions of following through with the South Carolina
19 lawsuit, I think that's wrong. If it is that the la -- that
20 that the South Carolina class action litigation was going to
21 be used in an effort to strong-arm Dryvit to settle individual
22 claims of these claimants to receive a higher value in order
23 to buy off the class representatives so that they no longer
24 had an individual personal interest in pursuing the class
25 action litigation, I believe that is wrong. If those -- but

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1 THE COURT: Okay.

2 MR. PENDARVIS: --- next week, first thing.

3 THE COURT: We'll -- I'm not gonna tell you to do it so
4 I'm not gonna ask ya to do it either ---

5 MR. PENDARVIS: Alright, thank you.

6 THE COURT: --- so. Yes, sir.

7 MR. STAIR: Your Honor, I actually have done a PowerPoint
8 and one the advantages I do it because it tends to lead me in
9 a direction that I don't veer from as well as the disadvantage
10 obviously it's done before I get here and so a lot of the
11 things we may have discussed and so I will try to move through
12 it as I can.

13 (Whereupon, counsel handed the document to the Court.)

14 MR. STAIR: What I have done is I have made a colored
15 copy full page for the Court so you don't have to strain your
16 eyes and we're gonna give to the other counsel in the case a
17 forward to a sheet in a way to try to save the ecology and so
18 as I say I will walk through these and I ask myself questions
19 on these because sometimes they tend to head me in a direction
20 and so I I will say that some of the dollar figures he just
21 mentioned my understanding is they involve the monies paid by
22 contractors and the like in addition to Dryvit and so it's not
23 an apple and an apple but I suppose we'll get to that some day
24 if and when we ever get to that point but with that having
25 been said what I wanna do is I just wanna start and my first

1 question is what this case is not and it's not an extension of
2 the *Cardamone* case and I think we've discussed that I will not
3 beat that one to death anymore and and why did I ask that
4 question? I asked the question because in their reply
5 memorandum and I guess to kinda get the terminology they filed
6 a motion for class certification, we filed a response and they
7 then filed a reply. I do agree with the Court we should have
8 everything by now. As a matter of fact, you might recall you
9 had a scheduling order that required them to provide any
10 additional grounds for certification by February 15th that
11 they had not put in their original motion and I will tell you
12 they did not in that original motion mention anything about
13 subcategories or subclasses nor have they to any moment up
14 until now and so I'm hearing really for the first time about
15 subcategories, we'll talk about that, I guess I'm not hearing
16 about it for the first time, I have heard it suggested that
17 they might amend their pleadings to do such a thing but they
18 have never done such a thing, we'll talk about that, but the
19 reason I I wanted to separate this from *Cardamone*, and I'll
20 call that the *Cardamone* case and this the *Tucker* case, is they
21 said that based on the evidence in the 1377 matter which was
22 *Cardamone*, the cert -- the certification of the class in this
23 case, *Tucker*, will allow the Court to complete tasks
24 identified in the order and judgment granting final approval
25 and so forth by this court in the underlying 1377 matter and

1 then they go on to say that this court at that time was tasked
2 with and this court stated that and this court acknowledged
3 that and I I wanted to draw the distinction as I have done
4 today and won't beat it to death any further between the court
5 in this case and the court in that case but moreover this case
6 is not the vehicle by which the Court completes its task as
7 they call it as set out in the *Cardamone* case, that this is
8 its own case and and it's difficult but as I say a necessary
9 task to distinguish in our case the Court in this case and the
10 Court in that case the plaintiffs here from those plaintiffs,
11 the punitive class here from the certified class there and the
12 recovery sought in this case from the recovery had in that
13 case there -- it's two different situations and I know it's
14 difficult and the Court has obviously indicated how difficult
15 it might be given your knowledge and so forth of the other
16 case and I understand that difficulty but if we could stay
17 focused on that and and the question's what is this case? it's
18 a new case with new parties, new issues and a new record and
19 the *Tucker* case is not the *Cardamone* case and so forth and the
20 record is really important because I know you spent a lotta
21 time as the judge in the *Cardamone* case with that record, I
22 have not spent that same time and so when we assume that the
23 record in that case as in this case, I don't have it and so I
24 I do distinguish it but I understand the burden that you have
25 in having been in both but ---

1 THE COURT: If you don't have it, I would strongly
2 suggest that you obtain it.

3 MR. STAIR: Well and and and I have read portions of it I
4 can assure you.

5 THE COURT: Okay.

6 MR. STAIR: Yeah, but my point is is that for purposes of
7 class certification here the record there is not the record
8 here.

9 THE COURT: Well I I suggest that you get it because
10 there have been representations made to me in the other case
11 that apply to representations that will be made here in this
12 court and I shared with you the example of the criminal
13 defendant who injured a young man on the highways of the
14 state, came to court in one legal proceeding and asserted to
15 this court that she was under the influence of crack cocaine
16 and then in a subsequent civil proceeding she was represented
17 by a lawyer and who was representing her and the insurance
18 company that insured the vehicle and represented to me that
19 they were going to contest that she was not intoxicated. I do
20 not view that substantial amount of misrepresentations of very
21 important facts to me I don't view that very fondly and I
22 don't take it kindly and I think it shows a great amount of
23 disrespect to the Court. The representations that have been
24 made to me as to the conduct that is the subject matter of
25 this litigation I consider it to be very serious so I want to

1 strongly suggest and encourage you to please get a copy of
2 the -- of those transcripts and and have someone, either you
3 or have someone take a look at them because these are very
4 serious allegations that have been made involving these
5 lawyers, officers of the court, including representations that
6 have been made to me, this judge, this court, this same person
7 that sat in December of 2005. I understand what you're saying
8 that my role has been assigned to this judge in this case is
9 different than my role as the judge in the other case but
10 we're dealing with a lotta similarities in facts and I
11 don't -- I'm tired, an -- I'm I'm very concerned when factual
12 representations are made to me by very competent lawyers who
13 have excellent reputations in the state who work very hard for
14 their clients and I I -- so I I want to know what the
15 truth is, ---

16 MR STAIR: Yeah

17 THE COURT: --- okay? So please if you don't have 'em
18 please get the, please get the -- please get those records,
19 okay?

20 MR. STAIR: By suggesting the distinction between the two
21 records I was not suggesting I had not read some portions of
22 of 'em nor do I fail to understand the Court's feelings about
23 a lot of things arising from those and I just make the point
24 as the lawyer in this case that the record in that case is not
25 the record in this case but I understand what the Court is

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1 identity of person but their whole argument on numerosity is
2 there were enough there therefore there must be enough here
3 without identifying who the people are here or what the number
4 is here.

5 THE COURT: Do they actually have to identify the people
6 or is it sufficient ----

7 MR. STAIR: I think they've gotta give evidence of of the
8 of of --- no, I don't think that, no, no, sir, I don't think
9 they have to identify people. I think what they've gotta do
10 is give you sufficient evidence to demonstrate that there are
11 enough people out there to satisfy this requirement and my
12 point is is that they have done nothing of that at all other
13 than to say there were numerous, there were enough people in
14 the other class therefore there are enough people in this
15 class and and a couple a things; one, there's no evidence of
16 what the other people were in the other class but more than
17 that we know it's not the same class and so there will be I
18 think less people in this class than that class, how many less
19 we don't know but the point is is that there's no evidence
20 here as to what that's gonna be and and they go on and again
21 argue about because the proposed classes are identical, the
22 class approved and certified in the underlying Cardamone, it
23 clearly satisfies numerosity and again hence my paranoia over
24 the concept of identical because they're clearly not
25 identical. Question if cre -- if the classes are not

1 identical, is there any evidence in this record to demonstrate
2 numerosity and the answer is no, there there is none other
3 than their allegation that in the other case there were enough
4 therefore there are enough here, in this case there's no
5 evidence as to how many of those people might be.

6 Commonality, this is is is a big problem in this case and
7 there must be questions of law or fact that are common to the
8 class and those questions deal not only with the offense but
9 with the defense. In other words, are our defenses generally
10 common to each of the class members and if they're not then
11 the case lacks commonality. A couple case citations, and this
12 is from a recent Walmart case from the Supreme Court,
13 Commonality requires the plaintiff demonstrate that the class
14 members have suffered the same injury, a question is not
15 common if resolution turns on consideration of the individual
16 circumstances of each class member.' I think you're gonna find
17 here as we go through and I think Mr. Pendarvis's recitation
18 of the damages that each of the people got, some of 'em
19 they're losing their homes, some of 'em they're home's
20 rotting, some of 'em have this problem or that problem if I
21 were trying to make an argument as to why the cases are
22 atypical or uncommon I probly couldn't do better than to say
23 each of the plaintiffs has its own claim of damage that they
24 claim arise from whatever breach there was but I'll get to
25 that in a little bit. Commonality is well established that if

1 the underlying facts of law necessitate an individualized
2 factual and legal determination related to each member's
3 claims, commonality and typicality is lacking.

4 And then the next point is when the defendants'
5 affirmative defenses, and we have asserted and there's such a
6 statute of limitations because I'm gonna be talking about that
7 in a minute, may depend on the facts peculiar to each
8 plaintiff's case class certification is erroneous. And in in
9 a few minutes we're gonna go through different situations and
10 I think you'll see that our defenses to different people are
11 gonna be different.

12 The next question does the plaintiff recognize their
13 problems with commonality and have they done anything to
14 address them? The answer to the first question is yes and the
15 answer to the second question is no. And as you know they
16 filed a motion for class certification and then they filed a
17 reply and independent of that they most recently filed this
18 motion for settlement approval that we heard earlier today and
19 in that place, in that document they make a really really
20 significant statement but that doesn't appear as they argue
21 commonality and typicality for class certification and that
22 is, "The plaintiff's have investigated and identified various
23 factual and legal differences in the damage claims that are
24 available between certain subcategories members of the
25 proposed settlement trial class." So they apparently have

1 identified various legal and factual differences in the damage
2 claims and so my question is is why does that statement not
3 appear in their documents filed in connection with their class
4 certification and why have they not brought that otherwise to
5 the Court's attention? I don't know if what they did just a
6 moment ago for the first time by talking about three separate
7 subclasses, none of whom have been identified until this
8 afternoon in this case, I don't know if that's the effort to
9 do so and so I I guess again I need to ask Mr. Pendarvis why
10 they haven't said that before now. Going back, and and this
11 may answer some of the question, when they filed their motion
12 for class certification in October, they put as a footnote
13 that the plaintiffs will be seeking leave to amend their
14 complaint to add Mr. Stephen Christianson -- Christian, excuse
15 me, Christian as an additional class representative, quote end
16 quote and they say that in October. You might recall that you
17 issued a scheduling order that told them if they wanted to do
18 something other than what they've done, do it before February
19 15th because we were gonna respond at the end of February.
20 They responded, they didn't add Mr. Christian. You might
21 recall that Mr. Pendarvis I think as it relates to the
22 settlement of the Mullen case was emailing you or writing you
23 a letter and this is May 18th 2011, "Plaintiffs feel that a
24 motion to amend the complaint will be appropriate in order to
25 add an additional class representative, clarify proposed

1 subclasses and provide better focus and notice to defendants
2 of the tortious misconduct that will be presented to the
3 jury." That was more than two months ago and that has not
4 been done so we were told there was gonna be a Mr. Christian
5 amendment in October, it didn't happen. We were told in May
6 that there was gonna be a Mr. Christian amendment, it didn't
7 happen. We were told in May that there were going to be
8 amendments to clarify proposed subclasses, that has not
9 happened and that they were gonna provide better focus and
10 notice to us about our alleged tortious misconduct, that has
11 not happened and frankly our concern that we show up to today
12 and this effort to create subcategories and subclasses in
13 verbal fashion like this with no notice when we should have
14 been told about this some time ago frankly we object to it.
15 Now the questions that I ask from all of that is who is
16 Mr. Christian and why do you think he is needed? What are the
17 various factual and legal differences in the damage claims?
18 The claims were identified by subcategory members not been
19 identified and made a part of this motion and again, I don't
20 have the answer to any of those questions.

21 Question: What are some of the issues involved in the
22 plaintiffs' claims against these defendants the plaintiffs
23 recognize must be common to their class and let's look at
24 their pleadings. So in other words, they're gonna make a
25 claim against us and the question is is what do they recognize.

1 their requirements to be and I took this from their motion for
2 class certification where they talk about their burdens as it
3 relates to malpractice and I think you were right that the
4 fiduciary duty is simply another way of saying the legal
5 malpractice, I think they overlap, I think the requirements
6 are the same and they are that the plaintiff must prove the
7 attorney/client relationship, a breach of duty, damages and
8 proximate of damages and of course that would be in a normal
9 case but when you're doing it in a class action effort you
10 have to prove all of those things but you have to prove 'em in
11 a common way subject to common defenses and and if all of that
12 doesn't take place then ya shouldn't have a class
13 certification of a legal malpractice case.

14 Question: Is that gonna be a problem for them and and I
15 think the answer is yes. Let's look at some of the variations
16 of potential claims of some of the members of the class
17 created by the Cardamone action, to use their language, and my
18 first question is who are the Creasys and I'm gonna use the
19 Creasys as a poster child for why there are class members out
20 there who have different relationships and different claims
21 against the lawyer defendants in this case then any of the
22 class representatives, they are exceedingly uncommon,
23 exceedingly atypical and the Creasy is going to be my poster
24 child for demonstrating how the difference might occur. To
25 answer who are the Creasys and I I I don't know if you know

1 who they are but I I'll -- I will tell you that they were
2 clients of Sam Phillips, they chose to not opt out of Posey,
3 they appeared as objectors in Posey in September 3 '02, they
4 appeared in the Posey fairness hearing through Mr. Phillips in
5 October 1 of '02. They filed post judgment motion in Posey in
6 February of '03 and then the question is is when and how did
7 they appear and and and I say disappear from the Cardamone
8 case, so they've actually had an appearance in this case early
9 on in life long before you were here and the answer is they
10 filed a motion to intervene on November 22, 2002. They argued
11 a motion in February 26, 2003, the motion was denied in 2003
12 and they filed an appeal in August of '03 but dismissed it in
13 in in November of '03 and what they came to know and what they
14 said is exceedingly significant when you think of them in
15 terms of being a plaintiff against these lawyers in a breach
16 of malpractice, breach of duty, breach of any kind of thing
17 and so I'm going to sort of start and I'm gonna try to do this
18 without beating the total heck out of it but just looking in
19 the beginning they filed a a a pleading in Posey in September
20 2003 so they went with their lawyer, these are people who know
21 about Posey and they filed something in Posey so they could
22 make an objection and that was Mr. Gleissner and Mr. Phillips
23 September '02 and they're leading the charge there for the --
24 these people. The Posey transcript, apparently Mr. Phillips
25 said yes, I got notice, our folks obviously had notice,

1 they're here; they could have opted out, yes they could have,
2 they didn't, they were there and and then he he starts to
3 argue against the class and he says the class is not properly
4 defined, we don't have subclasses based on people whose legal
5 rights have been extinguished because of the statute of
6 limitations versus those who have legal rights. Now his
7 argument as it relates to statute of limitations I I kinda
8 want you to keep in the back of your mind because it's gonna
9 be critical as we distinguish how defenses, if we ever were
10 called upon to make them, tend to be the class members are
11 gonna be different, but he did make a nice argument in in in
12 that case that had a statute of limitations, it -- it's
13 important. Anyway, he came and he moved to intervene in the
14 Cardamone case back here in November of '02 so this is back
15 when Judge Kemmerlin was still in charge and they say that,
16 We, the undersigned attorneys for the Creasys move to be added
17 as as intervenors on behalf of class reps so they they can
18 remain and work as class reps, that again was filed by
19 Mr. Phillips so ---

20 THE COURT: Alright, now you talk a lot about
21 Mr. Phillips who's ---

22 MR. STAIR: Yes.

23 THE COURT: --- a lawyer, I believe that from our prior
24 discussions about the issue of 1a -- conflicts with lawyers
25 that that so far in my belief can be addressed at an

1 appropriate time but as a basis of asserting on the issue of
2 class you need to get to the point, otherwise ---

3 MR. STAIR: Okay.

4 THE COURT: --- I I ---

5 MR. STAIR: Okay.

6 THE COURT: --- don't, you know, my view on lawyers
7 attacking lawyers unless there is something to it that I need
8 to know should be clear ---

9 MR. STAIR: Alright, tell you what I I ---

10 THE COURT: --- 'cuz I don't like sitting here, you know,
11 involved in this case with lawyers attacking lawyers, I think
12 I've already made that clear. If you have something that you
13 want me to know that is improper about Mr. Phillips's conduct
14 or Mr. Gleissner's conduct let's get to the point, tell me
15 what it is ---

16 MR. STAIR: That's ---

17 THE COURT: --- so I don't have to worry about when I'm
18 gonna hear that.

19 MR. STAIR: Alright. Alright. Actually, I -- I'll jump
20 ahead and tell ya I was not here to criticize Mr. Phillips or
21 Mr. Gleissner's conduct. I'm here to show you how their
22 knowledge and information on behalf of their client makes that
23 client's claim different from the claims in this case as it
24 relates to commonality, typicality and so I'll tell you
25 where, ---

1 THE COURT: Alright.

2 MR. STAIR: --- I'll get to the point where they they
3 were as you might recall, you might know they were denied the,
4 they were denied intervention and so they filed an appeal in
5 this case in August of '03 so there is in the record of our
6 case here -- well actually this is in the case over there in
7 in in the, in the 1377 case, Cardamone case, obviously it
8 wasn't ours, and here's what they said in August 27 '03 that,
9 The Creasys are members of this class. The Creasys and
10 similarly situated South Carolinians have been abandoned by
11 the plaintiffs' counsel in this action. Plaintiffs' counsel
12 provided no notice to the South Carolinians that counsel had
13 opted out of the entire state. Counsel also did not provide
14 any notice that they had compromised the entire class by
15 settling with Tennessee class counsel, and and so my point is
16 is that ---

17 THE COURT: I understand that to be the allegations.

18 MR. STAIR: Okay, that -- that's that's what he said in
19 August of '03 yes, alright, and I will then as you have
20 suggested jump to the bottom line and what the bottom line is
21 is that what he knew about the alleged abandonment, whatever
22 settlement he thinks happened or whatever on behalf of the
23 Creasys was known and stated to the Court in August of '03.
24 Another thing that in glancing and in glossing over my slides
25 I failed to mention was that he dismissed the appeal in the

1 Posey case, they appealed in the Posey case, with a document
2 that says that they had satisfied and settled their claims
3 with Dryvit and so my point there, and that that really comes
4 in January of '04, my point there is that the Creasys were
5 represented by exceedingly competent counsel, I'm not here to
6 criticize Mr. Phillips, and with exceedingly competent counsel
7 who had knowledge of everything that had taken place in this
8 case -- excuse me, in 1377, in the Cardamone case, had
9 knowledge of what had taken place in Posey, worked his way
10 through the situation and ultimately resolved the claim on
11 behalf of the Creasys with the Dryvit to their mutual
12 satisfaction and that was done more than three years before
13 the complaint in this case was filed and so my point here is
14 that ---

15 THE COURT: Also also way before the misrepresentations
16 were made, alleged misrepresentations were made and the
17 alleged conspiracy that took place between prior plaintiffs'
18 counsel or class counsel and Dryvit prior to all of that
19 occurring ---

20 MR. STAIR: No, I ---

21 THE COURT: --- which forms the factual basis as leas --
22 at least the meat and bones of what I understand the claim is
23 from that side of the courtroom which forms the actual
24 foundation of where they go with their case.

25 MR. STAIR: Okay. If we might return focus to motion for

1 class certification on class certification and we ---

2 THE COURT: Right and we're dealing with ---

3 MR. STAIR: --- focus on commonality and ---

4 THE COURT: --- and so we we would be dealing with a
5 class certification on issues that they raise in their
6 complaint and as I understand it it forms the basis of their
7 complaint is the lawyers and the class representatives that
8 did not do their job and and make false representations to the
9 Court did not do what they needed to do as class
10 representative in their fiduciary duty that all transpired
11 around December of '05, January of '06 where they attempted to
12 have the case dismissed upon a claim of *res judicata* and
13 collateral estoppel claiming that the *Posey* suit in Tennessee
14 was was -- had beaten South Carolina and, you know, was a race
15 to the finish and they beat South Carolina, I think that was
16 even Dryvit's lawyer's contention that she wrote in her brief
17 that it was over because *Posey* beat South Carolina when the
18 South Carolina lawsuit never got out of the gate once the
19 certification occurred. There is nothing that I have heard
20 that indicates that they are wrong and that the lawyers did
21 nothing. The fact that a -- the Creasys, I understand who the
22 Creasys were, they wanted to intervene because they wanted to
23 intervene because they didn't like what was going on and they
24 were told no you cannot intervene.

25 MR. STAIR: Yes, sir, and and I understand all that you

1 just said and at some point I -- we'll probably have some
2 explanation and understanding about what happened back when it
3 all happened but as it relates to the motion for class
4 certification, ---

5 THE COURT: Um-hum.

6 MR. STAIR: --- if you don't mind my focusing on
7 commonality, the question is is if the Creasys were coming at
8 these lawyers with a breach of fiduciary duty, malpractice
9 case, whatever you wanna call and they said as these
10 plaintiffs here are saying where is that, they say well you
11 all abandoned the class, you made a deal, you you didn't tell
12 anybody ---

13 THE COURT: There's a very strong indication based upon
14 what's been given to me so far that there was a secret deal
15 going.

16 MR. STAIR: Well and and again I didn't come to argue
17 that today ---

18 THE COURT: Okay.

19 MR. STAIR: --- but but I came to argue that if these
20 people, the Creasys, come to us now and knew what they knew in
21 August of '03 and tried to claim malpractice or breach of
22 fiduciary duty, I hope you would understand that we as
23 attorneys representing other attorneys would raise a statute
24 of limitations defense ---

25 THE COURT Um-hum.

1 MR. STAIR: --- that I think would not only be good, I
2 think it would be dispositive of their claim.

3 THE COURT: Mr. Stair, I do not want to grant this class
4 certification.

5 MR. STAIR: Yes.

6 THE COURT: I think, I think ---

7 MR. STAIR: Alright.

8 THE COURT: --- everybody in this courtroom knows that.
9 I think I've stated that I've had -- do not have any affinity
10 for this case, I think I stated in back in 1377 in in one of
11 those cases, I think, I think the defense counsel even quoted
12 me in one of the briefs they filed as to how I view ---

13 MR. STAIR: I think that might have been ---

14 THE COURT: --- this case.

15 MR. STAIR: --- me, sir.

16 THE COURT: Alright, so I think you know where probably
17 my heart is ---

18 MR. STAIR: Right.

19 THE COURT: --- with this ---

20 MR. STAIR: Alright.

21 THE COURT: --- but what I'm having a difficulty
22 separating from, sir, is the fact that there was a class
23 action litigation in place, that the lawyers that this side of
24 the courtroom is representing in all indications failed to do
25 their job and sit -- let this South Carolina case sit for an

1 extremely long period of time, let that fruit rot on the vine
2 and did not send out any notice. There are class
3 representatives that are named in this litigation that
4 received settlements that on their face seem to be extremely
5 favorable to them. I have seen documents, I have seen
6 letters, I have seen emails that highly suggest that there was
7 a deal contemplated between Dryvit lawyers and class counsels
8 and included these members of -- that were the -- these class
9 representatives, a secret deal to make the South Carolina case
10 rot on the vine while Posey went, while Posey up in Tennessee
11 went through all the hurdles it went through to be ripened.
12 If you have those types of allegations arising from a class
13 action lawsuit and factual basis of the class action, a
14 subsequent class action lawsuit that's the failure of the
15 lawyers and class representatives to be able to do their job
16 under Rule, under Rule 23 that I am obligated that gives me
17 duties as well, I have to see that there is going to be a
18 class. I might agree with you that plaintiffs' counsel is not
19 making it easy for me to apply these rules that need to be
20 applied but give me some help, don't -- I -- your credibility
21 in your argument is lost with me when the facts that I have
22 heard for years are so clear, they're so documented. I've not
23 come to any final conclusions on those facts, if I did my
24 judicial obligations would be different. I have not heard
25 from the defense and I want to hear from the defense but we

1 are talking about the first stage class certification and
2 there are certain facts that are screaming at me that we need
3 to have a class certification as much as I do not want to do
4 it.

5 MR. STAIR: Okay.

6 THE COURT: You're picking Mr. Searcy, or if I say his
7 name incorrectly, I have heard this argument. I have heard
8 this argument as an attack on Sam Phillips, I heard it in the
9 other case and I will tell you that Mr. Phillips's
10 participation in the 1377 case was extremely valuable to the
11 class who eventually received a better settlement or no
12 settlement that resulted from the attorneys that are being
13 represented on your side of the room. He was invaluable in
14 1377 in reaching that settlement.

15 MR. STAIR: I don't think I suggested otherwise.

16 THE COURT: Alright.

17 MR. STAIR: Alright, now if if you might I think our
18 dialogue here has demonstrated a lot of the problem under
19 which I operate which is I have not been involved in the other
20 case, you obviously have, ---

21 THE COURT: And I would hope that you had obtained those
22 records.

23 MR. STAIR: Again, again, I -- I'm not ignorant at all of
24 the other case ---

25 THE COURT: Okay.

1 MR. STAIR: --- but my point is is you invited me to come
2 as counsel and advocate for my client and and I would be
3 irresponsible if I did not do so.

4 THE COURT: You you would but but by your throwing Sam
5 Phillips's name up there, you're throwing that other lawyer's
6 name up there, you're wanting me to imply something of of some
7 type of improper conduct on their part, i.e. the motions that
8 were filed previously to try to get lawyers disqualified.
9 We ---

10 MR. STAIR: No, no ---

11 THE COURT: --- need to get to the bottom of this.

12 MR. STAIR: Actually, actually I'm going to throw our
13 names up there, I'm gonna throw other lawyers up there.
14 Here's what I'm focused on and first of all I I really am
15 focused on the motion that called us here today and and so if
16 I, if I don't have the the widespread vision that that you'd
17 like me to have it's because I worked hard on this motion
18 and ---

19 THE COURT: I can tell. You're going a great job.

20 MR. STAIR: Thank you, sir. Well I -- I'm here on this
21 and you you started out by saying you you really don't wanna
22 do this, I can assure you if you tell me you're not gonna do
23 it motion denied, you'll not see anybody sittin' ---

24 THE COURT: I ---

25 MR. STAIR: --- down any quicker than me.

1 THE COURT: Un -- unfortunately my job is that I
2 cannot -- I frequently have to do things that I don't want to
3 do.

4 MR. STAIR: Alright, and and and my job is is I have to
5 help you. What I, what I wanna do is help you understand that
6 what you want to do is the right thing to do which is to deny
7 the motion and so what I wanna do is I wanna look at this as a
8 motion for class certification and look at the elements as we
9 must and I wanna look at 'em and Mr. Phillips just happened to
10 have the first one up that makes the best example but I will
11 go on and and I don't want you to be bothered by what's about
12 to occur but what's about to occur is there are other cases
13 that he and his firm handled and my point there is not they
14 did anything wrong, my point is is that these people represent
15 people who had lawyers who had knowledge of the situation and
16 they proceeded independently and with knowledge and so as we
17 were call -- if we were ever to be called upon to defend a
18 case, our defenses is to everybody that was represented by
19 Mr. Phillips and his firm would be different and and I think
20 materially enhanced then they might be as to other defen --
21 other other clients comin' at us and hence the commonality is
22 the issue. Now if I I -- I'll I'll run through these but I
23 will tell ya ---

24 THE COURT: Let me ask you a question.

25 MR. STAIR: Yes, sir.

1 THE COURT: I I -- maybe I -- maybe our conversation back
2 and forth I've lost track of your position, how would these
3 people let that have -- that somehow opted out of, you know,
4 were represented by individual -- okay, let me back up. It
5 has been represented to me that one of the goals in opting out
6 of Posey in Tennessee was to a -- was to have South Carolina
7 opt out and then in fact set up a mechanism where lawyers
8 could represent individual claimants and pursue claims against
9 Dryvit.

10 MR. STAIR: Okay.

11 THE COURT: Alright. I don't see, and and and it was
12 brought out at the other hearing and I believe that that this
13 is a correct statement, use of the, use of the class action
14 vehicle in that manner is not proper, you know, you you can't
15 just set up a class action in order to to let individual
16 lawsuits get more money and then settle because you run into
17 the situation of where there's allegations have been made that
18 that even the class representatives used the class action
19 mechanism as a tool to enhance their individual settlements
20 and se -- individually settle their cases, put more money in
21 their back pocket but yet in doing so blatantly violated their
22 ethical ob -- or their their fiduciary obligations to the
23 class at whole which is to try to, you know, work -- watch out
24 for their interest so I don't think I would, individual
25 lawsuits that had been pursued, I don't think that I would

1 be -- lean favorably to including these people into any type
2 of class for for this lawsuit unless they came in with with,
3 you know, ---

4 MR. STAIR: Then then I have made some progress here
5 because the point is just exactly that. They say that the
6 class is the same as the Cardamone class and yet we find
7 examples here of people who are in the Cardamone class that I
8 think you very appropriately say should not be a part of the
9 class in this case and if I've done nothing else I I have
10 accomplished something and if we might and I'll try to go more
11 quickly there are others who are in the same situation. There
12 are 39 people as shown by the record in this case who are
13 represented by the Mullen Firm so the Mullen Firm had these
14 people and they filed cases in '99, 2001, 2, 3, 4, 5, 6, 7,
15 they settled 'em in 2003, 4, 3, 5, 6, 7, 8, 9 and settled
16 this one as late as '09, they settled this one as early as
17 0 -- obviously this one, the Smoak for example, they
18 represented they were in and out the door before any of this
19 ever happened. Well they obviously shouldn't be a person
20 against us 'cuz they obviously didn't have anything to do with
21 us or vice versa. The rest of these people if they were to
22 come at us, these remaining defendants as as plaintiffs in a
23 breach of fiduciary duty, breach of wha -- malpractice,
24 whatever you wanna call it, we'd say Whoa, you know, your
25 lawyer knew everything we knew, your lawyer participated as we

1 participated and so our defenses to these 39 would be
2 different. Dixon Robertson had had clients who settled, I
3 don't have their names up here but he had some clients, and my
4 defense on behalf of Leath, Bouch & Crawford would be
5 different as it relates to his people because they had
6 knowledge and interestingly I put us up here just to show you
7 there's there's there's no sinister intention by having names,
8 to the extent we represented, I say we, Leath, Bouch, Crawford
9 to the extent they represented people and if they as Cardamone
10 class members wanted to sue us, their claims against us since
11 we were directly their lawyer would be different than the
12 claims of these folks over here, the plaintiffs in this case,
13 our defenses would be different. The point is is it's just
14 kind of merry-go-round of people who are in the Cardamone
15 class as it has been defined for the purposes of this case who
16 don't belong in the Tucker claims.

17 THE COURT: But you will agree with me that given the
18 nature of the class action litigations that any legal
19 malpractice claim that arises from a lawyer not doing his job
20 and as as being class counsel is going to involve different,
21 factually different individual plans, I mean, that because the
22 nature of class action litigation ---

23 MR. STAIR: Yeah, ---

24 THE COURT: --- is they ---

25 MR. STAIR: --- it's gonna have different people, they're

1 all gonna have different situations which is a reason why I
2 would suggest this is not an appropriate class for -- case for
3 a class action. It may be a case where people, different
4 people have different feelings but it's not a case that's
5 appropriate class action if you look at the rules of class
6 action including commonality and and as I say and there's
7 more.

8 Another group of people ---

9 THE COURT: But the -- but see these are all homeowners
10 and so if under that logic then you would never have a class
11 action litigation and any type of construction suit like
12 Dryvit's.

13 MR. STAIR: Well I think all of these people had a claim
14 against Dryvit and it was asserted as a class and I think as a
15 class against Dryvit that was an appropriate class, it must
16 have been, you certified it as such and so I think it could be
17 done that way but it's different when you're talking about a
18 legal malpractice case because ----

19 THE COURT: Well not only did I certify ---

20 MR. STAIR: Yeah, well get, you know, ---

21 THE COURT: --- but your clients actively pursued it.

22 MR. STAIR: Well and and and so I don't think any of us
23 disagree that it is a proper class against Dryvit in a
24 products liability case, that I don't think we're here to
25 argue and I have not ever argued that. What I'm here to argue

1 is the fact that a class can be formed to pursue a products
2 liability case does not then make a class that you just didn't
3 have against a legal malpractice because you gotta look at the
4 issues and so here my question is is are there folks who
5 settled with Dryvit before the Posey order was entered would
6 not have a malpractice claim against us at all and the answer
7 is yes, I mean, we saw one with Smoak but there are others
8 others and so they would be folks who are in the class created
9 by the Cardamone class action but they would not be people who
10 would have a claim against us. When I say "us", I'm talking
11 about my clients and and for this purpose the rest of the guys
12 over here.

13 Are there folks who settled cases with Dryvit before
14 Cardamone was filed and that they would have malpractice
15 cases. Again, it's the same question just using a different
16 time frame and the answer there is yes.

17 Are there members of the class and I I put that in quotes
18 because that is of course the class that they seek to certify
19 here and as we're discussing our -- it includes folks that
20 don't belong who bought houses after our defendants were
21 relieved as counsel and would therefore present claims that
22 are different from those of the plaintiffs. Now I'm not
23 necessarily saying they wouldn't have a claim, that does not
24 mean, and don't get mad at me if I ever do take ---

25 THE COURT: Have you ---

1 MR. STAIR: --- the posi ---
2 THE COURT: --- ever seen me mad?
3 MR. STAIR: Not, not at all, sir, and but but my point
4 there is that if they did there would be a different defense
5 because there is a passage of time from 2005 to whenever the
6 thing was done, whenever they bought it, it's just a different
7 defense, it's a different damage claim, it's a different
8 defense, it's a different everything so if at any point I have
9 sufficiently persuaded you that you want me to sit down, all
10 you've gotta do is say denied and I'll be on my chair.
11 Alright, here's an interesting question ---
12 THE COURT: As much as I wish you would, you're not there
13 yet.
14 MR. STAIR: Alright, and I -- well I -- until until you
15 say denied ---
16 THE COURT: Until you run outta paper we'll ---
17 MR. STAIR: I ---
18 THE COURT: --- continue on, ---
19 MR. STAIR: --- I feel compelled to stay, yes, sir, ---
20 THE COURT: --- you know.
21 MR. STAIR: --- and I do appreciate your indulgence.
22 Alright, the question is is as they have defined their class
23 does not the definition of their class indicate the variety of
24 issues that are different and unique to the thing? What I've
25 done is I've taken, this is their definition of the class,

1 members of the Car -- class created by Cardamone action and
2 that that says including those who is what was left out there
3 without formal notice settled their claims with Dryvit for
4 reduced compensation based on the assertion the Posey
5 settlement ended their right to make claims against Dryvit.
6 Those cases I think are each unique to themselves and whether
7 or not there are class representatives here that might
8 represent them and and that really hasn't been shown other
9 than what Mr. Pendarvis said in casual response to your
10 question, there's been no demonstration that Davis is a a
11 Poseyite or anything, there's no evidence about that at all,
12 but the point is is even if they are does that definition
13 alone not yield itself to an individual question for each and
14 the questions would be what notice even if not formal did they
15 receive and who'd they receive it from so and and who if
16 anyone advised or helped them all with the settlement
17 negotiations, what were they told, what did they do in
18 verifying the situation. In other words, a reliance has to be
19 valid. Was their reliance reasonable? How much did they get
20 and how does it compare to whatever they contend they should
21 have got. So in other words, if there's somebody who under
22 their definition settled their claims for reduced compensation
23 based on the assertion that Posey ended their rights to makes
24 claims there are within that class of people individual
25 situations for each and every one of them and each and every

1 one is gonna have to be the subject of an individual defense,
2 individual claim, it's it's all different.

3 Let's see. Oh, where are we here? Are there members, so
4 forth who would have no claim? Uh, let's see. Oh, in other
5 words, as a result of the Cardamone settlement agreement are
6 there people who wouldn't have a claim against us or it would
7 be different, and these are just taking and and you know
8 better than I do out of the settlement agreement there were
9 folks who couldn't recover, there were folks who didn't
10 satisfy the product identification, there were folks who
11 claimed by Posey if the structure was included was denied
12 based on lack of product identification, you know, there just
13 the reasons why you all gave in the underlying case that those
14 folks couldn't recover, those folks likewise are the members
15 of the Cardamone class but they would not be appropriate
16 plaintiffs against us or if they were their -- our defenses as
17 to them would be different so again, I'm just beating perhaps
18 to death but in the hopes of letting you understand that
19 commonality is a huge, huge issue in this case and ---

20 THE COURT: Difficult but not impossible to overcome.

21 MR. STAIR: Well actually it it -- it's near impossible
22 and I think if we got into this case and we tried to do it as
23 a class action, there'd be a day when you look back and say,
24 Mr. Stair, as mad as I was back in the beginning, I think you
25 might have been right but in any event and and again there's

1 folks who failed 23 and I just -- it's in the record but it's
2 it's all the folks who couldn't recover. Then the folks that
3 opted out, again, I think they're people who the plaintiffs
4 recognize don't have commonality and typicality and yet they
5 would be members of the class created by the Cardamone class.

6 So let's see, and and as to our people, our former class
7 representatives, defendants in this case, members of the
8 Cardamone class created by the Cardamone action of course they
9 were and I don't think the plaintiffs are gonna contend that
10 our claims or defenses would be the same so...

11 Have they carried their burden on commonality? I'm happy
12 to tell you I've reached the end of that conversation and I
13 suggest the answer is no. Typicality the two merged and I'm
14 happy to tell you that I'm gonna repeat it other than to say
15 that other than all the things we just talked about are there
16 other ways the claim is not typical, the answer is is because
17 of their reliance on identical nature of the claims we really
18 don't have the evidence. In other words, they haven't shown
19 what the typical claim is because they've always relied upon
20 the fact that they're the same class. They obviously aren't
21 the same class because we've been pickin' 'em out a little
22 while ago if nothing else so but and this is an important one:
23 In general the class reps damages must be typical of the
24 class, and they say that, they say in these cases the proposed
25 class members have similar injuries based on similar course of

1 conduct, this is in their motion for class certification and
2 the question is are they really typical, are their damages
3 really typical of the class and my answer is given their
4 responses to our request to admit in this case they couldn't
5 be because many of the class members have unique damage claims
6 themselves. Here is the response to the request for admit
7 that we got in this case and frankly it was based on the logic
8 that you enunciated earlier which is wasn't the fairness
9 hearing in the other case the answer to the the the damage
10 issue and doesn't that take care of the damages, we were
11 searching for a yes it does but of course we didn't get a yes
12 it does, instead we got a lot of talk but among the talk was
13 the following: The Cardamone class members have had to endure
14 substantial financial hardship from the continued
15 deterioration of their homes and cost of repairs proximately
16 caused by this product, and the important thing here is where
17 they say many Cardamone class members have even lost their
18 homes to foreclosure due to the costs of repairing the damage
19 and/or the inability to sell the home with Dryvit products.
20 Well obviously the claims and the damages have to be typical
21 and when this indicates that many of the class members have
22 lost their homes to foreclosure, I don't know that to be the
23 case but I'm just taking what the plaintiffs are saying as
24 true, each of those situations is a unique damage situation
25 that would have to be delved into essentially in a separate

1 lawsuit situation and it's indicative of the, of the
2 differences. As I told you a little while ago Mr. Pendarvis's
3 statements to ya about how all the different people have
4 suffered all these different damages because they've all been
5 made to wait, they've all suffered this, again, they're all
6 different damages and and and that alone is defeative of the
7 the issue of typicality.

8 Let's see, same thing getting back to the way they've
9 defined their class, folks who settled for compensation based
10 on the assertion are their damage claims the same or
11 different? they're very different. Each one is unique, each
12 one has a different damage claim and seriously we contend that
13 they've carried it out I I would say.

14 Adequacy. We've got adequacy of representation and we
15 have raised questions in this case as to the adequacy of the
16 representation and the the the plaintiffs and their their
17 counsel have to show that they will fairly represent and
18 adequately represent the interest of the parties and one of
19 the issues to determine is whether the named plaintiffs and
20 counsel have conflicts of interests with the other class
21 members and, you know, it it may not make me class president
22 to suggest this but I I -- I'm concerned that there are
23 conflicts in this case and I'd like to discuss them with you
24 so that you might focus on them. I'll get over the law, it is
25 what it is but as I said they set the bar in their motion for

1 class certification where they say the class representatives
2 and certainly attorneys representing the class had obligations
3 of undivided loyalty not only to the unnamed plaintiff class
4 representative but also to each unnamed member of the class so
5 the question is is do the class representatives in this case
6 and do their attorneys in this case have undivided loyalty to
7 the punitive class in this case, that's the ---

8 THE COURT: Why -- you know what it sounds like you're
9 making this argument in this case.

10 MR. STAIR: What's that, sir?

11 THE COURT: And it's sort of it's just -- this --
12 nothing. It's just that you're making this argument that now
13 you're gonna tell me somebody on that side of the courtroom
14 has a conflict either either in class representation or as
15 class counsel? Is that what I'm gonna ---

16 MR. STAIR: Yes.

17 THE COURT: --- hear now?

18 MR. STAIR: Yes.

19 THE COURT: Okay. And you're going to assert and but yet
20 you're knowing what I know about the people that sit on this
21 side of the courtroom?

22 MR. STAIR: Well, I I actually ---

23 THE COURT: And and if you do I wanna hear it ---

24 MR. STAIR: Okay.

25 THE COURT: --- because I ---

1 MR. STAIR: Alright, well let let me say what what you
2 know about the people on this side of the courtroom again I
3 respectfully suggest you know because of your involvement in
4 the other case ---

5 THE COURT: And ---

6 MR. STAIR: --- and and you're sitting here in this case
7 and I I don't think I'm asking you to do more than than you
8 really should do which is to look at this case and this motion
9 independently of that situation. I know the burden that
10 you've got, you've told me that, uh, ---

11 THE COURT: And and again, I say based on what what I
12 know not having heard from the people on that side of the
13 courtroom but I have heard a lot of allegations, I've seen a
14 lot of factual information.

15 MR. STAIR: Well it it it has been tough because we've
16 been talked about in cases in which we've not been here to
17 defend ourselves and I think you may have some notions about
18 it all that we never had a chance to ---

19 THE COURT: Um-hum.

20 MR. STAIR: --- involve ourselves in.

21 THE COURT: And I, and I sorta keep repeating this
22 because again I want the parties in this litigation to have an
23 opportunity, give you a fair and reasonable opportunity to
24 control the destination of the outcome of this case if you
25 want to control the destinations as to outcome of this case,

1 if not I will do so and I have again, I -- I've tried to
2 structure and manage this litigation in a way that gives ya'll
3 that opportunity.

4 MR. STAIR: Well Mr. Pendarvis I think suggested in the
5 earlier conversation, ---

6 THE COURT: But ---

7 MR. STAIR: --- you know, ---

8 THE COURT: Go ahead. I'm sorry.

9 MR. STAIR: He he suggested that certification of this
10 class would most likely lead to settlement and and it would
11 facilitate a settlement and I will tell you their settlement
12 number against us or their damage claim against us is \$35
13 million plus punitive damages and certification ---

14 MR. PENDARVIS: Your Honor, excuse me. I'm gonna object
15 to that. Those were comm -- communications made and
16 compromise a settlement and those are barred under the rules
17 of evidence and I would respectfully request that this not be
18 part of the record in this case, that that those were
19 privileged communications that happened in the mediation,
20 that's a violation of the mediation order and the rules of
21 evidence.

22 MR. STAIR: They filed it as a memorandum of damages and
23 it's not indicated to be in connection with the mediation,
24 Your Honor.

25 THE COURT: Okay.

1 MR. STAIR: Uh, ---

2 THE COURT: Well I I guess ---

3 MR. STAIR: --- but but my my my point is is that to give
4 these guys a gun to point at our heads for the next two or
5 three or four years and if the idea as he says is that doing
6 this is going to create less litigation, giving these guys a
7 class action in this case with a \$35 million claim is not
8 going to diminish the litigation, it's gonna enhance the
9 litigation.

10 THE COURT: Well I I know nothing about about what they
11 claim because right now I thought my scheduling order I told
12 ya'll you didn't have my permission, if you agreed to it,
13 ya'll could do it but you didn't have my permission to go
14 beyond just doing the discovery based upon the issue of class
15 certification. I -- I'm gonna take that as a positive sign
16 ya'll at least done some other things, you know, in in
17 discussion, um, ---

18 MR. STAIR: Alright ---

19 THE COURT: --- you know, ---

20 MR. STAIR: --- well let me, let me -- I -- and again, I
21 I hope I have expressed to you why I'm standing here and it's
22 not to be a bother to the Court, ---

23 THE COURT: You're not a bother.

24 MR. STAIR: --- it -- it's it's to represent my clients
25 before this court on a motion for class certification and to

1 try to see that that's defeated which I think should be the
2 case and that's what I'm doing my best to do and I I continue
3 to appreciate your indulgence in allowing me to do it and I am
4 not intentionally stepping on your toes. If if I get close to
5 'em, it -- it's not my intent.

6 THE COURT: I I think if you speak with the lawyers in
7 the original Dryvit case we've been through these things so
8 much and I've heard arguments over and over and over again and
9 I think that our rapport with each other everybody has been
10 like this because they understand my -- I take my role
11 seriously sitting up here doing this, I usually am not this
12 engaged in conversation with lawyers in in the presentation of
13 arguments, I usually just sit and keep my mouth shut, you
14 know, unless something comes up, but I know a lot about this
15 case, I heard on the facts of this case, I know, I ju -- I
16 know more about this case than any case I think that I ever
17 have had in my career ---

18 MR. STAIR: Yes, sir, and I I certainly understand ---

19 THE COURT: --- and I'm frustrated that it won't settle
20 under and I don't know, don't wanna know about the settlement
21 but there's so many reasons on both sides of the courtroom why
22 this case needs to be able to be resolved and ya'll and
23 Mr. Stair is pointing me out 10,000 reasons why it needs to
24 get resolved, you know, um, ---

25 MR. STAIR: And and while I want to assure you I

1 appreciate your job in the case, I hope you appreciate
2 mine ---

3 THE COURT: Um-hum.

4 MR. STAIR: --- and and my again ---

5 THE COURT: You're doing a great job.

6 MR. STAIR: Well again today I -- I'm limited in what I
7 would typically do, first of all I typically get outta line
8 and secondly, I -- I'm attempting to defeat the motion for
9 class certification so and what I'm gonna do is I'm gonna
10 gloss over, if you will, the conflicts because I don't think
11 that seems to be your favorite part of the conversation but
12 and and ---

13 THE COURT: I'm -- well I'll listen to anything that you
14 want to present to me.

15 MR. STAIR: Alright, and and well the the question is is
16 is is there undivided loyalty here and I tell you what I'm
17 going to do, I I -- let me, let me -- if I think for a moment
18 I might do two things, I might shorten the discussion and I
19 might enhance my life, my longevity.

20 THE COURT: You're making me feel bad.

21 (Laughter.)

22 MR. STAIR: Well I do not intend that to be the case.
23 Let's see, let's see, let's see, I I guess in a nutshell my
24 point on the problem that we've got here with Mr. Scarce and
25 and certainly the Treons is that they have a loyalty in the

1 1377 case and they have a loyalty here and again, my point in
2 distinguishing between the two classes is to note that there
3 are two classes if there will be a class here and again I
4 suggest there should not be a class here but if there is a
5 class here, Searce and Treons have undivided loyalty to this
6 class, they simultaneously have undivided loyalty to another
7 class and you can't have undivided loyalty to two different
8 classes and so, ya know, I I suggest here because they've got
9 the other undivided loyalty they can't have it here. Now how
10 did that manifest itself and it manifested itself in the
11 motion for accounting and what I'm going to do is be very
12 brief on this because we again in the Tucker case, I will --
13 let me, let me kinda go here and I'll work backward. In the
14 Tucker complaint which is how we got here, they sued us and
15 they alleged that the wrongful acts and omissions complained
16 hereof are as you were noting with Mr. Pendarvis the result of
17 the violation of the Rule 23 and the violation in the
18 underlying case and so forth and through which the original
19 class counsel were paid \$600,000 with the promise of an
20 additional \$225,000 so if we might focus on those two things
21 for the moment in the Tucker case, this case, we got sued for
22 those amounts of money by these people saying they had the
23 right to recover it and they said that this court here, who is
24 you now but at the time was not, but that this court has the
25 jurisdiction to decide that issue and they say that in taking

1 the money and so forth our guys did wrong and that the relief
2 requested in this case was disgorgement of the fees so in
3 other words the 600 and 225, whatever you wanna call it should
4 be done in this case, in this class action. Now while that
5 was pending they then -- let me see, let me go backwards if I
6 can, teach me to try to drive this thing in reverse, let's
7 see, what then happened was in January of 2010 after this case
8 was pending and and and let me, let me look at you for the
9 moment as the judge in this case and this case alone and what
10 they have told you now is is, Judge Hayes, you in this case
11 have jurisdiction over this issue to award us the 600 plus the
12 225 and the disgorgement in this case. Having done that,
13 Mr. Searce and the Treons as class representatives in the
14 1377 case went over there and they said to that judge, Judge
15 Hayes, let me tell ya we now realize that you have
16 jurisdiction in this case, this case being that case, and
17 these guys took the money and ran and you oughta to do sumtin'
18 about it and return it to this class here, the Cardamone
19 class, and so what you've got is you've got the same class
20 representatives representing different classes each one of
21 which is asking for the same money and my suggestion there is
22 there simply by definition cannot be undivided loyalty to this
23 class in asking for the money when they turn around and they
24 ask it for the other class so ---

25 THE COURT: Do you contend that there is till something

1 being pursued by the class representatives in the other suit?
2 There's -- is there still something out there that that you
3 contend they're purs -- they're they're pursuing through that
4 litigation?

5 MR. STAIR: In the 1377? Now, okay, let me go over there
6 and I'll stand over in that case. As I understood the
7 discussion that we had earlier today, you're going to issue a
8 show cause hearing in that case and I think the 600 and the
9 225 will be the subject of those discussions and so based on
10 that and what we've otherwise heard about the show cause
11 hearing I would say yes I do and so the the point is is that
12 as they ask you in that case to get the money in that case,
13 they're doing something that's in conflict with this case, the
14 Tucker case, where they're asking you in this case to do the
15 same thing and vice versa and and that's the problem with
16 having the two class actions and certainly having the same
17 class representatives doing it and I will suggest to you the
18 remedy for that is to not have the second class action and
19 then I think that problem's solved but under its current form
20 I do respectfully suggest there is a conflict there.

21 THE COURT: Well let let -- is is besides the overlapping
22 and the relief that they're seeking, is there something else
23 that raises the issue of conflict of the class representative?

24 MR. STAIR: Okay, as I I thought you were going in one
25 direction, I was gonna try to meet you when you got there and

1 I think I missed the question, okay. I I think the the thing
2 that's in conflict is the mutually simultaneous search for the
3 same amounta money on behalf of two different classes,
4 yeah, ---

5 THE COURT: You -- you're not aware of any allegations as
6 there was in this case of being bought off or paid off or some
7 improper conduct on their part other than that seeking the
8 same relief in two different actions?

9 MR. STAIR: I'm happy to answer that question. I have
10 absolutely no information or thought of that nature ---

11 THE COURT: Alright.

12 MR. STAIR: --- no, sir. Now let me kinda get back here
13 and raise the next question. Let's see, okay, and and what I
14 was saying is in this case and I I do have this document in
15 here because this was given to us in December of 2010 which is
16 after the accounting was given, the motion for accounting was
17 given to you, they're still seeking in this case the 600 and
18 the 225 as evidenced by that.

19 MR. PENDARVIS: Excuse me, Your Honor, we have to make an
20 objection again. This was a material submitted to defendants
21 as part of the mediation that's -- that happened early part of
22 January so we object to this being included as part of the
23 presentation simply not consistent with the mediation rules
24 and the objectors of mediation.

25 MR. STAIR: I I I ---

1 THE COURT: If it was then I'd rather not see it.

2 MR. STAIR: Well and it was, it was filed I think in the
3 case as a damage memorandum that came on a pleading, it did
4 not come with mediation only or anything like that but I will
5 tell ya it doesn't really matter because in the document they
6 filed in reply to our response in this case they continue to
7 take the position that it is still appropriate for them to
8 continue to search for the same amount of money and
9 disgorgement here while simultaneously doing it there and and
10 so I I think that's a a major problem we've got.

11 THE COURT: Well you would -- if you wanna -- I mean, I I
12 agree with you that there would not be a double recovery ---

13 MR. STAIR: Right.

14 THE COURT: --- if in fact there would be any recovery.
15 I mean, there would not be a double recovery, um, okay.

16 MR. STAIR: Alright. Let's see, and and I I I won't beat
17 this one to death but the question that there are plaintiffs
18 in this case that work that don't have both hats on so you've
19 got Searces who have hats with with with two numbers on 'em,
20 one's card 1377, one's this number, you've got then the
21 Davises and the other folks the Tuckers who don't bear the
22 same burden but my suggestion is they've sort of been sucked
23 along because they've agreed to let the money, this is what I
24 was talking about earlier today, to the extent the money they
25 recover in this case for the class they represent in this

1 case, they are agreeing that it can go elsewhere and I just
2 think that is an improper thing and I I I beat that one to
3 death more than it should and I'll move on, let's see, and
4 that's just the statement of that situation. Then does
5 Mr. Pendarvis have undivided loyalty to the Tucker case class
6 and and I I suggest no for the reason he participated in that
7 other settlement but more than that ---

8 THE COURT: In in ---

9 MR. STAIR: --- is the ---

10 THE COURT: --- in the other settlement with ---

11 MR. STAIR: It -- with the Mullen people.

12 THE COURT: With Ms. Williams?

13 MR. STAIR: The ---

14 THE COURT: The one we did earlier ---

15 MR. STAIR: Yeah, ---

16 THE COURT: --- today?

17 MR. STAIR: --- right. Yeah, right. Yeah, yeah. But
18 but here's, here's the real, here's the real issue as it to
19 undivided loyalty to the Tucker class so let's stand here and
20 talk about the Tucker class and of course I hate to talk about
21 'em as a class because I don't think there's a class but if
22 there were one does his involvement with the DeLoaches act to
23 compromise his undivided loyalty here and we got a letter in
24 January of this year from Mr. Pendarvis where he made a claim
25 against all the folks sittin' on my side of the table and he

1 says it's based on the events of the draft complaint and he
2 included it and he says as a direct result of these things,
3 the DeLoaches suffered actual damages that include the
4 \$600,000 funds defendants received and the additional 225 they
5 have a right to receive and so I just put this chart up here
6 just to to emphasize the fact that, you know, it's got this
7 600 and the 225 and what you've got is you've got the
8 Cardamone folks and the Tucker folks each wanting it, you've
9 got the DeLoaches with Pendarvis and the DeLoaches with Tucker
10 wanting it and this I would suggest is a -- I -- it -- I I
11 must suggest it's a conflict that is of serious nature because
12 here he is saying for this class we should recover that money
13 and here he's saying for this person we should recover that
14 money and I'm concerned that it's difficult to say that same
15 thing and not be in conflict with each other but so and then
16 my question is is is Mr. Pendarvis's defense of all this
17 indicative of the problem. When we noted this in our
18 response, he wrote a reply that is really worth reading and
19 actually I put it all up here but I'm not sure it's worth
20 reading right now so I'm gonna pass over it but somethin' that
21 he said in here was that i -- this is one part and I'll quote,
22 "In the event the Court in 1377 were to require all of the
23 original class defendants to disgorge the monies, at worst for
24 the Tucker plaintiffs would be an argument that those
25 disgorged monies would be a setoff from any recovery obtained

1 in these two companion cases." Well again, if he is undivided
2 loyalty interest to the Tucker folks, he oughta be fightin'
3 like hell to keep that other groupa people from gettin' the
4 the 600 or the 225 but instead what he's saying, well what the
5 heck, if they get it all that means is we don't get it and and
6 that's a problem so but with that I would suggest that there
7 is a problem with adequacy, plain and simple.

8 Amount in controversy, it's gotta exceed a hundred
9 dollars and I thought you all had a a very engaging
10 conversation on that.

11 What do the plaintiffs recognize one of their burdens to
12 be as it relates to causation and damages? Let's look at
13 their brief, not what Mr. Pendarvis said here -- there, let's
14 look at their brief and he says, For purposes of Rule 23
15 motion for class certification a plaintiff must demonstrate an
16 injury proximately resulting from the defendants' actions and
17 not simply a general wrong suffered by the members of the
18 group to which the plaintiff belongs. So he he starts out and
19 says that, then he says, As a result of the defendants'
20 conduct all those folks were left without any active
21 representation and then he says as per the testimony of
22 Professor Moore, each of the plaintiffs as members of the
23 class certified in 1377 sustained damages as a proximate
24 result in defendants' conduct. So the point is is that as a
25 result of her testimony they suffered damages as a proximate

1 result and they cite her affidavit. I really do invite you to
2 read her affidavit and at no point will you see her say that
3 they suffered damages as a proximate result. What's more
4 importantly though is ---

5 THE COURT: Ya'll still contend that that her affidavit
6 is insufficient for purposes of the application of the statute
7 on malpractice claims?

8 MR. STAIR: No, I --- and and what happened there was she
9 filed an affidavit in the beginning, we filed a motion. She
10 filed a supplemental affidavit and frankly, I mean, this is
11 not my first rodeo and and I like to argue about things that
12 are worth arguin' about although that may not be apparent to
13 you at the moment but on on that particular thing we thought
14 well that one's over, you know, that one's gone. To suggest
15 that we now think the case is meritorious because she amended
16 her complaint and satisfied the rule is a bad suggestion and
17 that's not what happened but no, we're we're beyond motion.
18 Alright now but the question is is if you'll remember what --
19 if you remember what they said she said and what they told ya
20 in this brief she said is that she shows causation and the
21 real question is what did she really say. Here's what she
22 really said, we went Boston, \$600 an hour, we talked as quick
23 as I can talk and and and her answer here and it follows my
24 question, she says, I'm not an expert, I'm not giving an
25 expert opinion on causation and damages. Then she says, It's

1 not my role to determine whether or not there's been damage as
2 a result of the defendants' conduct. And then she says and a
3 question: So you had neither the factual basis nor the
4 inclination to weigh into the issue of causation and damages.
5 Answer: correct. And then she says, I don't generally
6 consider myself an expert on causation, I don't know that I've
7 ever given an opinion on causation. And then it says, I can't
8 imagine circumstances in which I would feel comfortable giving
9 that opinion. Now that's the testimony and that was before
10 Mr. Pendarvis was in the case but he says he's read the entire
11 record of 3177, I think it would be worth while for him to
12 read the deposition of the expert before they cite it for a
13 proposition that simply is not true and she is not a causation
14 and to the contrary to what they say she had bowed out of that
15 issue.

16 Alright now on the issue of damages how does Mr. Searce
17 describe his damage and and my answer is other than
18 non-existent and and I must tell ya I really like Mr. Searce,
19 he was a pleasure to deal with in his deposition, a wonderful
20 man but here's what he said, Question, I'll read the part
21 that's not highlighted, So as it relates to your house you
22 really haven't had any meaningful damage or for matter any
23 damage that you can tell me about as a result of the EIFS have
24 you?

25 Answer: There's no known damage because until you cut

1 away the EIFS and look at the materials behind it, you don't
2 know.

3 Well we had deposed him and found out his history and and
4 and I said, But as we sit here today and your having had your
5 house inspected twice and your having been the plaintiff in
6 four separate lawsuits against Dryvit, what you're telling me
7 is you cannot show me one square inch of your house that is
8 damaged because EIFS is on it. And his answer is, Yes, that
9 would be correct. Now that was before he got \$8 or \$10 or \$12
10 or whatever dollars he got from the settlement so we got a guy
11 who really doesn't have a square inch of damage in his house
12 and as you noted he got a a a handsome recovery in the
13 settlement with Dryvit and yet he's back for more as the
14 plaintiff in this case saying that his damage claim is typical
15 of those of others and at no point along the way did he ever
16 have a square inch of damage on Dryvit and so the idea that
17 they have presumptively shown a hundred dollars or more at
18 this point is just that, it's a presumption and so the
19 question is in summary as it relates to their burden to
20 withstand the rigorous analysis of their motion had the
21 plaintiffs done and I say it's good to to revisit controlling
22 South Carolina law, when in doubt always go to the law, and
23 here's a *Waller vs. Seabrook* case and it sort of sums up the
24 Rule 26, Proponents of the class certification have the burden
25 of proving these prerequisites class certification have been

1 met. It is imperative that the Court apply a rigorous
2 analysis to ensure the prerequisite 23(a) have been satisfied.
3 The failure of the proponents to satisfy any one of the
4 prerequisites is fatal to class certification. And my
5 question is is can
6 they -- well, okay, actually, I guess in the judicial estoppel
7 and simp -- and frankly because they didn't argue it, I'm not
8 gonna argue it but the reality is it's premised upon an
9 argument being made in one case that's contrary to one you
10 make in this case and there has never been an argument before
11 that a class of these people trying to get a class certified
12 in a legal malpractice case against us that's just never been
13 an issue so the whole idea of judicial estoppel breaks down
14 plus you simply can't use that even if any of the elements
15 were met as a way to cram down everybody's throat, including
16 your own, a class that doesn't belong and so I think at that
17 point I'm going to tell you I will -- I didn't put a question
18 up there, maybe that's that's God telling me it's time to sit
19 down or entertain questions from you. I'm through, Your
20 Honor. What what we'd like to say is that the plaintiffs in
21 the case, these plaintiffs in this case have a burden in this
22 case to prove this case is subject to a class certification of
23 a legal malpractice case, call it a breach of fiduciary duty,
24 whatever it is, it's all the same part and parcel thing and
25 they've gotta show all of the elements and they simply haven't

1 shown any of the elements and we'd ask the Court in this case
2 to to deny the motion. Thank you, sir.

3 Your Honor, I have been given I think that's that's not
4 the same timeline.

5 MR. WINTON: I believe it is 'cuz it starts on this side
6 1999, that goes to -- you have it right there, there's just
7 two sides.

8 MR. STAIR: You gotta crack the code, you gotta go to the
9 backside and see 89 and then over there.

10 THE COURT: Alright, do you you have another one for the
11 court reporter 'cuz I'll -- if you ---

12 MR. WINTON: Yes.

13 THE COURT: --- give it to me I'll right on it, that way
14 she can make it part of the record.

15 MR. STAIR: Judge, what we'd also like to do is since we
16 went through the PowerPoint slide and I think this has
17 been ---

18 THE COURT: I gave ---

19 MR. STAIR: --- marked as pleadings, okay. Alright,
20 thank you. Alright. I do appreciate your indulgence, Your
21 Honor.

22 THE COURT: Thank you.

23 MR. PENDARVIS: Your Honor, again we renew our objections
24 that that's gonna be made part of the record the the
25 PowerPoint printout, not not not the time slide but the

1 PowerPoint package, the printout. We do renew our objections
2 to that being made part of the record to the extent it
3 includes information that was exchanged as part of the
4 mediation process.

5 THE COURT: Alright.

6 MR. STAIR: I'll be honest with Your Honor if you want to
7 we'll just take the big, I -- first of all I don't think it's
8 improper but I've got better things to do than worry about
9 that as an issue so let's just take a black pen and mark it
10 all out.

11 THE COURT: Uh, alright, that's that's the one that's
12 going to her.

13 MR. STAIR: Alright, give me the one that ---

14 THE COURT: Exhibit's right there (indicating).

15 MR. STAIR: Okay, and you can take it outta your -- throw
16 it away. Let's see -- do you know the slide number on that
17 one?

18 MR. WINTON: Um, ---

19 MR. STAIR: Let's see, ---

20 MR. WINTON: --- yeah, it's on Page 37, it's Slide No.
21 148.

22 MR. STAIR: You can see why I brought him along. Okay,
23 the defendants' memorandum, okay.

24 (Whereupon, a discussion was held off the record.)

25 THE COURT: Is -- are the other I I know Ms. Wall has

1 said she -- her client incorporates the position that
2 Mr. Stair just argued; am I correct of the other defendant?

3 MS. WALL: Your Honor, to the extent that it's in the
4 documentation, we're not participating in the oral argument
5 itself.

6 THE COURT: Okay.

7 MR. LEONARDI: Your Honor, my name's Dan Leonardi, I
8 represent Dixon Robertson. We filed a memorandum adopting the
9 arguments made by Mr. Stair on behalf of his clients in
10 opposition to class certification and we adopt the arguments
11 he made in oral argument here today as well.

12 MR. BRUNER: Your Honor, I am Jim Bruner and I represent
13 the defendant William Bowen. Likewise, I got Mr. Stair's
14 memorandum in opposition and his arguments here today. I
15 think he's quite correct they haven't proven the elements
16 required by Rule 23.

17 MR. JONES: Your Honor, on behalf of the defendant
18 former class representatives we also filed a memorandum
19 adopting Mr. Stair's memra -- memorandum of law and we too
20 adopt his arguments put forth today.

21 THE COURT: Alright.

22 MR. PENDARVIS: We have a brief reply at some point and
23 if the Court's inclined ---

24 THE COURT: Um, ---

25 MR. PENDARVIS: --- to hear that.

1 THE COURT: Well let me have a discussion with you, and
2 trust me even though my voice might sound it, I'm not mad at
3 anybody, you know, let's do this: I have some concerns I
4 think I've shared with everybody, I'll go back through 'em
5 again, the basis as I understand conduct that's forms the
6 basis of this lawsuit arises from a class action litigation
7 that the class representatives, that are being sued in this
8 particular lawsuit and the lawyers in this particular lawsuit
9 that are being sued asked the court of South Carolina to
10 certify it and the court in South Carolina agreed to do that
11 certification. There are affirmative duties and obligations
12 that attach to lawyers that serve as class counsel and
13 individuals who serve as class representatives to do their
14 job, it's undisputed in both sets of litigations, there is a
15 stark absence of what information's been provided to the Court
16 to the allegations in this lawsuit or to my knowledge having
17 worked and been assigned to the other litigation of very much
18 if anything that went on once certification was given by Judge
19 Kemmerlin. It it -- nothing happened for a substantial period
20 of time for years. I do not believe that it is disputed in
21 this lawsuit that in December of 2005 I was asked to address
22 an issue that was going to dismiss, either to declass --
23 decertification of the class or to the application of *res*
24 *judicata* and collateral estoppel through the Constitution of
25 the United States of America, to give full faith and credit to

1 that action in *Posey*, that I would terminate the South
2 Carolina lawsuit and close it down. There is a factual basis
3 for me to believe that there is a class that is properly
4 certified as part of this litigation that we're here today. I
5 have concerns though at -- but but simply because I feel like
6 that there is a class I do not believe and I don't want the
7 defense counsels to think that my belief that there is a class
8 that this is somehow some unlimited class beca -- that any any
9 John, Dick, Jane off the street can walk in and say, Okay,
10 we're part of this class, it's not, I mean, it -- this is a
11 legal malpractice claim and a claim of fiduciary duties for
12 violation of the those legal -- of the attorney client
13 relationship and the duties that arose from that attorney
14 client relationship to the class and in class action
15 litigation the class that the Court is concerned about are not
16 only the people sitting in this courtroom but it's also all of
17 those people out there in society that the legislature and the
18 the courts have set up these rules that this court has to be
19 mindful of and I've got to see that I'm not going to let
20 lawyers just do back behind the scene deals and and things to
21 to benefit those and to manipulate the court system and based
22 upon the allegations in this lawsuit and as well as based upon
23 what I know by do -- by being in the other litigation there
24 allegations that in fact the court system was used in that
25 fashion. I am -- I do not believe that I can lay my head down

1 in good conscience and say that there is not a good enough
2 factual showing at this juncture to say that there is a class
3 that will be represented in this lawsuit. What I'm having
4 trouble with as Mr. Stair very ar -- very appropriately and
5 was very articulately pointed out to me that just because all
6 that happened doesn't mean that the plaintiffs in this --
7 in -- plaintiffs' counsel in this particular lawsuit get a
8 blank check and just go after just anybody and their brother,
9 we still have to apply some rules and those rules have been
10 developed by the courts and by the legislature as to how we're
11 gonna apply class action rules and and come up with a
12 definition of the class. I do not intend to certify a class
13 that is gonna allow every, every homeowner in the State of
14 South Carolina whether they have participated in, you know,
15 who owned a home from January 1999 to July 21, 2011 to be able
16 to come in and say that they're part of this class or that
17 they're part of this litigation and entitled because I do not
18 believe that the factual, that the duties that arose from
19 being part of the class representative or the class counsels
20 extended to everybody that was in the State of South Carolina,
21 I think it was limited to first obvious one is limited to
22 people who had Dryvit clad on their house so I I I say that
23 because, Mr. Stair, I don't intend that if I do certify a
24 class that it's going to be as broad as what I think you fear
25 and your information you've given to me has been very helpful

1 and li -- and enlight -- and it has drawn my attention back to
2 what I need to focus on in ruling on this particular motion so
3 I appreciate your advocacy and also the quality of your work.
4 Whoever assisted you in putting this together it was very
5 good.

6 MR. STAIR: Thank you, sir.

7 THE COURT: What I'd like to do because I I get
8 worried -- yesterday, give you an example about time, not only
9 do I have to answer to these people here on a regular basis,
10 ya'll get to go home tomorrow but I still have to live with
11 these people and they get angry when I run over, not only do I
12 have to worry about those people, I also worry about the
13 decisions that I make when I get pressed on time. Yesterday
14 unfortunately I was in criminal court and had to sentence a
15 young man for in -- for involuntary manslaughter and the
16 solicitor's office worked it in right before I was to to pick
17 up from a lunch break and I thought that it was unfair not
18 only to the importance of the State, the victims that were in
19 the courtroom and also to the defendant 'cuz he was the one
20 that went to jail but I thought it was unfair to me to expect
21 me make that type of decision when I'm under a time constraint
22 like that. I would like to suggest that we stop for today on
23 this issue. I would like for us to get back together tomorrow
24 though on the same issue and let me hear the reply of the
25 plaintiff and then I would anticipate all of us having a

1 discussion, maybe a lengthy discussion about if we're going to
2 have a class what will be that class, alright, and naturally
3 if ya'll decide what that class is before tomorrow ya'll can
4 let me know too 'cuz, you know, I I -- that's what I would
5 like to do, I wanna hear your, I wanna hear your reply, let's
6 do that in the morning. What that means is to the lawyers
7 that are here to participate on the other motions I don't
8 think we will do more tomorrow than the class certification
9 issue. The class, the joinder iss -- consolidation issue, you
10 know, we might could do that because I don't anticipate that
11 will be as long as as this, as this issue but I don't think
12 we'll get to the issue of -- that deals with the dismissal
13 that you wanted me to do. Is that -- don't we have that?

14 MR. JONES: With all due respect, Your Honor, dismissal
15 and consolidation it's we're gonna be arguin' back and forth
16 the same thing and I think it can be done in five to ten
17 minutes.

18 THE COURT: Okay. Okay.

19 MR. PENDARVIS: I'm gonna write that down.

20 THE COURT: Yeah, write that down.

21 (Laughter.)

22 THE COURT: Joel Smith had a product, had a products
23 liability case in front

24 (Whereupon, a discussion was held off the record.)

25 MR. STAIR: I did not suggest I was only gonna take five

1 or ten minutes.

2 THE COURT: No, you didn't. Yes, thank you. Let --
3 let's get back together tomorrow and now I -- again, I've been
4 more animated than what I usually am, I make -- interrupted
5 ya'll during arguments, I apologize for that but hopefully
6 maybe my thoughts and comments give ya'll some direction if
7 ya'll continue wanna -- want to have discussions among
8 yourselves on any issues that might get worked out.

9 (Whereupon, a discussion was held off the record.)

10 THE COURT: Thank ya'll very much and I'll see ya in the
11 morning 9:30.

12 (Proceedings July 22, 2011)

13 THE COURT: Alright, ya'll wore me out yesterday. I had
14 a good night's sleep last night. You ready?

15 MR. PENDARVIS: Yes, we are, Your Honor. Mr. Tim Roberts
16 is follow up with the response for the plaintiffs.

17 MR. STAIR: Your Honor, before he begins may I address
18 the Court?

19 THE COURT: Um-hum.

20 MR. STAIR: Alright. You wore me out too yesterday, Your
21 Honor, and I unfortunately I didn't have as good a night of
22 sleep last night and I I hope the Court accepts what I'm
23 saying with the spirit with which I'm offering. Yesterday we
24 had a very engaging conversation about a variety of issues and
25 I came to understand the Court's strong beliefs about

1 fiduciary duties that lawyers have and professional
2 responsibilities that they have to their clients and/or with
3 the court and you invited me to continue to advocate on my
4 clients' behalf notwithstanding whatever reaction I might have
5 gotten from you and you were most gracious in your reception
6 of my arguments and I appreciate that. Last night I reflected
7 though on those things and on what occurred yesterday and it
8 is in the spirit of all of those things that I do what I'm
9 about to do and that is to ask you to disqualify yourself from
10 the case or I guess more specifically move to recuse you and
11 and if you will let me give you my thoughts as to why and
12 again, I do this as an officer of the Court with most respect
13 for the Court but I have some feelings that I think really I
14 would be remiss and irresponsible if I didn't share. This
15 case as you know, and I, when I say this case I'm talking
16 about the Tucker case, is a case of civil action against my
17 clients' lawyers and and of course the former class
18 representatives and it's for a significant sum of money and
19 they need and have a right to have their case decided on the
20 merits of this case and on the evidence in this case and the
21 record in this case and it needs to be decided by a jury and a
22 judge who come to this case impartial, unbiased and
23 unprejudiced in any way and doesn't come with preconceptions,
24 predispositions or conclusions about fundamental issues that
25 are at stake in the case and with due respect based on the

1 record of yesterday I think it's clear that the Court, this
2 court, you in this case, have an inability to separate your
3 findings and conclusions and involvement in the underlying
4 case and more importantly your conclusions reached about those
5 things from this case and from the issues in this case and
6 most specifically I know that from the underlying case, and I
7 think the record from yesterday will reflect that, is that you
8 have very strong negative beliefs about my clients and their
9 conduct in the underlying case and I think they carry over to
10 this case and you simply are unable to separate those two and
11 your feelings about them and again, I think the record from
12 yesterday indicated that and that problem is one that results
13 in my clients in this case being unable to receive a fair and
14 impartial trial in this case based on the record of this case
15 and I would note yesterday as I did yesterday and I note again
16 today the underlying case is one in which we have had no
17 involvement and whatever conclusions you have reached from
18 that case and beliefs and thoughts we had no ability to
19 influence and I think they're sufficiently far down the road
20 now that in fairness, notwithstanding what I might try to do
21 or my clients might try to say or explain, we really just lack
22 the ability to change the course of of history as it has been
23 established and you've heard one side of the case, not our
24 side and in doing so I think as the record reflected yesterday
25 you've reached a very negative feeling about our clients and

1 what they did and what should happen to them in this case and
2 with due respect to the Court I have to on their behalf say
3 that we consider that to be unfair and it shouldn't happen. I
4 think compounding this issue is from what you said yesterday a
5 lot of your feelings about them and what they did in the
6 underlying case dealt with their dealings with you as the
7 judge in that case and I think to some degree, if not a great
8 degree, you took that as a a personal professional affront and
9 it carries over into this case and it's not that you mean to
10 have that happen I think just by nature it does and I just
11 don't think that there will be an ability on your part to
12 separate that case from this case and your feelings from that
13 case from your feelings in this case and frankly, as a lawyer
14 in the case I I just don't think that's the way it oughta be,
15 I mean, we we should have a a judge in this case, and again I
16 might say I have probably never been more graciously treated
17 than I was treated yesterday and I appreciate that, but we
18 should have a judge in this case who comes to us afresh and
19 looks at the record in this case and has no preconceptions
20 about who did right or wrong, who is good or bad or what
21 should happen and we should base our decisions in this case
22 with a totally fair and impartial and and unbiased mind and of
23 course the judicial ethics speak to that, I certainly do not
24 intend to lecture the Court on those but Rule 501 Canon 3, The
25 judge shall perform the duties of judicial office impartially

1 and diligently. Subsection (e) of that is disqualification
2 and it says that a judge shall disqualify himself or herself
3 from a proceeding in which the judge's impartiality might
4 reasonably be questioned, including but not limited to
5 instances where in subsection (a) is the judge has a personal
6 bias or prejudice concerning a party or party's lawyer or
7 personal knowledge of disputed evidentiary facts concerning
8 the proceeding and in this case I think you're burdened with
9 all of those things and I think due process would be denied us
10 if we had to defend a case of this size and magnitude with a
11 judge while gracious is predisposed and cannot see the case
12 impartially and we would ask you as just as an aside and as a
13 matter of interest it seems as though based on their theory of
14 damages and based upon one of your reactions from your
15 recollection of the case from yesterday you might be a
16 material witness in the case because their concept is that
17 what happened in the underlying case was unfair, my perception
18 from what I understood from you yesterday is that you thought
19 it was fair but I mean, it it could be the odd situation where
20 that occurred so I guess for a variety of reasons having the
21 judge from the case within a case treat the second case
22 particularly where the conduct of the lawyers in the first
23 case was at such a core issue as one at issue and particularly
24 where they did not have the opportunity there to influence the
25 result and where the Court as a result reached very adverse

1 feelings about them that impact the issues and determinations
2 made in the second case which is the one we're here for today,
3 I think clearly the practice should be for the Court to
4 disqualify itself and it is with luck -- reluctance that I
5 make this motion but based on what happened yesterday, Your
6 Honor, I feel compelled to do so. Thank you.

7 THE COURT: Thank you.

8 MR. ROBERTS: Judge, unlike the folks on the other side,
9 I've not had an opportunity to sit around and scratch my head,
10 read case law and figure out how to respond to this. I will
11 say this: I am disappointed but not surprised and I am not
12 surprised because from the very beginning these lawyers
13 representing these defendants have done their very best to
14 delay, delay, delay and for that reason their clients have
15 never been deposed and this case sits where it sits and the
16 motions to disqualify granted, motions to disqualify denied
17 and threats of motions to disqualify, now the file and I would
18 suggest to the Court that the timing of this motion is not a
19 coincidence. Defense counsel has inferred or they believe or
20 they think rightly or wrongly that they are going to lose and
21 that the motion for class certification is going to be granted
22 and so now they move to disqualify the judge. The Court made
23 very clear in its comments yesterday that it would keep an
24 open mind. The Court made very clear in it's comments
25 yesterday and before that it had not formed any opinions. The

1 Court made very clear in its comments yesterday that it looked
2 forward to the opportunity of hearing the defendants explain
3 what occurred in this case and I will point out to the Court
4 that the, that the defendants have had that opportunity. I
5 understand in March of 2010 there was a hearing where the
6 Court invited the defendants to come and the defendants did
7 not come and there's a reason the defendants didn't come and
8 the reason is the defendants thought it in their best interest
9 not to come, they're represented by very capable counsel.
10 These defendants have had an opportunity to explain to this
11 court and they have declined that opportunity and they've done
12 it for a reason and what we have here today is just more of
13 the same, that is why we have a case that is years and years
14 old that is a great burden upon this court and upon the State
15 a South Carolina. I would point out to this court that when
16 the Court made these comments yesterday that the defense had
17 an opportunity at that time to make this motion and they did
18 not make that motion and the reason they didn't make that
19 motion is because they think they have inferred that the Court
20 is gonna grant the motion and the only way to stop it and
21 create further delay in this case is to now disqualify the
22 Court by trying to convince the Court that it can't be fair,
23 by trying to convince the Court, Hey, they can't be fair, we
24 may put ya under subpoena, and that's what this is about.
25 This court made very clear that it has not formed any

1 preconceived conclusions adverse to these defendants and there
2 is no doubt in my mind this court will be eminently fair to
3 all the parties involved in the case and the only thing that a
4 party and a lawyer can expect or should expect from the Court
5 is simply to have an even playing field. Now I've been told
6 by my colleagues here that in South Carolina judge can't be
7 disqualified and should not be disqualified unless the folks
8 seeking to disqualify that judge can show actual harm.
9 They've not been able to show any actual harm in this case and
10 I would suggest to the Court and I firmly believe that this is
11 simply a subterfuge in an effort to delay this case. We need
12 to try this case, we need to get this motion heard and granted
13 or denied and we need to move forward. Thank you.

14 MR. STAIR: Your Honor, first of all, I take offense to
15 the suggestion we've done anything improper in the litigation
16 of this case, that has not occurred and other than noting my
17 objection to that I'll move on. As it relates to the timing
18 of my motion, frankly I think my timing is quite good because
19 in all honesty and not to sound like Charlie Sheen I think
20 we're winning on the motion for class certification, I think
21 you indicated you were not going to grant their motion for
22 class certification, certainly not as they issued it but
23 that's the only motion we've got on the table at the moment so
24 if anything my motion is made at a time when I believe we are
25 ahead rather than behind. It is interesting that they

1 apparently have discussed the issue of disqualification since
2 my friend from Georgia seems to understand the rules; I don't
3 think it's a surprise to them that the issue is ripe for
4 consideration here, and finally he says we're entitled to a
5 even playing field and that's not a bad way to describe the
6 situation. With due respect to the Court, we don't feel we
7 have an even playing field and I that's what we want and I
8 think that a judge with no back background in this case and no
9 thoughts about the case would provide us with that and we're
10 otherwise not going to get it. Thank you.

11 THE COURT: Alright, um, a -- let's do this: I will take
12 that motion under advisement and take a look at it. The
13 motion is a surprise to me so I wanna take a look at what the
14 actual rules, canons and requirements are to be sure that that
15 I comply with those. I will let defense counsel know that as
16 far as this court is concerned, and that I do take my judicial
17 duties extremely serious, if based upon my prior work in the
18 companion case, the case to which this case, the factual
19 foundation that they are asserting leads to their theories of
20 liability in this case that if I have formed an opinion or a
21 conclusion to the extent that I viewed your clients in a way
22 that is suggested by the facts then my judicial obligation and
23 duties would have required me to do something substantially
24 more than what I have done so far in regards to those
25 allegations. Do you understand what I mean?

1 MR. STAIR: I'm not sure that I do but I I acknowledge
2 what you're saying.

3 THE COURT: If I view those facts to a conclusion that
4 you believe or that I believe you're asserting that I have
5 concluded those facts to be true and the inferences from those
6 facts then I would say have turned your clients into the
7 grievance board. I have not done that. I do not, I do not
8 come to those conclusions lightly nor quickly. I have been in
9 this business long enough to know that there are facts and
10 there inferences that one party asserts that are very damaging
11 and damning to the other side and unless you hear from the
12 other side and frequently in this job I've been heard from the
13 other side and their conclusions and the inference -- and the
14 facts are completely wrong and the inferences from those facts
15 are wrong so I have formed no conclusions as to the
16 allegations. I have -- these allegations that they make
17 against your clients and have been made are quite, are quite
18 serious to the Court, I will acknowledge at that, because they
19 involve officers of the court and I -- as I expressed
20 yesterday I view the legal system that we have in this country
21 and in this state with a great deal of respect and when those
22 types of allegations are made they're very serious to the
23 Court. I would hope that any judge in the state would view
24 those types of allegations with with a, with a great deal of
25 seriousness and not treat them light.

1 MR. STAIR: Your Honor, excuse me, are -- were you
2 through? I didn't mean to interrupt.

3 THE COURT: Go ahead.

4 MR. STAIR: Yeah, I I was just going to say I I view the
5 system in the same way the Court does and I hope there was
6 nothing about my motion that suggested that you do not take
7 your role and the process very seriously, I acknowledge you do
8 and I have no question about that so I hope there was no
9 suggestion in the motion to the contrary.

10 THE COURT: I did not hear any or didn't read anything
11 into it from that.

12 MR. STAIR: None was intended I can assure the Court.

13 THE COURT: Alright, I'm gonna take it under advisement.
14 What I'd like to do is go ahead and let's get the reply ---

15 MR. STAIR: Yes.

16 THE COURT: --- in from the -- from counsel.

17 MR. STAIR: Yes.

18 MR. HODGES: Judge, would you like for us to brief the
19 issue of recusal?

20 THE COURT: You can do -- I'm not gonna ask you to. If
21 you feel like you you need to, you can submit something but
22 while you're out preparing a brief I might have come up with a
23 decision by the time so I don't, I -- in the event I make a
24 decision and and you're in the middle of writing something or
25 you've sent it to me I I apologize in advance if I don't read

**GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER**

1 THE COURT: Alright. Alright, let me step down for for a
2 little bit. If ya'll will we can take a break and if you,
3 Mr. Anthony, if you wanna take 'em over to your office you can
4 but just be sure you leave my law clerk with your telephone
5 number but I'll try to check back in with ya in about thirty
6 minutes.

7 MR. ANTHONY: Thank you.

8 (Whereupon, a recess was taken.)

9 THE COURT: Alright, we'll go on the record. Alright,
10 I'm gonna address the the motion for recusal. Now as I
11 understand it the motion for recusal is based on Canon 3
12 Subsection (e) and I've reviewed that Canon, I've also
13 reviewed some case law and there's very little case law in the
14 State of South Carolina on that particular Canon. My
15 understanding of the motion is that the motion is based on the
16 fact that I have had the involvement and I have gained
17 knowledge of this case based upon my participation in the
18 other case, 1377 case. I mention that because I read Canon 3
19 as going to -- so obviously I do have personal -- I mean, I do
20 have knowledge of what went on before in the other case, I
21 mean, there's undisputed about that. I have received through
22 several years of work substantial, massive, huge amounts of
23 information related to the other case and based upon my
24 understanding of the facts that are being alleged in the
25 complaint, the facts of that case and the facts of this case

1 cross over hundreds of times. I am aware of the defendants
2 that are in this case being the defendant or or being lawyers
3 that at one time participated in the other case and they did
4 at one time appear before me in the other case for a brief
5 moment through a motion of -- to to be relieved. The names of
6 the defendants and allegations related to the defendants in
7 this case were brought up in the other case. Facts have been
8 alleged in the other case related to alleged misconduct of
9 these defendants in the other case that are the same types of
10 facts that are related, that I believe will be related and are
11 some contained in the complaint that are in this case we're
12 here today on, the same defendants, the same facts. There is
13 just an inexcuse -- there's no way I don't think anybody can can
14 argue that there is not the overlap of facts and and these
15 defendants in the other case they're in this case, I mean,
16 that's just clear as clear can be that they're the same, I and
17 I have knowledge of that. I have knowledge of legal issues
18 that were raised in the other case that are the same legal
19 issues that are raised in this -- that are being raised or have
20 been argued and I anticipate will be raised in this case no
21 question about that clearly and I -- so that those are not
22 disputed. And I'm taking a look running through Canon 3
23 Subsection (e) to see if there's any other areas where I
24 believe the defense motion for disqualification may be based
25 other than on my prior knowledge. I don't see anything that

1 comes out of Subsection (c) or (d). There was the statement
2 that a judge might be a material witness in, that I might be a
3 material witness in this case, I -- I'm not understanding what
4 that argument is. I don't -- I cannot find where my prior
5 work in the other case, my knowledge of the other case falls
6 within a disqualification motion based on (e) because all of
7 the facts that I know about, all of the legal issues that I
8 have addressed or have pending or may address in this case or
9 all of this comes through my professional work and I've
10 made -- let's let's -- and so th -- I have -- there's
11 nothing -- I have not gained any of this information through
12 any of my proffe -- personal activities through my personal
13 conduct. I I even, in my thought processes I even took it to
14 the extent okay let's say that in the other case I had made
15 rulings that were negative or somehow against the interest of
16 the defendants that are in this present case, let's say I made
17 those rules and I made them in in a manner that was negative
18 to them would that be a basis for disqualification of me in
19 this case? And I came to the conclusion that it would not be
20 otherwise judges would be prohibited from making rulings in
21 subsequent cases when they, when they might have similar facts
22 or similar law or similar clients and I don't believe that
23 that is the -- what the case law shows in the State of South
24 Carolina with particular reference to the I don't know whether
25 it's a Supreme Court opinion or a Court Appeals decision that

1 involved a case with Judge Barber where he had had a client in
2 front of him at one particular time and had made rulings
3 adverse to that client and the client came back on some other
4 matter Ju -- and Judge Barber ruled again on the matters and
5 I, and I guess they went adverse to the client and the Court
6 of Appeals, the Supreme Court said that's, you know, that that
7 happens in our judicial system. So I'm not seeing that the
8 fact that I, and I will readily admit I have what I think to
9 be a massive amount of information gained from the other
10 litigation that may or may not be but I think it probably will
11 be part of what I hear in this litigation but the manner in
12 which I acquired that information I don't believe that because
13 I possess it that that forms a basis for disqualification. I
14 I do -- I don't beli -- well I've never had a motion for
15 disqualification asked me. I've never been asked to
16 disqualify myself before so my analysis of going through this
17 is is novel for me and I've tried to rely upon the best
18 resources that I have. This case I would like to propose
19 something to the lawyers and I do this hesitant, I do it with
20 some reservation because I do not wish for the plaintiff to
21 feel like that I am somehow acting in a manner that
22 overburdens the plaintiff or unnecessarily burdens the
23 plaintiff but I am -- I have the privilege of being, of being
24 a member of the National Association of State State Trial
25 Court Judges and we have for the last twelve months have been

1 engaging in a discussion and a review of proposals that are
2 going before the Amer -- that eventually may make it to the
3 American Bar Association Board of Governors for consideration
4 and adoption and we have been discussing issues of judicial
5 recusal and and how they should be handled. If I recall
6 correctly one of the proposals and this is not a, and this is
7 not a mechanism that that I believe has been endorsed or is
8 even being planned to be begin the ABA in their next annual
9 meeting unless the wheels within the ABA have sped up some but
10 one of the proposals deals with when these issues arise allow
11 a third party judge to make an objective determination on the
12 issue of recusal. In this particular case we have here
13 with -- in the 0774 and the 3145 case I have the, could be
14 called burden but I have the responsibility of being this
15 judge based upon an order that was signed on August the 10th
16 2010 by judge Perry M. Buckner of the Fourteenth Judicial
17 Circuit. I had the order pulled to see if he had any
18 explanation as to why he did this to me and it, and it just
19 says that he assigned it to me. I I I think Perry, I think
20 Judge Buckner's reasoning for assigning it to me is that he
21 knew that I had knowledge of the prior case and felt that my
22 being involved in this case given the massiveness that this
23 case is might be helped sped along to be more efficient from a
24 judicial standpoint and a court standpoint if I actually did
25 this ca -- did these cases as well. I have not spoken to

1 Judge Buckner about this and I'm not, and I'm not saying or
2 dictating that I want you to do this, I'm just giving you a
3 suggestion, I would -- given the fact that it is the
4 defendants that are uncomfortable through their motion, I'm
5 I'm inferring that they're uncomfortable or that they have
6 concerns, they expressed this view that that they believe that
7 I might not be able to serve impartial and that some way my
8 prior involvement might somehow inappropriately affect the
9 decisions that I make in this case, I would like to propose
10 that, and given the fact that I've taken a look at the rules
11 and I just don't see how I can get out of this just based upon
12 a simple assertion, what I would propose is that the
13 defendants file a motion with Judge Buckner, ask him to take a
14 look at this, ask him to take look at it independently, you
15 can let him know that he does it with my blessing and let him
16 decide and if he then makes the decision that it would be best
17 for someone else to be assigned it, he can, he can do it and
18 will not hurt my feelings whatsoever, will not hurt my
19 feelings whatsoever if he keeps it with me either because
20 somebody's gotta do it, ya know, but I would -- I -- and and
21 at least have another set of eyes take a look at it and you
22 can order the record because you said it was based upon things
23 that I'd said yesterday, let him take a look at the record and
24 let him take a look at it 'cuz as far as I'm concerned Judge
25 Buckner being the administrative judge down there he actually

1 could could at any reason remove this case from me for
2 whatever reason. I think from the plaintiffs' perspective I
3 wanna encourage you to participate in that process and let him
4 take a look at it. If it were -- if it weren't for the fact
5 that we're dealing with lawyers as defendants and the
6 accusations deal with lawyers and I hope that I've, I think
7 I've said it once, I might have said it three or four times
8 over the last couple of days is that I have a great deal of
9 admiration for the judicial system and the legal process in
10 our country and I would view it as a, while an extra step I
11 wouldn't view it as an insurmountable or an overly burdensome
12 step in asking Judge Perry to take a look at it. If Judge
13 Perry, if Perry -- if Judge Buckner then says that, Oh, it's
14 probly best if we have it go to somebody else and it goes to
15 somebody else. If Perry -- if Judge Buckner says leave it
16 with Judge Hayes, I think that it would also give the
17 defendants a better feel as well that they're being treated
18 fairly because these are significant issues and I say
19 significant issues from the basis of your claim of liability
20 being officers of the Court and I would not want the process
21 that we use here to lead to any other conclusion other than
22 that everybody, both the plaintiffs and the defendants had
23 been treated fairly and so I would ask that you do that, I'm
24 not gonna require you to do that, but I would ask that you
25 consider doing that. That's my ruling at this juncture on the

1 issue of disqualification, you know.

2 MR. STAIR: Might I say, Your Honor, I think that is a
3 most appropriate way of handling it and I very much appreciate
4 your proposing that and we will follow that route, that I
5 think it is demonstrative of your respect for the judicial
6 system and I appreciate it.

7 THE COURT: Alright, well and I appreciate your saying
8 that.

9 MR. PENDARVIS: Your Honor, brief comment. Just so
10 you're clear Judge Buckner's not the administrative judge in
11 the Fourteenth district, Judge Carmen Mullen is and Judge
12 Mullen's relationship with George Mullen, Mullen Wylie Firm
13 and their participate and they're defendants in this case is
14 the reason it got over Judge Buckner. Just so you'll be clear
15 he's not the ---

16 THE COURT: Okay, ---

17 MR. PENDARVIS: --- the administrative judge.

18 THE COURT: --- then I -- if ---

19 MR. PENDARVIS: I I don't think that would offer a lot, I
20 just wanna let you know that that's how it got to Judge
21 Buckner, my understanding of how ---

22 THE COURT: Okay, ---

23 MR. PENDARVIS: --- it got to Judge Buckner.

24 THE COURT: --- then I would probably think that Judge
25 Mullens would still send it to Judge Buckner but his order he

1 put him down as the chief administrative judge ---

2 MR. PENDARVIS: I understand and I, and I'm just lettin'
3 that's kinda how ---

4 THE COURT: Okay.

5 MR. PENDARVIS: --- okay I remember how it got there and
6 I just want you to be clear on that. I I think -- I'm not
7 disagreeing with your suggestion, I'm just suggesting that ---

8 THE COURT: Alright.

9 MR. PENDARVIS: --- I wanna make sure you understood
10 that.

11 MR. BRUNER: Judge, I think he was the chief
12 administrative judge at the time he signed the order and since
13 we've had a new calendar year that's why Judge Mullen is now
14 the chief.

15 THE COURT: Alright, then I would probly think Judge
16 Mullen would still send it over to Judge Buckner. I don't
17 think she would touch it.

18 MR. PENDARVIS: Again, we're not suggesting, Judge, I
19 just wanna let you know that.

20 THE COURT: Okay, now ---

21 MR. STAIR: I would not suggest that she should do it,
22 Your Honor.

23 (Laughter.)

24 THE COURT: Yeah. I would -- what I would like to do is
25 if ya'll would act expeditiously on that, I will act

1 expeditiously on taking this matter of class certification
2 under advisement and then if if I still have the case I will
3 then issue a ruling in a timely fashion. If it goes to
4 somebody else, you can either order the record or present the
5 record to whomever, let them review the record or or or redo
6 your oral arguments but, you know, all of your submissions are
7 already in so it would just be rearguing the case but
8 unfortunately I don't feel that I should rule on any other
9 motions either today so I wanna thank ya'll for -- yes, sir?

10 MR. PENDARVIS: One other thing, Your Honor. I'm gonna
11 need to talk to Susan Wall about our and I'm understanding
12 this kinda inherently in your your suggestion to send this up
13 to Judge Buckner that you're not gonna be able to sign an
14 order on the motion to approve the settlement in the Mullen
15 Wylie motion that was heard yesterday so I'm I'm just -- I
16 wanna make sure what I'm gonna communicate to her that it's
17 kinda on the pause button right now, on hold.

18 THE COURT: You wanna give her a heart attack?

19 (Laughter.)

20 MR. PENDARVIS: I might let you -- I'll let you make the
21 call then to, um, ---

22 THE COURT: I I had thought about that briefly. If if I
23 unders -- I mean, I do not see the relatio -- I I -- okay,
24 there's a same base I mean, I have knowledge of what Mott,
25 Wylie, Mullens and Grimball did in this lawsuit or the

1 allegation or in this lawsuit based upon my work in the other
2 lawsuit but my belief is that those issues have reached a
3 point to where I've I've not -- I have -- will not be asked to
4 give a decision based upon my prior knowledge. Ya'll have
5 worked that settlement out. Now I did approve it as being
6 reasonable based upon my prior knowledge but those things were
7 not in an adversarial setting when it came in front of me.

8 MR. PENDARVIS: I I wholly agree with that. The the
9 concern I've got though, Your Honor, is that settlement
10 involves a a settlement class and notice and a fairness
11 hearing and a lotta things that it would seem procedurally
12 would need to either be heard by the judge that's got this
13 case whether it be you or another judge that Judge Buckner may
14 determine before we proceed down that path and at the same
15 time I know that Susan's got -- wants some finality here and
16 and I'm still believing it it -- that's gonna have to be held
17 up while this process ---

18 THE COURT: Alright, well let let let me ask this ---

19 MR. STAIR: And maybe I can shortcut this, I've been
20 taking a poll among the defendants for the limited purpose of
21 that motion and and without waiving any other objections we
22 don't have a problem with that part of the case moving on.

23 THE COURT: Thank you. Now it -- they they -- if I
24 understand correctly all of the defendants that are remaining
25 they have no objection in that part of the case going on. A

1 concern that came up in the last case, the 1377, is that the
2 judge who actually does the preliminary settlement approval
3 has to be the judge that does the final settlement hearing so
4 I've already done the preliminary approval hearing so if I
5 di -- if I -- if if you have concern that I should not be the
6 judge at the final hearing due to the fact that Judge Buckner
7 or somebody may say somebody else then ya'll are gonna have to
8 go back up.

9 MR. BRUNER: May, I? Your Honor, I think there's a very
10 practical solution to this. If that were to happen then the
11 case could easily be bifurcated between that part which has
12 been settled with Mullen Wylie and you could continue to
13 administer that settlement and then someone else would would
14 handle the rest of the case. I just don't think that's a ---

15 MR. PENDARVIS: Well quite candidly, Your Honor, we're
16 not willing to do that. Our motion for -- our motion and we
17 understand that there was the issue about whether there was
18 gonna be a trial case was gonna be -- which was gonna be part
19 of what notice went out as part of the notice of the
20 settlement. If there's just gonna be a settlement class,
21 that's fine if that's the final ruling that comes from the
22 motion we are finished up today and that we are opposed to
23 sending out a settlement class only notice until this trial
24 class ruling has been resolved. It it it -- we don't wanna
25 send out mixed signals to the class and we are -- it's it's

1 just we would prefer that this class cert -- certification
2 motion be resolved before the settlement class proceeds and
3 and if it's denied that's fine but if it's granted we want a
4 settlement trial class notice to go out so we would prefer to
5 hold everything until this ---

6 THE COURT: Alright, let me thank thank you for that and
7 let me offer a suggestion. Why don't you speak with Ms. Wall,
8 let her know what has happened, let her know what ya'll may or
9 may not do with Judge Buckner, see what she suggests that to
10 do 'cuz she might very well say wait, you know, she might say
11 go, I don't know, you know, but I if I understand they are,
12 the defendants are agreeable to ya'll proceeding with doing
13 the ---

14 MR. PENDARVIS: If we ---

15 THE COURT: --- settlement part.

16 MR. PENDARVIS: --- said we choose that ---

17 THE COURT: If you choose that, ---

18 MR. PENDARVIS: Okay.

19 THE COURT: --- if not then -- I mean, they're not
20 gonna -- if I understand them correctly the defendants who are
21 still here don't care, they're not gonna get in your way and
22 you do whatever you feel ---

23 MR. PENDARVIS: Got it.

24 THE COURT: --- like you should do.

25 MR. STAIR: Correct.

1 MR. PENDARVIS: And we'll -- we will ---
2 THE COURT: Okay.
3 MR. PENDARVIS: I will communicate with Ms. Wall and
4 we -- if it's okay with you all for now as those
5 communications -- when Susan and I communicate, we'll reach a
6 conclusion and we'll make sure all the parties and Your Honor
7 are copied and since that we've decided is collateral to the
8 the issue for Judge Buckner and this class, this class
9 certification.
10 MR. BRUNER: If we'll all hear her response.
11 MR. PENDARVIS: Oh, I know.
12 THE COURT: Yeah, we won't have to have a telephone.
13 (Laughter.)
14 MR. JONES: I don't think we'll need a phone to hear it.
15 THE COURT: No.
16 (Laughter.)
17 MR. STAIR: I'm only a few blocks from her in Charleston,
18 I know I'll hear it.
19 MR. BRUNER: You know you're gonna hear it.
20 THE COURT: Okay, well thank ya'll very much and keep me
21 posted.
22 MR. STAIR: Thank you, Judge Hayes.
23
24
25

CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on July 21 and 22, 2011 at the time and place heretofore set forth; and that the foregoing pages numbered from 3 through 239, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

October 12, 2011

Margaret A. Woods

Margaret A. Woods, Court Reporter
in and for the State of South Carolina at Large.

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,)

-VS-)

DRYVIT SYSTEMS, INC.,)

DEFENDANT.)
_____)

2002-CP-07-1377

TRANSCRIPT OF RECORD

MOTION FOR ATTORNEY FEES
(VOLUME ONE OF TWO)

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

GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 (WHEREUPON COURT WAS IN RECESS AT 12:32 P.M.)

2 THE COURT: WE'LL GO BACK ON THE RECORD. AND I'LL
3 REMIND THE WITNESS THAT HE REMAINS UNDER OATH.

4 MR. MULLEN: YES, YOUR HONOR.

5 MS. WALL: THANK YOU, YOUR HONOR.

6 THE COURT: DID MR. FIELDS HAVE QUESTIONS?

7 MR. FIELDS: I WAS WONDERING IF YOU WOULD PREFER
8 THAT I GO AHEAD AND GO NOW AND DO THEM ALL OR IF YOU
9 WANTED TO DO YOURS, AND THEN I'LL GO.

10 MS. WALL: WELL, I WASN'T AWARE THAT MR. FIELDS HAD
11 ANY QUESTIONS.

12 MR. FIELDS: I DO HAVE A COUPLE, JUST A FEW THAT
13 OCCURRED TO ME AS I WAS LISTENING.

14 THE COURT: OKAY. LET'S -- WE'LL LET MR. FIELDS GO.
15 AND THEN THAT WAY IF YOU HAVE ANYTHING YOU NEED TO ASK
16 HIM IN RESPONSE TO WHAT HE ASKED, YOU CAN, OKAY?

17 MS. WALL: I'M SORRY TO INTERRUPT. AND HE'S HERE
18 ASKING QUESTIONS BASED ON THE COLLOQUY THAT HE GAVE TO
19 THE COURT THIS MORNING?

20 THE COURT: YES, MA'AM.

21 MS. WALL: I HAVE NO IDEA WHAT HE'S GOING TO ASK.
22 SO IF THE COURT WOULD NOTE MY OBJECTION. THANK YOU.

23 THE COURT: OKAY.

24 **CROSS-EXAMINATION BY MR. FIELDS:**

25 Q. MR. MULLEN, I THINK YOU'VE INDICATED THAT YOUR

1 ORIGINAL STRATEGY FOR THIS CLASS ACTION WAS TO OPT-OUT
2 THE ENTIRE STATE OF SOUTH CAROLINA AND ALLOW INDIVIDUAL
3 HOMEOWNERS TO PURSUE INDIVIDUAL LAWSUITS, IS THAT
4 CORRECT?

5 A. THAT'S CORRECT.

6 Q. AND SO THE WAY THAT WOULD HAVE WORKED IN THE NORMAL
7 COURSE OF THINGS WOULD HAVE BEEN, YOU CERTIFY THE CLASS,
8 THAT'S THE FIRST THING, CORRECT?

9 A. YES, SIR.

10 Q. FILE THE OPT-OUT, ONCE YOU'RE AUTHORIZED BY THE
11 COURT TO DO SO, CORRECT?

12 A. YES, SIR.

13 Q. THEN GIVE NOTICE TO THE STATE OF SOUTH CAROLINA THAT
14 THEY'VE BEEN OPTED OUT SO THAT THEY COULD PURSUE THEIR
15 INDIVIDUAL CLAIMS, IS THAT CORRECT?

16 A. YES, SIR.

17 Q. AND THAT WOULD BE THE END OF THIS LAWSUIT.

18 A. YES, SIR.

19 Q. IF THINGS HAD GONE IN THAT WAY WHERE WOULD THE
20 ATTORNEY'S FEE HAVE COME FROM FOR CLASS COUNSEL?

21 A. I WASN'T EVEN THINKING OF ANY ATTORNEY'S FEES WHEN I
22 CAME UP WITH THIS IDEA.

23 Q. OKAY. SO WITH THIS STRATEGY, IT'S A STRATEGY TO
24 ENABLE PEOPLE TO PURSUE INDIVIDUAL LAWSUITS, AND THERE'S
25 NO CONTEMPLATION THAT A COMMON FUND IS GOING TO BE

1 CREATED FROM WHICH AN ATTORNEY'S FEE COULD BE AWARDED, IS
2 THAT CORRECT?

3 A. UNDER MY THOUGHTS, NO. I'D NOT THOUGHT OF ANY
4 ATTORNEY'S FEES. THE ONLY THING I WAS THINKING OF WAS
5 HOW DO WE STOP POSEY BECOMING THE LAW OF THE LAND.

6 Q. OKAY. NOW, ONCE YOU -- YOU GOT THE CLASS CERTIFIED,
7 CORRECT?

8 A. YES, SIR. WELL, I DIDN'T DO THAT. I WASN'T
9 INVOLVED IN THAT PART OF IT, BUT IT WAS DONE, YES.

10 Q. YOUR FIRM, AND MR. LEATH'S FIRM, AND THE FIRMS THAT
11 BECAME THE ORIGINAL CLASS COUNSEL GOT THE CLASS
12 CERTIFIED, CORRECT?

13 A. YES, SIR.

14 Q. AND FILED THE OPT-OUT IN TENNESSEE, CORRECT?

15 A. YES, SIR.

16 Q. AND FROM YOUR PERSPECTIVE, ONCE THAT OPT-OUT WAS
17 FILED IN TENNESSEE, IT WAS EFFECTIVE, CORRECT?

18 A. WELL, I CERTAINLY HOPE IT WAS. THERE WAS A
19 PROVISION IN JUDGE SLONE'S ORDER THAT PROVIDED YOU COULD
20 NOT HAVE ANY -- AND I THINK THE TERM HE USED WAS GROUP
21 OPT-OUT.

22 YOU KNOW, IS -- I GUESS IT'S AN ARGUABLE ISSUE, IS A
23 CLASS OPTING OUT, IS THAT BY A GROUP OPTING OUT OR IS IT
24 THE INDIVIDUAL REPRESENTATIVE ON BEHALF OF THE CLASS
25 OPTING THE ENTIRE CLASS OUT? SO I GUESS THERE COULD BE A

1 LEGAL DEBATE OVER THAT ISSUE.

2 Q. THERE WAS A DEBATE ABOUT IT, BUT YOUR POSITION WAS
3 IT WAS EFFECTIVE UPON FILING?

4 A. YES.

5 Q. OKAY. WHOSE DECISION WAS IT, IN YOUR MIND, AS TO
6 WHETHER IT WAS EFFECTIVE UPON FILING?

7 A. I DON'T KNOW HOW TO ANSWER A QUESTION LIKE THAT.

8 Q. OKAY. WHICH COURT? WAS IT JUDGE SLONE'S DECISION?
9 WAS IT JUDGE KEMMERLIN'S DECISION? HAD YOU GOTTEN THAT
10 FAR IN YOUR THINKING?

11 A. I WOULD THINK THAT, YOU KNOW, NO, I'D NOT GOTTEN
12 THAT FAR IN MY THINKING BECAUSE, QUITE HONESTLY, OTHER
13 THAN COMING UP WITH THE CONCEPT, I WASN'T INVOLVED IN THE
14 SUIT UNTIL THE END OF 2005.

15 Q. OKAY.

16 A. BUT SITTING HERE THINKING, I WOULD THINK IT PROBABLY
17 WOULD BE THE SOUTH CAROLINA COURT.

18 Q. WHY THEN, IF THE OPT-OUT HAD BEEN FILED, AND IF YOUR
19 PERSPECTIVE IT WAS EFFECTIVE, AND IF IT'S THE SOUTH
20 CAROLINA COURT'S DECISION AS TO WHETHER IT'S EFFECTIVE OR
21 NOT, WHY GO TO TENNESSEE AT ALL? THE ENTIRE STATE OF
22 SOUTH CAROLINA IS OUT. WHY ARE YOU GOING TO TENNESSEE AT
23 ALL?

24 A. WELL, THAT'S ACTUALLY A PRETTY EASY QUESTION TO
25 ANSWER. YOU DON'T KNOW IF THE SOUTH CAROLINA APPROACH IS

1 GOING TO BE EFFECTIVE. YOU DON'T KNOW IF THE TENNESSEE
2 APPROACH IS GOING TO BE EFFECTIVE. REALLY, I'M SITTING
3 HERE NOT KNOWING, YOU KNOW, IS THERE ANYTHING YOU CAN DO
4 ABOUT POSEY BECAUSE, QUITE FRANKLY, THERE HAVE BEEN SOME
5 OTHER NATIONAL CLASS ACTIONS THAT YOU GET STUCK IN THE
6 MIDDLE OF AND YOU'RE JUST THERE AND THERE IS NOTHING YOU
7 CAN DO.

8 SO I'M NOT SAYING I HAD THE RIGHT IDEAS. I JUST HAD
9 SOME IDEAS. AND LET'S TRY TO SEE WHAT WE CAN DO WITH
10 TENNESSEE, DO WITH POSEY. LET'S MAKE IT BETTER. IF
11 THAT'S WHAT WE'RE GOING TO GET STUCK WITH, AT LEAST LET'S
12 MAKE IT BETTER. LET'S TRY AND SEE IF WE CAN JUST GET THE
13 WHOLE STATE OF SOUTH CAROLINA OUT. IF WE SUCCEED, GREAT.
14 MAYBE NEITHER ONE IS GOING TO WORK, BUT IT'S BETTER THAN
15 JUST SITTING THERE DOING NOTHING.

16 Q. OKAY. WITH WHOM -- SINCE YOU HAD NO EXPECTATION OF
17 A FEE INITIALLY IN THIS CASE, DID YOU HAVE A FEE
18 AGREEMENT WITH ANY CLIENT WITH REGARD TO THIS CASE?

19 A. WITH REGARD TO THE CLASS ACTION ITSELF?

20 Q. WITH THE CARDAMONE CLASS ACTION?

21 A. NO. NOW, IF ANY OF THE OTHER LAWYERS DID, I DON'T
22 KNOW THE ANSWER TO THAT, BUT WE DID NOT.

23 Q. WITH REGARD TO THE TENNESSEE WORK THAT WAS DONE IN
24 POSEY, I THINK YOU TESTIFIED EARLIER THAT YOU HAD NO
25 EXPECTATION OF A FEE IN THAT CASE ---

1 A. THAT'S CORRECT.

2 Q. IS THAT CORRECT?

3 A. THAT'S CORRECT.

4 Q. DID YOU HAVE -- I GUESS THAT WOULD MEAN YOU HAD NO
5 FEE AGREEMENT WITH ANY CLIENT WITH REGARD TO POSEY AS
6 WELL. IS THAT ACCURATE?

7 A. THAT IS ACCURATE. AGAIN, AT POSEY IT WAS DIXON
8 ROBERTSON'S CLIENT, OR SO HE SAID. WHETHER HE HAD AN
9 AGREEMENT WITH HER -- I ASSUME IF HE DID, WE WOULD HAVE
10 SEEN IT BY NOW. SO I'M GOING TO ASSUME HE DID NOT HAVE
11 ONE WITH THE DeLOACHES.

12 Q. WHEN 2005 COMES AROUND AND THE REST OF THE ORIGINAL
13 CLASS COUNSEL WITHDRAW, AND WE'RE NOW INTO 2006, AND
14 MULLEN WYLIE IS STAYING IN THIS CASE AS COUNSEL, DID YOU
15 ESTABLISH A FEE ARRANGEMENT WITH ANY CLIENT AT THAT POINT
16 IN TIME?

17 A. I DON'T BELIEVE SO. ASK MR. GRIMBALL, BUT I DON'T
18 BELIEVE SO.

19 Q. SO TO YOUR KNOWLEDGE MULLEN WYLIE HAS NO FEE
20 AGREEMENT WITH ANY CLIENT WITH REGARD TO THIS CASE?

21 A. WELL, I THINK THE CLIENT IS THE CLASS. AND I THINK
22 THE COURT SETS THE FEE FOR THE CLASS. IN A CLASS ACTION,
23 I DON'T REALLY KNOW HOW YOU DO THAT.

24 Q. OKAY.

25 A. I DON'T KNOW THAT THERE'S AN INDIVIDUAL OUT THERE

1 WHO SAYS, THIS IS THE ATTORNEY'S FEES YOU GET IN A CLASS
2 ACTION. THAT'S SOMETHING THAT THIS COURT DETERMINES.

3 Q. HAVE YOU CONSULTED WITH ANY CLIENT WITH REGARD TO
4 THIS FEE APPLICATION THAT YOU'RE PRESENTING HERE TODAY?

5 A. WELL, AGAIN, THE CLIENT IS THE CLASS.

6 Q. I'M TALKING ABOUT ANY INDIVIDUAL REPRESENTATIVE
7 CLIENT?

8 A. ANY OF THE NAMED CLASS ---

9 Q. HAVE YOU CONSULTED WITH THE MOODYS WITH REGARD TO
10 THIS FEE APPLICATION?

11 A. NO.

12 Q. HAVE YOU CONSULTED WITH ANY OTHER IDENTIFIABLE
13 INDIVIDUAL WHO WAS A MEMBER OF THE CLASS WITH REGARD TO
14 THIS FEE APPLICATION?

15 A. I HAVE NOT.

16 Q. OKAY. HAVE YOU PROVIDED A WRITTEN SETTLEMENT
17 STATEMENT TO ANY CLIENT REGARDING THE OUTCOME OF YOUR
18 WORK IN THIS CLASS ACTION?

19 A. I DON'T KNOW IF I UNDERSTAND.

20 Q. THIS CLASS ACTION HAS COME TO A CONCLUSION, CORRECT?

21 A. YES.

22 Q. IT'S BEEN SETTLED, ---

23 A. YES.

24 Q. --- CORRECT? AND THERE'S A RESULT, ---

25 A. YES.

1 Q. --- CORRECT? HAVE YOU PROVIDED ANY WRITTEN REPORT
2 OR SETTLEMENT STATEMENT TO ANY CLIENT WITH REGARD TO THE
3 OUTCOME OF THIS CASE?

4 A. OKAY. I PERSONALLY HAVE NOT. WHETHER OR NOT MR.
5 GRIMBALL HAS, I DON'T KNOW. I DO BELIEVE THAT MR.
6 CAPELL, WHO'S NO LONGER WITH MY FIRM, BUT WAS -- I KNOW
7 HE'S COMMUNICATED WITH THE MOODYS IN FILING THEIR CLAIM.
8 I DON'T KNOW IF HE DID THAT ON BEHALF OF SOME OTHERS OR
9 NOT. HE MAY HAVE. WHAT HE MAY HAVE GIVEN THEM IN
10 WRITING ALONG THOSE LINES, I DO NOT KNOW.

11 Q. ARE THE MOODYS ONE OF THE CLIENTS MR. CAPELL TOOK
12 WITH HIM WHEN HE LEFT YOUR FIRM?

13 A. YES.

14 Q. SO YOUR FIRM NO LONGER IS REPRESENTING THE MOODYS
15 INDIVIDUALLY, IS THAT CORRECT?

16 A. YES.

17 Q. THANK YOU, MR. MULLEN. THAT'S ALL I HAVE. I
18 APPRECIATE IT.

19 THE COURT: YES, MA'AM.

20 MS. WALL: THANK YOU, YOUR HONOR.

21 **REDIRECT EXAMINATION BY MS. WALL:**

22 Q. THE LAST QUESTION THAT YOU WERE ASKED, DO YOU HAVE
23 ANY UNDERSTANDING AS TO WHETHER OR NOT THERE'S BEEN
24 NOTICE IN THIS CLASS CONCERNING THE SETTLEMENT THAT'S
25 BEEN APPROVED BY THIS COURT TO THE CLASS?

1 A. YES.

2 Q. YOU WERE SHOWN IN CROSS EXAMINATION A DOCUMENT THAT
3 WAS MARKED AS RESPONDENT'S 12.

4 A. IF YOU COULD TELL ME WHAT IT IS, I COULD PROBABLY
5 FIND IT.

6 Q. IT IS A TWO-PAGE LIST OF CASES.

7 A. ALL RIGHT.

8 Q. HAD YOU EVER SEEN THAT BEFORE?

9 A. NO.

10 Q. YOU WERE ASKED A QUESTION WITH REGARD TO THAT ON THE
11 FOUR MULLEN WYLIE CASES, CARDAMONE, WILSON, GIANNI, AND
12 SCHNAARS TO THE EFFECT THAT WHETHER YOU UNDERSTOOD THAT
13 THOSE FOUR CASES WERE SETTLED WITHIN A SETTLEMENT WEEK.
14 AND THEN I THINK COUNSEL LATER USED THE TERM, SETTLEMENT
15 MONTH, WITH DRYVIT. DO YOU RECALL THAT?

16 A. I RECALL BEING ASKED THE QUESTION.

17 Q. OKAY.

18 A. THE ANSWER WAS THAT I WOULDN'T HAVE ANY KNOWLEDGE OF
19 THAT, EXCEPT THAT AS TO CARDAMONE. AND IT WAS SETTLED AS
20 THE CASE WAS BEING CALLED TO TRIAL.

21 Q. WELL, IF YOU'LL LOOK FOR ME, SIR, THE OTHER DOCUMENT
22 THAT WAS HANDED TO YOU BY COUNSEL, WHICH HE MARKED AS
23 RESPONDENT'S 7, AND QUESTIONED YOU ABOUT AT LENGTH ---

24 A. ALL RIGHT.

25 Q. --- WITH REGARD TO A LIST. IF YOU'LL LOOK AT THAT.

1 DOES THAT INDICATE THAT CARDAMONE WAS SETTLED IN FEBRUARY
2 OF 2003 AND THEN WILSON NOT UNTIL MARCH OF 2004?

3 A. CARDAMONE WAS 2/24/03. GIANNI, JUST SINCE IT'S ON
4 HERE, WAS IN JULY 28TH, '03. THE FIRST ONE IS FEBRUARY.
5 THE NEXT ONE IS JULY. AND ---

6 Q. AND, I BELIEVE, WILSON MAY BE ON THE NEXT PAGE,
7 SECOND TO THE LAST. AND THAT WAS IN 2004, CORRECT?

8 A. WILSON IS MARCH 26 OF '04.

9 Q. YOU WERE ALSO HANDED A DOCUMENT MARKED -- THAT THEY
10 MARKED AS EXHIBIT NUMBER 13, WHICH WAS A REQUEST FOR
11 EXCLUSION IN THE POSEY MATTER.

12 A. YES, MA'AM.

13 Q. EXCLUSION, DID YOU -- CAN I USE THE TERM OPT-OUT?
14 IS THAT WHAT YOU UNDERSTAND THIS WAS FOR?

15 A. THAT'S WHAT I WOULD REFER TO IT AS, YES.

16 Q. AND, IN FACT, WAS THE CLASS EFFECTIVELY OPTED OUT?

17 A. YES, IT WAS.

18 Q. WAS IT EVER OVERTURNED?

19 A. IT WAS NOT. AND THIS WAS FILED WITH THE COURT
20 THERE, AND IT WAS NEVER REJECTED. AT LEAST TO MY
21 KNOWLEDGE IT'S NEVER BEEN REJECTED.

22 Q. AND THEN YOU WERE SHOWN WHAT WAS MARKED AS
23 PETITIONER'S 11, WHICH IS A SETTLEMENT AGREEMENT IN
24 POSEY.

25 A. ALL RIGHT.

1 Q. I'M SORRY. IT'S -- DO YOU HAVE IT?

2 A. YES.

3 Q. WAS THE SOUTH CAROLINA CLASS EVER SUBJECT TO THIS
4 DOCUMENT?

5 A. NO. IF YOU WERE OPTED OUT, YOU'RE NOT SUBJECT TO
6 THIS SETTLEMENT AGREEMENT. AND THE SOUTH CAROLINA CLASS
7 WAS OPTED OUT.

8 Q. AFTER IMPROVING THE SETTLEMENT IN POSEY AND
9 WITHDRAWING THE OBJECTION, DID THAT HAVE ANY EFFECT ON
10 THE VALIDITY OF THE SOUTH CAROLINA OPT-OUT OR ON THE
11 SOUTH CAROLINA CLASS ITSELF?

12 A. NO. IT'S TWO TOTALLY SEPARATE LAWSUITS, TWO TOTALLY
13 SEPARATE CLASS ACTIONS THAT ARE GOING. THE WORK THAT MR.
14 GRIMBALL DID IN TENNESSEE ON BEHALF OF THE OBJECTORS, WHO
15 WE THOUGHT TO BE DeLOACHE, WAS FOR THAT OBJECTOR.

16 THE SOUTH CAROLINA CLASS IS A TOTALLY SEPARATE GROUP
17 OF PLAINTIFFS, A DIFFERENT LAWSUIT. THE OBJECTIONS THAT
18 MR. GRIMBALL RAISED IN TENNESSEE AND THE ULTIMATE
19 AGREEMENT TO IMPROVE THAT CLASS WAS ACTUALLY COMPLETING
20 ONE OF THE TWO-PRONGED APPROACH THAT WE TOOK.

21 WE WANTED TENNESSEE TO BE AS GOOD AS WE CAN GET IN
22 CASE WE DO GET STUCK WITH IT. AND AT THE SAME TIME,
23 WE'RE TRYING TO GET SOUTH CAROLINA SO WE CAN JUST BRING
24 OUR INDIVIDUAL CASES.

25 Q. AND DID SOUTH CAROLINA HOMEOWNERS GET STUCK WITH

1 POSEY, EXCEPT, OF COURSE, THOSE WHO, I THINK THE TERM HAS
2 BEEN USED ON OCCASION, OPTED-IN? I THINK TECHNICALLY
3 THAT MAY NOT BE CORRECT, BUT THAT SUBJECTED THEMSELVES TO
4 THE JURISDICTION OF THE TENNESSEE COURT?

5 A. WELL, ULTIMATELY, NO BECAUSE OF WHAT WE'VE DONE
6 RIGHT HERE IN THIS COURTROOM.

7 Q. ARE YOU AWARE OF ANY CLASS SETTLEMENT WITH DRYVIT IN
8 THE ENTIRE UNITED STATES THAT IS BETTER OR MORE FAIR THAN
9 THE CLASS ACTION SETTLEMENT IN THIS CASE?

10 A. NO, THIS IS -- AT EIGHT DOLLARS A FOOT IS THE
11 LARGEST THEY HAVE EVER PAID. WHEN WE UPPED THEM TO SEVEN
12 DOLLARS A FOOT IN TENNESSEE, THAT WAS THE LARGEST THEY
13 HAD DONE AT THAT TIME.

14 I THINK NORTH CAROLINA WAS SIX DOLLARS. AND THERE'S
15 SOME OTHERS, NOT DRYVIT, BUT SOME OTHER SYNTHETIC STUCCO
16 ONES THAT ARE FOUR DOLLARS A FOOT IS WHAT HAS BEEN AGREED
17 TO. EIGHT DOLLARS IS THE MOST THAT WE HAVE EVER HEARD
18 OF.

19 MS. WALL: THANK YOU, YOUR HONOR. THAT'S ALL I
20 HAVE.

21 THE COURT: LIMITED TO WHAT SHE WENT INTO.

22 MR. ALFORD: AYE, AYE, SIR.

23 THE COURT: OR MR. FIELDS WENT INTO.

24 MR. ALFORD: YES, SIR.

25 **CROSS EXAMINATION BY MR. ALFORD:**

1 Q. OKAY. THE SOUTH CAROLINA CLASS WAS OPTED OUT BY
2 VIRTUE OF YOUR OPT-OUT THAT YOU FILED?

3 A. YES. MR. SEEKINGS IS ACTUALLY THE ONE WHO FILED IT,
4 NOT ME. BUT, YES.

5 Q. I'M SORRY. AND WHEN I SAID YOU, I MEANT -- I'M
6 REFERRING TO ---

7 A. THE FIRM.

8 Q. WELL, CLASS COUNSEL, ORIGINAL CLASS COUNSEL ---

9 A. OKAY.

10 Q. --- FILED AN OPT-OUT AND THAT'S WHAT TOOK EVERYBODY
11 OUT OF -- EVERYBODY IN SOUTH CAROLINA WAS OUT OF POSEY?

12 A. YES.

13 Q. OKAY. SO THEN YOU DIDN'T NEED AN OBJECTOR, DID YOU,
14 BECAUSE YOU WERE OUT?

15 A. WELL, NO. IT'S GOING ON TWO DIFFERENT APPROACHES.
16 YOU DON'T KNOW WHAT ULTIMATELY IS GOING TO WORK. YOU
17 DON'T KNOW IF ULTIMATELY, YOU KNOW, FOR SOME REASON WE
18 DON'T GET OUT IN SOUTH CAROLINA. YOU DON'T KNOW IF
19 SOMEBODY WANTS TO TAKE ADVANTAGE OF POSEY.

20 WHEN WE ACTUALLY CAME UP WITH THE IDEA -- AND I SAY
21 WE, I GUESS IT WAS ME THAT CAME UP WITH THE IDEA, I DON'T
22 KNOW WHAT'S GOING TO WORK. I'M JUST TRYING TO DO WHAT I
23 CAN.

24 Q. YES, SIR. AND THEN, I GUESS, MY FINAL QUESTION IS
25 IF THE PEOPLE WERE -- IF THE OPT-OUT IS FILED AND THE

1 PEOPLE ARE OPTED OUT OF POSEY, THEY NEVER GOT NOTICE THAT
2 THEY WERE OPTED OUT OF POSEY BECAUSE NOTICE WAS NEVER
3 DONE?

4 A. UNTIL THIS WAS DONE RIGHT HERE IN THIS COURTROOM,
5 THAT'S TRUE.

6 Q. THANK YOU, SIR.

7 THE COURT: LIMITED TO WHAT HE WENT INTO, ANYTHING
8 ELSE?

9 MS. WALL: IF YOU WOULD JUST GIVE ME ONE MOMENT.

10 THE COURT: SURE.

11 MR. MULLEN: I WAS HOPPING DOWN.

12 **RE-REDIRECT EXAMINATION BY MS. WALL:**

13 Q. ON THAT LAST QUESTION THAT WAS ASKED OF YOU, MR.
14 MULLEN, IN FACT, ARE YOU AWARE THAT INTERVENER COUNSEL IN
15 MAY OF 2007 FILED WITH THIS COURT A PLAINTIFF'S REPLY TO
16 DEFENDANT'S DRYVIT'S, IT'S A NEW BRIEF IN SUPPORT OF ITS
17 MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS OF *RES*
18 *JUDICATA* AND FULL FAITH AND CREDIT, AND ON PAGE 10
19 STATED, "IN THE INSTANT ACTION IT WOULD HAVE ALSO BEEN
20 IMPRACTICAL TO PROVIDE NOTICE TO CLASS MEMBERS BEFORE THE
21 LEGAL ISSUES THAT DRYVIT NOW BELATEDLY RAISES ARE
22 RESOLVED." ARE YOU AWARE OF THAT?

23 A. I AM AWARE OF THAT. AS FAR AS NOTICE GOES, AND I
24 DON'T -- THE CLASS ACTIONS I'VE BEEN INVOLVED IN HAVE
25 DEALT WITH A LIMITED NUMBER OF PEOPLE BEFORE, USUALLY THE

QUESTIONS BY THE COURT

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1 HOMEOWNERS IN A BIG CONDOMINIUM PROJECT, THINGS YOU COULD
2 POINT TO, GRASP THE NUMBER, EASY TO GIVE NOTICE TO. AND
3 NOTICE ALSO CAME WHEN THE CASE IS SETTLED, RESOLVED, AND
4 YOU'VE GOT SOMETHING TO IDENTIFY IT AND TELL THEM. AND I
5 GUESS WE WEREN'T AT THAT STAGE YET.

6 MS. WALL: THANK YOU, YOUR HONOR. THAT'S ALL I
7 HAVE.

8 THE COURT: ALL RIGHT. I HAVE JUST A QUESTION OR
9 TWO. MR. MULLEN, WHEN I SPOKE TO YOU PREVIOUSLY, I
10 APOLOGIZE IF MY TONE WAS A LITTLE BIT HARSH, BUT I WAS
11 TAKING YOUR STATEMENTS AT THAT TIME IN REGARDS TO THE
12 SETTLEMENT IN THIS CASE AS BEING CRITICAL OF THE
13 SETTLEMENT.

14 AND I DO NOT RECALL THAT YOU ATTENDED THE HEARINGS
15 WHERE WE ACTUALLY -- THE LAWYERS AND THE COURT ENGAGED IN
16 MANY DISCUSSIONS CONCERNING THE SETTLEMENT OF THIS CASE.
17 AND BEING THAT I HAVE LOOKED TO ALL OF THE LAWYERS, BOTH
18 THE LAWYERS WHO SERVED AS CLASS COUNSEL AS WELL AS
19 DRYVIT'S ATTORNEYS IN RELYING UPON THEIR EXPERTISE AS
20 LAWYERS, THEIR WITNESSES THAT THEY CALLED FOR ME TO
21 LISTEN TO, THE NOTICE THAT WAS GIVEN IN THE CASE, I'VE
22 RELIED UPON THE LAWYERS IN MAKING THE DECISIONS THAT I
23 HAVE.

24 AND SO I WOULD WELCOME ANY CRITICISMS THAT YOU WOULD
25 LIKE TO PROVIDE ME AT THIS TIME CONCERNING THE SUBSTANCE

1 OF THE SETTLEMENT THAT YOU MIGHT HAVE.

2 MR. MULLEN: YOUR HONOR, I CERTAINLY DIDN'T MEAN MY
3 TESTIMONY THAT WAY AT ALL. OF COURSE, MR. GRIMBALL WAS
4 HERE AT THAT COURT HEARING. OF COURSE, HE DID STATE TO
5 THE COURT THAT WE DO AGREE. AND HE AND I HAVE OBVIOUSLY
6 CONSULTED, AND THAT IS WHY I WASN'T HERE.

7 THAT IS NOT WHAT I WAS SAYING. I MEAN, I THINK GOOD
8 LAWYERS CAN DIFFER ON APPROACHES TO CASES. GOOD LAWYERS
9 CAN DIFFER ON WHERE THEY WOULD LIKE TO SEE, AS FAR AS AN
10 OUTCOME COME.

11 I DON'T PRETEND TO BE, YOU KNOW, THE ANSWER TO WHAT
12 YOU DO IN CLASS ACTIONS. MY APPROACH, AND WHAT I WAS
13 SAYING THERE IS, BACK FROM DAY ONE WHEN I FILED IT, WHAT
14 I THOUGHT WAS A BETTER APPROACH WAS TO HAVE INDIVIDUALS
15 BE ABLE TO BRING THEIR OWN SUIT AND LET THEIR SUIT STAND,
16 BE RESOLVED ON THEIR OWN. THAT'S CLEARLY NOT THE ONLY
17 WAY OF DOING IT.

18 AND AS A MATTER OF FACT, THE TYPICAL WAY OF SETTling
19 THESE CASES IS THE WAY THAT THIS COURT ULTIMATELY DID.
20 MINE IS -- I'M NOT SITTING HERE SAYING MINE IS THE BEST
21 WAY. IT WAS A PERSONAL OPINION IS WHAT I WAS EXPRESSING
22 OF, YOU KNOW, WHAT I REALLY THOUGHT AS THE THOUGHT
23 PROCESS THAT I HAD.

24 THIS ALL CAME OUT OF THE QUESTION ABOUT THE ONE
25 LETTER THAT I WROTE TO THE COURT, WHERE I HAD A PROPOSAL

QUESTIONS BY THE COURT

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1 OF DOING A SETTLEMENT ALONG THAT LINES. IT WAS SOMETHING
2 THAT, YOU KNOW, I SORT OF MADE SOME PROPOSAL TO GET THE
3 BALL ROLLING. AND I THOUGHT IT WAS AN EXCELLENT TIME FOR
4 SETTLEMENT DISCUSSIONS TO TAKE PLACE.

5 AND THIS BEING THE APPROACH THAT I HAD, THE POSTURE
6 WHEN WE FIRST BROUGHT THE SUIT, WAS THE SAME APPROACH
7 THAT I FIRST DISCUSSED WITH THIS COURT IN 2005 AT OUR
8 VERY FIRST MEETING, A MEETING YOU PROBABLY SOMETIMES WISH
9 HAD NOT TAKEN PLACE, MAYBE. BUT IT WAS THAT SAME
10 APPROACH IS WHAT I PUT FORWARD IN THAT PROPOSAL.

11 AND IT DID SERVE AS A BASIS TO BEGIN THE TALKS. IT
12 SERVES AS A BASIS THAT DRYVIT WAS WILLING TO COME AND
13 ACTUALLY HAVE SOME MEANINGFUL DISCUSSIONS. QUITE
14 FRANKLY, MY POSITION OF THINKING THIS IS THE APPROACH WE
15 SHOULD TAKE WAS, IF YOU WERE TO SAY OUT-VOTED, THAT WOULD
16 BE ONE WAY OF PUTTING IT.

17 I WAS THE ONLY LAWYER THERE OUT OF ALL THE LAWYERS
18 REPRESENTING THE PLAINTIFFS' GROUPS THAT WANTED TO GO ON
19 THAT WAY. THE OTHERS THOUGHT THAT IT SHOULD BE A
20 TRADITIONAL CASH TO PLAINTIFFS, HAVE IT OVER WITH, WHICH
21 IS CERTAINLY FAR BETTER THAN HAVING NOTHING.

22 IT'S CERTAINLY FAR BETTER THAN WHAT WAS DONE IN
23 POSEY. AND IT'S CERTAINLY FAR BETTER THAN ALL THE OTHER
24 SETTLEMENTS THAT WE'VE GONE TO RESEARCH THAT HAVE BEEN
25 DONE IN SYNTHETIC STUCCO CASES. SO -- AS A MATTER OF

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1 FACT, WE'VE DONE SOMETHING MORE RECENTLY LOOKING AT HOW
2 IT COMPARED TO SOME OF THE INDIVIDUAL CASES THAT WE HAVE
3 SETTLED.

4 AND WHEN YOU TAKE THE TYPICAL SIZE HOUSE, WHAT WE
5 HAVE SETTLED -- AND WE ACTUALLY WERE COMPARING THE AMOUNT
6 THAT WE GOT FROM THE MANUFACTURER OF THE SYNTHETIC
7 STUCCO, BACKED OUT THE FEES THAT WE HAVE THEN IN RETURN
8 CHARGED ON THAT, THE EIGHT DOLLARS A FOOT IS FAIRLY CLOSE
9 TO WHAT -- I WAS SURPRISED, ACTUALLY, WHEN I SAW THAT,
10 BUT IT WAS ACTUALLY FAIRLY CLOSE TO THE AMOUNT THAT WE
11 HAD BEEN RECEIVING -- THE OWNER WOULD NET RECEIVE FROM
12 THE MANUFACTURER. AND THE CASES WHERE WE HAD JUST
13 HANDLED IT ON THE DOING IT BY HOUSE, BY HOUSE, BY HOUSE.
14 I WAS SURPRISED, BUT IT WAS VERY CLOSE.

15 SO, NO, MINE WAS NOT A CRITICISM. WHAT I WAS SIMPLY
16 EXPLAINING, WHY DID I COME UP WITH THAT PROPOSAL
17 ORIGINALLY? AND THAT'S WHAT I MEANT BY IT. DO I AGREE
18 WITH THE SETTLEMENT AS BEING, YOU KNOW, FAIR AND IN THE
19 BEST INTEREST OF THE CLASS? YES, I DO. AS I SAID, IT'S
20 THE LARGEST ONE IN THE COUNTRY THAT WE'VE BEEN ABLE TO
21 FIND. SO, ABSOLUTELY.

22 THE COURT: ALL RIGHT. WELL, THANK YOU. BECAUSE I
23 WANTED TO BE SURE THAT I HAD NOT HAD LAWYERS SERVING,
24 EVEN IF THEY'RE JUST LAWYERS ON RECORD, THAT WOULD HAVE
25 AN OPINION THAT WOULD BE DIFFERENT THAN WHAT I BELIEVE

QUESTIONS BY THE COURT

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1 THAT WE'VE ALL WORKED TOWARDS OVER THE LAST SOME-ODD
2 YEARS.

3 MR. MULLEN: WE HAVE ALL WORKED, EVERYBODY, HARD FOR
4 THAT. BUT, YEAH, MR. GRIMBALL WAS HERE SPEAKING ON --
5 WHEN HE SPOKE, HE SPOKE ON BEHALF OF ME, THE FIRM AND
6 HIMSELF.

7 THE COURT: OKAY. ANYTHING FURTHER FROM THE
8 LAWYERS?

9 MR. ALFORD: NO, YOUR HONOR.

10 MS. WALL: NO, YOUR HONOR.

11 THE COURT: OKAY. THANK YOU, SIR. YOU MAY STEP
12 DOWN.

13 MR. MULLEN: THANK YOU.

14 THE COURT: DOES THE PETITIONER INTEND TO CALL ANY
15 OTHER WITNESSES?

16 MS. WALL: I'M SORRY?

17 THE COURT: DO YOU INTEND TO CALL ANY OTHER WITNESS?

18 MS. WALL: NO, SIR.

19 THE COURT: OKAY. WHAT ABOUT RESPONDENTS, DO Y'ALL
20 INTEND TO CALL WITNESSES?

21 MR. ALFORD: NONE, YOUR HONOR.

22 THE COURT: ALL RIGHT. NOW, BASED ON WHAT WE, I
23 THINK, BRIEFLY DISCUSSED YESTERDAY, NOW Y'ALL WOULD LIKE
24 TO DO ARGUMENTS TO ME. IS THAT CORRECT?

25 MS. WALL: YES, SIR.

1 THE COURT: OKAY. ALL RIGHT. LET ME ASK MR.
2 FIELDS, DO YOU INTEND TO PRESENT AN ARGUMENT OR DO YOU
3 KNOW YET?

4 MR. FIELDS: VERY BRIEFLY.

5 THE COURT: OKAY.

6 MR. FIELDS: IF AT ALL.

7 THE COURT: ALL RIGHT. WHAT WE'LL DO THEN IS WE'LL
8 LET -- PETITIONER WILL GO FIRST, THEN THE RESPONDENTS.
9 MR. FIELDS WILL, IF HE HAS ONE, CAN GO THEN. AND THEN
10 WE'LL RETURN BACK TO THE PETITIONERS.

11 MS. WALL: THANK YOU, YOUR HONOR.

12 THE COURT: ALL RIGHT. AND IF ANYBODY NEEDS TO TAKE
13 A BREAK AT ANY POINT, JUST LET ME KNOW.

14 MS. WALL: YOUR HONOR, MAY I USE THE PODIUM?

15 THE COURT: YES, MA'AM.

16 MS. WALL: AND I DO THIS IN PART BECAUSE MY DESK
17 LOOKS AWFULLY MESSY. YOUR HONOR, IF IT PLEASE THE COURT,
18 ON BEHALF OF THE PETITIONERS WHO ARE HERE BEFORE THE
19 COURT WITH REGARD TO THEIR PETITION FOR FEES, WHICH WAS
20 -- THE PETITION OF WHICH WAS SERVED WITH THIS COURT,
21 TOGETHER WITH AN AFFIDAVIT OF MR. GRIMBALL.

22 IN ADDITION, YOUR HONOR, AS THE COURT KNOWS, THERE
23 HAVE BEEN SEVERAL MEMORANDA IN OPPOSITION. AND ON BEHALF
24 OF PETITIONER, THERE WAS FILED AN EXTENSIVE MEMORANDUM IN
25 SUPPORT OF THE PETITION, AND IN OPPOSITION TO THE

1 OPPOSITION TOGETHER WITH A NUMBER OF ATTACHMENTS THERETO.
2 AND WE WOULD REFER THE COURT TO THAT AS WELL AS A MATTER
3 OF THE RECORD.

4 YOUR HONOR, THE TESTIMONY OVER THE LAST TWO DAYS
5 HAS, ALONG WITH THE AFFIDAVIT AND THE PETITION ITSELF,
6 HAS ILLUSTRATED THAT -- AND WHEN I SAY MULLEN WYLIE, I'M
7 COLLECTIVELY, SPECIFICALLY REFERRING TO MR. GRIMBALL, MR.
8 MULLEN, AND IN PART, MR. MEEDER. BUT SPECIFICALLY AND IN
9 DETAIL, I'M SPEAKING ESPECIALLY OF MR. GRIMBALL, WHO HAS
10 DONE A GREAT DEAL OF WORK OVER THE LAST EIGHT YEARS,
11 TOGETHER WITH MR. MULLEN IN THIS CLASS ACTION.

12 YOUR HONOR, WITHOUT THESE GENTLEMEN'S ASSISTANCE IN
13 FILING, AND ACTUALLY, THEY DID PREPARE AND FILE THE
14 ORIGINAL CLASS ACTION COMPLAINT, WE WOULD NOT BE HERE
15 BECAUSE THERE WOULD BE NO CLASS. AND WE WOULD SUBMIT TO
16 THE COURT THAT OVER THESE EIGHT YEARS SUBSTANTIVE,
17 DILIGENT WORK HAS BEEN DONE WITH THE BEST INTEREST OF THE
18 CLASS IN MIND, WHICH HAS RESULTED IN WHAT IS UNDISPUTEDLY
19 THE BEST CLASS ACTION SETTLEMENT IN THE UNITED STATES
20 AGAINST DRYVIT AND WHICH IS UNDISPUTEDLY IN THE BEST
21 INTEREST OF THIS CLASS AS THIS COURT HAS FOUND.

22 NOW, IN OPPOSITION TO THE PETITION, A NUMBER OF
23 SUGGESTIONS TO THIS COURT HAVE BEEN MADE. AND I WOULD
24 LIKE TO ADDRESS THOSE CRITICISMS AND ALSO ADDRESS THE LAW
25 PERTINENT TO THEM.

1 FIRST OF ALL, IT HAS BEEN SUGGESTED THAT MULLEN
2 WYLIE HAS NO STANDING TO REQUEST A FEE BECAUSE MULLEN
3 WYLIE HAS NO CLIENT. YOUR HONOR, WE SUBMIT THAT THIS IS
4 ABSOLUTELY INCORRECT. UNDER CLASS ACTION LAW, THE CLASS
5 REPRESENTATIVES ARE NOT THE CLIENT. YOU DO NOT HAVE AN
6 INDIVIDUAL CLIENT. CLASS ACTION COUNSEL'S CLIENT IS THE
7 CLASS.

8 THE LAW INSTRUCTS US THAT THE RELATIONSHIP BETWEEN
9 CLASS REPRESENTATIVES AND CLASS COUNSEL IS NOT A TYPICAL
10 ATTORNEY/CLIENT RELATIONSHIP BECAUSE CLASS COUNSEL IS
11 APPOINTED BY THE COURT. AND MULLEN WYLIE WAS APPOINTED
12 FIRST BY JUDGE KEMMERLIN AND THEN CONTINUED ON UNDER THE
13 ORDER OF THIS COURT. THE COURT APPOINTS CLASS COUNSEL TO
14 REPRESENT THE BEST INTEREST OF THE CLASS AS A WHOLE, NOT
15 ANY INDIVIDUAL CLASS MEMBER, INCLUDING INDIVIDUAL CLASS
16 REPRESENTATIVES.

17 WHEN WE LOOK AT THE MANUAL FOR COMPLEX LITIGATION,
18 THE LATEST EDITION, WHICH IS 2004, AND I WILL BE HAPPY TO
19 HAND TO THE COURT A COPY OF THE OPERATIVE PAGE, YOUR
20 HONOR.

21 THE COURT: THANK YOU.

22 MS. WALL: WE SEE THAT UNDER SECTION 21.27 IT SAYS,
23 AND I QUOTE, UNLIKE OTHER CIVIL LITIGATION, MANY CLASS
24 ACTION SUITS DO NOT INVOLVE A CLIENT WHO CHOOSES A
25 LAWYER, NEGOTIATES THE TERMS OF THE ENGAGEMENT AND

1 MONITORS THE LAWYER'S PERFORMANCE. THOSE TASKS BY
2 DEFAULT FALL TO THE JUDGE WHO CREATES THE CLASS BY
3 CERTIFYING IT AND MUST SUPERVISE THOSE WHO CONDUCT THE
4 LITIGATION ON BEHALF OF THE CLIENT. AND IT GOES ON TO
5 SAY THE JUDGE MUST ENSURE THAT THE LAWYER SEEKING
6 APPOINTMENT AS CLASS COUNSEL WILL FAIRLY AND ADEQUATELY
7 REPRESENT THE INTERESTS OF THE CLASS.

8 AND, YOUR HONOR, WE SUBMIT THAT MULLEN WYLIE, MR.
9 GRIMBALL AND MR. MULLEN, HAVE ENDEAVORED AT ALL TIMES TO
10 FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF THE
11 CLASS, THE HOMEOWNERS IN SOUTH CAROLINA.

12 IN NOTES TO RULE 23, UNDER THE FEDERAL RULES OF
13 CIVIL PROCEDURE, NOTES OF THE ADVISORY COMMITTEE, AND
14 I'LL BE HAPPY TO HAND A COPY TO THE COURT AND COUNSEL,
15 SPECIFICALLY WE SEE PARAGRAPH 1(B) RECOGNIZES THAT THE
16 PRIMARY RESPONSIBILITY OF CLASS COUNSEL RESULTING FROM
17 THE APPOINTMENT AS CLASS COUNSEL IS TO REPRESENT THE BEST
18 INTEREST OF THE CLASS.

19 THE OBLIGATION OF CLASS COUNSEL, IT GOES ON TO SAY,
20 MAY BE DIFFERENT FROM CUSTOMARY OBLIGATIONS OF COUNSEL TO
21 INDIVIDUAL CLIENTS. THE PRIMARY OBLIGATION IS TO THE
22 CLASS RATHER THAN TO ANY INDIVIDUAL MEMBER OF IT.

23 AND, YOUR HONOR, THERE IS CASE LAW TO THAT EFFECT.
24 THERE'S THE FOURTH CIRCUIT CASE KNOWN AS FLYNN VERSUS FMC
25 CORPORATION. AND IN THAT CASE THE SAME CONCEPT IS SET

1 FORTH.

2 YOUR HONOR, I AM NOT AWARE THAT THE LAW SAYS, AND I
3 BELIEVE IT DOES NOT SAY THIS, THAT CLASS COUNSEL HAS A
4 FEE AGREEMENT WITH THE CLASS. IT CANNOT. IT CANNOT.
5 BECAUSE ANY ATTORNEY FEE THAT RESULTS FROM A CLASS ACTION
6 ACTIVITY IS ALWAYS BASED UPON THE DECISION OF THE COURT,
7 NOT ON ANY INDIVIDUAL FEE AGREEMENT THAT MAY EXIST WITH
8 ONE INDIVIDUAL OR ANOTHER. BECAUSE, AGAIN, THE
9 RELATIONSHIP BETWEEN THE ATTORNEY AND THE CLASS IS A
10 MATTER OF COURT CREATION, NOT PRIVATE CONTRACT.

11 AND, AGAIN, ALSO WHY IS THAT? BECAUSE WHEN A CLASS
12 CASE COMES TO FRUITION HERE THROUGH A SETTLEMENT, WHAT IS
13 CALLED A COMMON FUND IS CREATED. AND ANY FEE THAT THE
14 COURT DEEMS APPROPRIATE TO AWARD FALLS UNDER THAT THEORY
15 THAT THE WORK OF THE ATTORNEYS HAS CREATED THIS COMMON
16 FUND.

17 AND WHAT HAPPENS WHEN THERE ARE MULTIPLE FIRMS, THE
18 COURT WILL DIVIDE THE FEE AS IT DEEMS APPROPRIATE,
19 EQUITABLY. AND, YOUR HONOR, THAT IS ALL THAT MULLEN
20 WYLIE IS ASKING FOR.

21 THE TESTIMONY HAS BEEN BEFORE THE COURT THAT THEY,
22 MR. GRIMBALL MADE A GOOD FAITH EFFORT IN LOOKING AT THE
23 RECORDS OF THE FIRM TO FIND A NUMBER OF HOURS, THE
24 ACTIVITIES THAT WERE UNDERTAKEN THROUGH THIS PERIOD. HE
25 WAS VERY CANDID WITH THE COURT AS WAS MR. MULLEN WITH

1 REGARD TO THE MANY MEETINGS AND ACTIVITIES THAT WENT ON,
2 PARTICULARLY FROM AUGUST OF 2005 FORWARD.

3 THE ONLY REQUEST FOR MONIES PRIOR TO THAT TIME WERE
4 BASED ONLY ON MR. GRIMBALL'S PREPARING FOR, RESEARCHING
5 AND PREPARING THE CLASS ACTION COMPLAINT ITSELF.

6 THEREAFTER, MR. GRIMBALL, IN LOOKING AT THE RECORDS AND
7 DOCUMENTS TOOK INTO CONSIDERATION HIS TIME, MR. MULLEN'S
8 TIME AND MR. MEEDER'S TIME AFTER APPROXIMATELY AUGUST OF
9 2005.

10 THE CASE LAW INSTRUCTS US THAT A REASONABLE FEE FOR
11 ATTORNEYS IN A CLASS ACTION MATTER, WHEREIN A BENEFIT HAS
12 BEEN CONFERRED ON A CLASS, AS IT WOULD BE HERE THROUGH A
13 SETTLEMENT, AND IN WHICH THE MEMBERS OF THE CLASS ARE
14 CONFERRED A BENEFIT THROUGH THAT SETTLEMENT TO AVOID --
15 SOME COURTS HAVE CALLED IT UNJUST ENRICHMENT AS TO THOSE
16 WHO WOULD OTHERWISE BENEFIT FROM THE FUND WITHOUT PAYING
17 FOR ANY LITIGATION COSTS NECESSARY TO PRESERVE THAT FUND.

18 THAT IS WHERE THE COURT COMES IN AND, IN ITS WISDOM,
19 ALLOWS FOR AN ATTORNEY FEE FOR THE WORK PERFORMED AND THE
20 COSTS EXPENDED BY ATTORNEYS IN CREATING THE SETTLEMENT
21 FUND FOR THE BENEFIT OF THE CLASS.

22 AS THIS COURT IS WELL AWARE, IT IS COMMON, INDEED,
23 TO HAVE MULTIPLE GROUPS OF ATTORNEYS WHO MAY BE INVOLVED
24 AS CLASS COUNSEL, ATTORNEYS NOT FROM THE SAME FIRM. AND
25 WITH THE INFORMATION PROVIDED TO THE COURT ON THE TIME

CLOSING ARGUMENTS - MS. WALL

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1 EXPENDED, THE COSTS EXPENDED, AS MULLEN WYLIE HAS DONE
2 THROUGH THEIR, NOT ONLY TESTIMONY, BUT CERTAINLY THE
3 AFFIDAVIT AND THE PETITION ITSELF, MULLEN WYLIE REQUESTS
4 FROM THIS COURT A REASONABLE ATTORNEY FEE, WHICH IT HAS
5 CALCULATED AS ONE-FIFTH OF THE TOTAL, WHICH WOULD BE A
6 HUNDRED AND EIGHTY-THREE THOUSAND DOLLARS.

7 NOW, IT HAS ALSO BEEN SUGGESTED THAT THERE IS A
8 PREREQUISITE OR REQUIREMENT THAT CLASS COUNSEL HAVE A
9 SIGNED FEE AGREEMENT WITH AN INDIVIDUAL WITHIN THE CLASS
10 IN ORDER TO SERVE AS CLASS COUNSEL. YOUR HONOR, WE CAN
11 FIND NOTHING IN THE LAW THAT SUPPORTS THAT.

12 AND, IN FACT, WE'RE AWARE THAT THERE ARE INSTANCES
13 IN FEDERAL COURT WHERE A JUDGE MAY SEND OUT AN RFP ASKING
14 FOR ATTORNEYS TO APPLY TO TAKE A POSITION AS CLASS
15 COUNSEL. CLEARLY, THOSE ATTORNEYS DON'T HAVE INDIVIDUAL
16 WRITTEN FEES WITH ANY CLASS MEMBERS. AND IT IS NOT A
17 PRE-REQUISITE.

18 IF WE LOOK AT THE LAW THAT I JUST CITED TO THE
19 COURT, WE CAN FIND NOTHING IN THERE THAT REQUIRES SUCH AN
20 INDIVIDUAL FEE ARRANGEMENT. AND, AGAIN, WHY IS THAT?
21 BECAUSE THE CLIENT IS THE CLASS. AND THE FEE IS NOT
22 BASED ON A CONTRACT FEE AGREEMENT WITH ONE MEMBER OF THE
23 CLASS, OR TWO MEMBERS OR HOWEVER MANY MEMBERS. THE FEE
24 IS ALWAYS WITHIN THE COURT'S PURVIEW BASED UPON THE
25 BENEFIT TO THE CLASS FROM THE WORK EXPENDED BY THE

1 ATTORNEYS.

2 YOUR HONOR, THERE HAS ALSO BEEN AN ISSUE RAISED THAT
3 BECAUSE MULLEN WYLIE HAD INDIVIDUAL SETTLEMENTS FOR
4 INDIVIDUAL HOMEOWNERS IN SOUTH CAROLINA THAT SOMEHOW THIS
5 WAS AN IMPROPER ACTIVITY OR WOULD SOMEHOW DISQUALIFY THEM
6 AS BENEFITTING A FEE IN THIS CASE.

7 FIRST OF ALL, LET ME SPEAK ABOUT THE SETTLEMENTS OF
8 THE -- WHETHER THEY BE CLASS REPRESENTATIVES OF ANY OTHER
9 INDIVIDUAL SETTLEMENTS. IF WE LOOK BACK AT RULE 23,
10 FEDERAL RULES OF CIVIL PROCEDURE, THE ADVISORY COMMITTEE
11 NOTE, UNDER SUBDIVISION (E), IT SAYS AS FOLLOWS;
12 SUBDIVISION (E) (1) (B) CARRIES FORWARD THE NOTICE
13 REQUIREMENT OF PRESENT RULE 23 (E). WHEN THE SETTLEMENT
14 BINDS THE CLASS THROUGH CLAIM OR ISSUE PRECLUSION, AND I
15 QUOTE, NOTICE IS NOT REQUIRED WHEN THE SETTLEMENT BINDS
16 ONLY THE INDIVIDUAL CLASS REPRESENTATIVES.

17 SO AS TO THE CLASS REPRESENTATIVE SETTLEMENTS, WHICH
18 SEEM TO HAVE COME UP FOR CRITICISM OVER THE LAST TWO
19 DAYS, THERE IS NO NOTICE REQUIREMENT BECAUSE THOSE
20 SETTLEMENTS, AND WE LOOKED IN DETAIL AT THE CARDAMONE
21 SETTLEMENT AND THE GIANNI SETTLEMENT, THEY DID NOT BIND
22 THE CLASS. THERE WAS NO CLAIM OR ISSUE PRECLUSION.

23 THE COURT: I'M GOING TO HAVE TO BE HONEST WITH YOU.
24 THAT'S TOUGH FOR ME TO SWALLOW. NOT THAT THE INDIVIDUAL
25 SETTLEMENTS NEEDED TO BE NOTIFIED, BUT TOUGH FOR ME TO

1. SWALLOW THAT THE CLASS REPRESENTATIVES SETTLED THEIR
2 INDIVIDUAL CLAIMS, BEING UNDER ADVICE OF COUNSEL, WHO
3 HAVE STATED THEY WERE CLASS COUNSEL.

4 GIVEN MY UNDERSTANDING OF THE VAST CASE LAW THAT'S
5 OUT THERE, THAT WHEN THAT HAPPENS, THAT IS LIKE A RED
6 FLAG. THAT'S LIKE YOUR ALARMS GO OFF. THAT WHEN A CLASS
7 REPRESENTATIVE SETTLES THEIR INDIVIDUAL CLAIMS, AND THEN
8 FOR AS LONG AS THIS CASE SAT DORMANT AND NOTHING
9 HAPPENED? THAT IS A RED FLAG THAT IS WAVING IN FRONT OF
10 ME, LIKE I'M AT THE MAIN INTERSECTION OF TOWN. THAT
11 SHOULD NOT HAPPEN.

12 WHEN IT DOES, PEOPLE, LAWYERS ESPECIALLY, WHO
13 REPRESENT PEOPLE IN CLASS ACTIONS SHOULD IMMEDIATELY BE
14 ENGAGED TO ADDRESS THAT. BECAUSE WHAT THAT DOES, WITH
15 THE COURT HAVING THE RESPONSIBILITY THAT THE COURT HAS,
16 THEN THE COURT CAN'T PERFORM ITS SUPERVISORY FUNCTIONS IN
17 A PROPER MANNER.

18 BECAUSE YOU -- BECAUSE WHEN THAT INDIVIDUAL CLASS
19 REPRESENTATIVE IS TAKEN OUT OF THE PICTURE, CASE LAW, AS
20 I UNDERSTAND IT, IS REplete WITH EXAMPLES WHERE THEN THAT
21 PERSON, INDIVIDUAL, WHO IS SERVING IN THAT CLASS
22 REPRESENTATIVE CAPACITY, HAS NO PERSONAL MOTIVE THEN TO
23 WORK ON BEHALF OF THE CLASS.

24 AND FOR IT TO SIT AS LONG AS IT DID AND FOR SOMEHOW
25 AN ARGUMENT TO BE MADE TO THIS COURT, THAT THEN THIS

1 COURT, BECAUSE IT WAS NOT INFORMED, SHOULD NOW PAY AN
2 ATTORNEY FEES?

3 MS. WALL: YOUR HONOR, MAY I ADDRESS THAT?

4 THE COURT: YES, MA'AM. BECAUSE THAT'S A TOUGH --
5 THAT'S TOUGH FOR ME TO SWALLOW AS LONG AS THAT SAT THERE.
6 BECAUSE THE ONLY WAY THAT I SEE YOU GET AROUND THAT IS IF
7 YOU ACCEPT MR. MULLEN'S PROPOSITION OF THIS IS THE WAY I
8 WANTED THE CASE TO BE HANDLED, WHEN WE ALL KNOW, AS HE'S
9 ALSO STATED, THERE ARE OTHER OPTIONS ON HANDLING THESE
10 CASES. THAT WAS SIMPLY HIS PREFERENCE.

11 THE COURT HAD NO ROLE IN MAKING THOSE DECISIONS
12 BECAUSE THE COURT WAS NOT AWARE OF IT. I MEAN, THAT'S
13 TOUGH FOR YOU TO GET AROUND. I JUST WANT TO BE HONEST
14 WITH YOU, THAT'S TOUGH FOR YOU TO GET AROUND.

15 MS. WALL: WELL, YOUR HONOR, AS FAR AS THE COURT
16 BEING AWARE OF IT, THIS COURT, YOUR HONOR, OF COURSE, WAS
17 TOLD THE FIRST TIME THAT YOUR HONOR ---

18 THE COURT: GO BACK TO JUDGE KEMMERLIN.

19 MS. WALL: ALL RIGHT. YOUR HONOR, AND LET ME
20 ADDRESS THAT.

21 THE COURT: JUDGE KEMMERLIN WAS NOT MADE AWARE OF
22 IT.

23 MS. WALL: WE KNOW IN SEPTEMBER OF 2005 THERE WAS A
24 DISCUSSION WITH REGARD, OF COURSE, MR. MULLEN STATING
25 THAT THE SETTLEMENT WITH -- SETTLEMENTS HAD OCCURRED.

1 I'M GOING BACK, YES, SIR.

2 THE COURT: WELL, I'M TALKING ABOUT, GO BACK TO
3 JUDGE KEMMERLIN.

4 MS. WALL: I WILL. ALL RIGHT.

5 THE COURT: I MEAN, YOU'VE GOT MR. MULLEN'S PARTNER,
6 WHETHER THEY SAY IT -- AND I UNDERSTAND THEIR POSITION IS
7 THAT THEY DON'T KNOW WHY HE SAID WHAT HE SAID ON THE
8 RECORD, BUT HE'S STATING ON THE RECORD THAT THAT CASE WAS
9 SETTLED AND THE CASE IS OVER.

10 MS. WALL: AND ARE YOU REFERRING TO MR. SEEKINGS?

11 THE COURT: YES, MA'AM.

12 MS. WALL: OF COURSE, WE KNOW THAT'S FALSE. IT WAS
13 NOT -- IT WAS NOT OVER. BECAUSE, IN FACT, WHAT WAS GOING
14 ON DURING THIS TIME PERIOD WAS ---

15 THE COURT: I'M SHAKING MY HEAD NO BECAUSE I HAVE TO
16 LOOK AT THE RECORD THAT WAS BEFORE JUDGE KEMMERLIN. HE
17 DID NOT KNOW THAT. A MEMBER OF HIS FIRM STOOD THERE AND
18 MADE THAT REPRESENTATION TO THE COURT. I KNOW THEY DON'T
19 LIKE IT, BUT THE REPRESENTATION WAS MADE TO THE COURT AT
20 THAT TIME THAT THAT HAD HAPPENED.

21 MS. WALL: YOUR HONOR, BUT WHAT WAS GOING ON DURING
22 THAT TIME, JUDGE KEMMERLIN WAS AWARE. FIRST OF ALL, WE
23 KNOW THERE WAS A REMOVAL. AND THEN THERE WAS A REMAND.
24 AND THEN THERE WAS A -- I BELIEVE THERE WAS A MOTION BY
25 DRYVIT. AND THEN THERE WAS THE MOTION TO INTERVENE,

1 WHICH WAS DENIED BY JUDGE KEMMERLIN.

2 THE COURT: UH-HUH (AFFIRMATIVE).

3 MS. WALL: AND THEN THAT WENT ON APPEAL. NOW, WE
4 HAVE TWO TIME PERIODS IN THERE WHEN ACTUALLY JUDGE
5 KEMMERLIN HAS NO JURISDICTION. IT'S BEEN TAKEN AWAY FROM
6 HIM, TAKEN AWAY WHEN IT WAS REMOVED. AND THEN TAKEN AWAY
7 AGAIN WHILE THE CREASY MATTER WAS ON APPEAL. SO NOTHING
8 CAN HAPPEN IN THAT CASE ---

9 THE COURT: ALL RIGHT. SO YOU'RE GOING TO USE THAT,
10 DO I UNDERSTAND -- REALLY, I WANT YOU TO UNDERSTAND WHERE
11 I'M COMING FROM BECAUSE THIS IS AN IMPORTANT POINT THAT
12 -- FOR THE OTHER SIDE, FOR YOUR SIDE TO OVERCOME. AND AS
13 FAR AS I'M CONCERNED, BECAUSE I BELIEVE THAT THE RECORD
14 THAT'S IN THIS CASE SHOWS THAT ONCE THE CLASS ACTION
15 LAWSUIT WAS STARTED IN SOUTH CAROLINA, BOOM. THE COURT'S
16 INVOLVEMENT -- THE COURT THEN IS LET -- IT'S LIKE A HORSE
17 BEING LET OUT OF A STALL TO RUN A RACE. THE COURT'S
18 INVOLVED AT THAT TIME.

19 AND JUDGE KEMMERLIN ISSUED A DIRECTIVE. OKAY, LET'S
20 START THIS NOTICE. I KNOW THAT THEY DISAGREE THAT THAT'S
21 A GOOD THING TO DO. IT'S NOT A WISE THING TO DO IN
22 CONSTRUCTION CASES. YOU'RE GOING TO HAVE PROBLEMS WITH
23 COMMONALITY RULES AND ALL OF THAT AND THAT PROBABLY
24 STRATEGICALLY WE, YOU KNOW, THAT'S GOING TO PUT DRYVIT IN
25 PROBABLY THE DRIVER'S SEAT ON THAT ISSUE, AND MIGHT WIN

1 ON THAT ISSUE. AND SO WE DON'T WANT TO UPSET THE APPLE
2 CART FOR WHAT WE'VE BEEN ABLE TO ACCOMPLISH, BUT THAT'S
3 NOT WHAT THE COURT APPOINTED THEM TO DO.

4 BY FAILURE TO ACT, BY FAILURE OF CLASS COUNSEL TO
5 PERFORM THE DUTIES IN A REASONABLE AND DILIGENT FASHION,
6 I BELIEVE THAT THE COURT WAS NOT ALLOWED TO ENGAGE IN ITS
7 SUPERVISORY FUNCTIONS THAT THE COURT NEEDED TO DO.
8 THINGS WERE HID FROM THE COURT. OR EVEN WORSE, THINGS
9 WERE MISREPRESENTED TO THE COURT.

10 MS. WALL: WELL, YOUR HONOR, LET ME ADDRESS THAT
11 NOW. AGAIN, THE COURT -- NOW, WE'RE TALKING ABOUT THE
12 JUDGE KEMMERLIN PERIOD OF TIME. THE COURT WAS DEPRIVED
13 OF JURISDICTION FOR A SIGNIFICANT PORTION OF THAT TIME,
14 REMOVAL, APPEAL. AND WE KNOW THAT. I MEAN, THERE IS NO
15 JURISDICTION WITH THE COURT DURING THAT TIME.

16 THE COURT: WHAT WAS THE ISSUE ON APPEAL?

17 MS. WALL: THE ISSUE ON APPEAL HAD TO DO WITH THE
18 CREASY'S MOTION TO INTERVENE ---

19 THE COURT: OKAY.

20 MS. WALL: -- AND WHETHER IF, IN FACT, BY APPEARING
21 IN THE POSEY ACTION AND SUBMITTING TO THE JURISDICTION OF
22 THE TENNESSEE COURT, WHETHER THEY COULD THEN, AFTER DOING
23 THAT, THEN COME IN AND BECOME A MEMBER OF THE SOUTH
24 CAROLINA CLASS.

25 THE COURT: I WOULD PROBABLY DISAGREE WITH YOU. AS

1 A GENERAL STATEMENT, CASES, ONCE THEY ARE APPEALED, THAT
2 THE TRIAL COURTS DO LOSE JURISDICTION OVER THE CASES, BUT
3 ONLY AS TO THOSE MATTERS THAT ARE ON APPEAL. SO I'M NOT
4 GOING TO COMPLETELY BUY A GENERALIZED STATEMENT THAT
5 JUDGE KEMMERLIN COULD NOT DO ANYTHING AT ALL ON THE CASE,
6 OKAY?

7 MS. WALL: ALL RIGHT, YOUR HONOR. BUT EFFECTIVELY,
8 BECAUSE OF ALL THE OUTSIDE ISSUES THAT WERE GOING ON,
9 OUTSIDE BEING THE DEFENDANT IN THIS CLASS ACTION ---

10 THE COURT: OUTSIDE ISSUES -- AND, AGAIN, I'M SORRY
11 TO INTERRUPT. OUTSIDE ISSUES THAT THE COURT WAS NOT MADE
12 AWARE OF.

13 MS. WALL: OH, YES, SIR, THOUGH IT WAS. BECAUSE THE
14 ISSUES WERE AND INCLUDED WE WANT TO REMOVE, WE THINK, WE,
15 BEING DRYVIT, WE THINK THAT THIS ACTION SHOULD NOT BE
16 GOING FORWARD AT ALL.

17 AND THEN THE HOSPITALITY MANAGEMENT CASE COMES OUT.
18 WHY WOULD THE CLASS COUNSEL, ANY OF THEM, WHY WOULD THEY
19 GO TO COURT, GO AND CHALLENGE THAT WHICH THEY'VE ALREADY
20 ACCOMPLISHED FOR THE CLASS? THAT IS, THAT THE OPT-OUT --
21 THEY DON'T WANT TO TRY TO REINFORCE AN OPT-OUT. I MEAN,
22 THE OPT-OUT HAS ALREADY BEEN ACCEPTED. IT'S STILL THE
23 LAW OF THE CASE.

24 WHY WOULD THEY -- IT WAS SUGGESTED YESTERDAY THAT
25 THEY SHOULD HAVE BROUGHT THE HOSPITALITY MANAGEMENT CASE

1 TO THE ATTENTION OF THE COURT. BUT WHY WOULD YOU DO
2 THAT? BECAUSE THAT'S CONTRARY TO THE BEST INTEREST OF
3 THE CLASS BECAUSE IT WOULD HURT THE CLASS. BECAUSE
4 ACTUALLY THAT WAS A GOOD ARGUMENT FOR DRYVIT, NOT A GOOD
5 ARGUMENT FOR THE CLASS.

6 WHY WOULD CLASS COUNSEL GO TO THE COURT AND SAY,
7 GEE, THERE'S THIS CASE AND MAYBE WE NEED TO TALK ABOUT
8 IT. WHY WOULD THEY ISSUE OR FILE THEIR OWN MOTION? THAT
9 DOESN'T HELP THE CLASS.

10 BUT THE OVERALL CONCEPT OR CONCEPT MAY BE SLIGHTLY
11 THE WRONG WORD, BUT THESE LAWYERS ALL USED THEIR BEST
12 JUDGMENT BASED ON THEIR EXPERIENCE WITH CONSTRUCTION
13 CASES AND LOOKED AT WHAT WAS GOING ON WITH THE POSEY
14 ACTION ON APPEAL, THE CASE LAW, AND KNOWING THAT IF YOU
15 PUSH FORWARD A CLASS ACTION, WHICH RIGHT NOW IS FINE,
16 IT'S GOOD, IT HAS NOT BEEN OVERTURNED, IT IS A VIABLE
17 SOUTH CAROLINA CLASS ACTION. WHY WOULD YOU DO ANYTHING
18 TO UPSET THAT?

19 AND IS IT NOT REASONABLE, AND I SUBMIT TO YOUR HONOR
20 THAT IT WAS ABSOLUTELY REASONABLE, FOR THE CONCLUSION TO
21 BE THAT IF THEY WENT FORWARD AT THAT POINT IN TIME,
22 ACTIVELY STARTING DOWN A LITIGATION CLASS BECAUSE THAT'S
23 NORMALLY HOW A CLASS ACTION STARTS.

24 YOU ACTUALLY HAVE TO GO OUT, YOU'RE SUPPOSED TO BE
25 DOING DISCOVERY AND SO FORTH. THERE WAS ABSOLUTELY NO

1 WAY THAT A LITIGATION CLASS ACTION COULD COME TO
2 COMPLETION IN SOUTH CAROLINA BEFORE THE POSEY ACTION WAS
3 OVER. POSEY WAS ALREADY ON APPEAL.

4 THE COURT: LET ME SEE IF I CAN MAYBE ASK MY
5 QUESTION WITH A LITTLE BIT DIFFERENT TWIST BECAUSE YOU
6 ARE GIVING ME AN ANSWER, IF I UNDERSTAND IT CORRECTLY, AS
7 TO WHAT PETITIONER'S -- AS TO WHAT THE PETITIONER'S, HOW
8 THEY SAW THE BEST APPROACH FOR THE LAWSUIT.

9 THAT THEY -- YOUR ARGUMENT, IF I UNDERSTAND IT
10 CORRECTLY, THEY ARE GOOD LAWYERS. THEY ARE EXPERIENCED
11 IN THE AREA. THEY USED THEIR RESEARCH, THEIR KNOWLEDGE,
12 THEIR EXPERTISE IN COMING UP ON THE WAY TO HANDLE THIS
13 CLASS ACTION LAWSUIT AS THE BEST WAY THAT THEY SAW.

14 AND THE BEST WAY THAT THEY SAW IT, ONCE THEY FILED
15 AND ONCE THEY GOT KEMMERLIN TO CERTIFY THE CLASS WAS,
16 LET'S DON'T DO ANYTHING. LET'S JUST SIT HERE, BECAUSE
17 THERE'S SO MANY DANGEROUS THINGS THAT COULD HAPPEN TO
18 THIS LITIGATION IF WE STIR THAT POT.

19 OH, MY GOSH, POSEY, I MEAN, POSEY, SOMETHING COULD
20 HAPPEN THERE AND COULD CAUSE US TROUBLE. OH, SOUTH
21 CAROLINA LAW CHANGED. OH, WE CAN'T GO THERE. OH, WE
22 CAN'T DO LITIGATION BECAUSE WE NEED TO DO THIS INDIVIDUAL
23 CLAIM. OH, WAIT A MINUTE, WE DON'T NORMALLY DO CLASS
24 SETTLEMENTS LIKE THIS TO WHERE WE CAN GET MONEY.

25 THERE'S -- IF I UNDERSTAND YOU CORRECTLY, THEY HAD A

1 LITANY OF REASONABLE OPTIONS THAT THEY EXPLORED IN MAKING
2 THE DECISION TO DO NOTHING. AND YOUR ARGUMENT IS THAT
3 THEY MADE THE BEST DECISION THAT THEY KNEW HOW TO MAKE
4 OR THEY MADE THE BEST DECISION THAT THEY FELT IN THEIR
5 PROFESSIONAL JUDGMENT SHOULD BE MADE IN REGARDS TO THE
6 CLASS ACTION, THE ONE THAT'S FILED.

7 MY CONCERN IS THAT UNDER RULE 11 OR UNDER RULE 23,
8 THIS COURT -- COURTS, NOT JUST ME ALONE, ---

9 MS. WALL: YES, SIR.

10 THE COURT: --- COURTS HAVE OBLIGATIONS. AND WHEN
11 WE ASK PEOPLE, CLASS COUNSEL AND REPRESENTATIVES, WHEN
12 THEY GET INVOLVED IN CLASS LITIGATION, THE COURTS HAVE A
13 ROLE TO PERFORM.

14 AND BELIEVE IT OR NOT, WE TRY TO TAKE THIS
15 SERIOUSLY. AND WE TRY OUR BEST TO MAKE THE BEST
16 DECISIONS THE COURT CAN MAKE.

17 AND BY NOT TELLING US WHEN THINGS HAPPEN OR WHEN YOU
18 WANT TO DO SOMETHING OR NOT DO SOMETHING WHEN THE COURT
19 HAS SAID, LET'S START THIS NOTICE PROCESS, THEN YOU'RE
20 TAKING THE COURT OUT OF THIS PROCESS. YOU'RE LEAVING THE
21 COURT OUT AND THE COURT HAS AN INABILITY TO DO ITS JOB.

22 I MADE THE DECISION TO NOT REMOVE MULLEN AND WYLIE
23 BACK IN DECEMBER OF 2005 BASED ON THE BEST INFORMATION
24 THAT I HAD AT THE TIME. THE TESTIMONY AS I RECALL IT,
25 THAT SINCE DECEMBER OF 2005, MOST OF THE WORK IN REACHING

1 THE SETTLEMENT IN THIS CASE HAS BEEN DONE ON THAT SIDE OF
2 THE COURTROOM. MR. GRIMBALL'S OWN TESTIMONY WAS THAT HE
3 LIKED WHAT THEY -- IS THAT HE COMMENDED THEM FOR DOING
4 THEIR WORK ON THE SANCTIONS, AND THAT HE FELT LIKE THEY
5 WERE GOING TO GET A SANCTIONS AWARD AGAINST DRYVIT.

6 MY HUMBLE -- MY ASSESSMENT IS THAT IT WAS THE
7 SANCTIONS WORK ON THAT SIDE OF THE ROOM THAT DROVE DRYVIT
8 INTO A SETTLEMENT OF THIS CASE, NOT SOMETHING ELSE THAT
9 MR. GRIMBALL OR WYLIE MULLEN DID.

10 WYLIE MULLEN'S IMPORTANT PART OF THIS CASE WAS WHEN
11 THEY CAME UP AND THEY FILED THE CLASS ACTION, BECAUSE I
12 THINK YOU'RE RIGHT, WE WOULDN'T BE HERE TODAY. THE CLASS
13 WOULD NOT HAVE THIS CLASS ACTION IF IT HAD NOT BEEN FOR
14 THE INITIAL WORK THAT WAS DONE BY WYLIE MULLENS.

15 MS. WALL: BUT ---

16 THE COURT: BUT I SEE THAT THE COURT WAS TAKEN OUT
17 OF THIS BECAUSE -- WAS TAKEN OUT OF ITS ROLE AND WAS NOT
18 ABLE TO DO ITS JOB, AND WAS NOT ABLE TO BE SURE IT WAS
19 HANDLED PROPERLY WHEN THE COURT WAS NOT ENGAGED IN THE
20 PROCESS. SO THAT'S WHERE I'M HAVING CONCERNS.

21 MS. WALL: "ALL RIGHT." AND I WILL ADDRESS THAT. MAY
22 I ADDRESS ---

23 THE COURT: UM-HUM (AFFIRMATIVE).

24 MS. WALL: --- YOUR OTHER COMMENT?

25 THE COURT: UM-HUM (AFFIRMATIVE).

1 MS. WALL: YOUR HONOR, I BEG TO DIFFER IN THAT I'VE
2 SAT HERE LISTENING TO IT, AND I'VE SEEN THE PETITION AS
3 WELL. THERE WAS A TREMENDOUS AMOUNT OF WORK THAT WAS
4 DONE BY FRANK GRIMBALL FROM 2005 FORWARD.

5 HE ATTENDED -- ARE WE GOING TO SAY THAT EVERY ONE OF
6 THESE NUMEROUS MEETINGS, SETTLEMENT DISCUSSIONS THAT HE
7 ATTENDED, HE OFFERED NO POSITIVE ROLE FOR WHICH HE'S
8 ENTITLED TO QUANTUM -- TO AN ATTORNEY FEE?

9 THE COURT: IN THE LARGER PICTURE, MY STATEMENTS
10 WERE THAT IN REGARDS TO THE WORK THAT LED TO THE
11 SETTLEMENT, THE WORK WAS DONE ON THAT SIDE OF THE ROOM.

12 MS. WALL: WELL, YOUR HONOR, I WOULD JUST, FOR THE
13 RECORD, AND THIS ISN'T ABOUT ME, BUT I'VE HEARD THE
14 TESTIMONY AS WELL AND I READ THE, OF COURSE, THE
15 AFFIDAVIT AS WELL AND RECREATING WHAT WENT ON. THERE'S
16 NO QUESTION -- AND, IN FACT, I SAT THROUGH -- AND IT WILL
17 BE ABOUT ME. I'VE SAT THROUGH -- A FEW TIMES I'VE HAD
18 THE PRIVILEGE OF BEING IN YOUR HONOR'S COURTROOM SITTING
19 IN THE BACK.

20 THE COURT: UM-HUM (AFFIRMATIVE).

21 MS. WALL: AND I BELIEVE ONE DAY THAT ALL HAD TO DO
22 WITH SETTLEMENT. MR. MULLEN AND MR. GRIMBALL WERE HERE,
23 AND THEY PLAYED A LARGE ROLE. MR. GRIMBALL IS A PERSON
24 WHO IS A CONFLICT RESOLVER. I MEAN, THAT'S WHO HE IS.

25 AND I KNOW THIS COURT HAS HAD A LOT OF OPPORTUNITY

1 TO SEE MR. GRIMBALL BECAUSE HE HAS COME TO EVERY MEETING.
2 HE'S BEEN PART OF EVERY SETTLEMENT NEGOTIATION. AND HE
3 HAS, TO THE BEST OF HIS ABILITY, TRIED TO FIND WAYS OF
4 BRINGING THE PARTIES TOGETHER, INCLUDING, MAY I ADD, THE
5 PARTY -- THE COUNSEL ON HIS OWN SIDE.

6 IT HAS BEEN, AND I THINK HE TESTIFIED TO THIS,
7 EXTREMELY DIFFICULTY FOR HIM BECAUSE THERE HAS BEEN SOME
8 PERSONALITY DIFFERENCES AND CONFLICT AMONG CLASS CO-
9 COUNSEL. HE NEVER SAID, WELL, FORGET IT. I'M NOT GOING
10 TO GO ANYMORE. I QUIT. THIS IS AWFUL. THEY HURT MY
11 FEELINGS. THIS IS NOT FUN, AND I JUST DON'T WANT TO DO
12 THIS ANYMORE, AND THEY'RE BEING UNFAIR TO ME, AND THEY'RE
13 KEEPING ME OUT OF WHAT'S GOING ON, ET CETERA, ET CETERA.

14 AND I THINK HE TESTIFIED TO THIS, AND I FEEL CERTAIN
15 THAT HE DID. AND WHY IS THAT? BECAUSE HE HAD THOUGHT HE
16 HAD AN OBLIGATION BOTH TO YOU, WHO CONTINUED TO HAVE HIM
17 ON AS CLASS CO-COUNSEL, AND TO THE CLASS.

18 HE DIDN'T HAVE A LUXURY OF JUST SAYING, THIS ISN'T
19 FUN, AND I'M NOT BEING TREATED VERY NICELY, AND THESE
20 PEOPLE WON'T EVEN TALK TO ME, AND SO FORTH, SO FORGET IT.
21 I'M JUST GOING TO LEAVE. HE DIDN'T DO THAT. HE CAME TO
22 EVERY MEETING. HE ATTEMPTED TO FIND RESOLUTIONS TO
23 PROBLEMS.

24 THE COURT: UM-HUM (AFFIRMATIVE).

25 MS. WALL: AND I THINK IT WOULD BE INHERENTLY UNFAIR

1 TO SAY THAT BECAUSE SOME OF THE IDEAS THAT HE MAY HAVE
2 HAD OR MR. MULLEN MAY HAVE HAD ON HOW TO FORGE A
3 SETTLEMENT, HOW TO BRING ABOUT A GOOD CONCLUSION FOR THE
4 CLASS, EITHER ENDED UP NOT BEING ADOPTED BY THE GROUP, OR
5 ADOPTED IN PART OR EVEN REJECTED.

6 BUT THAT WOULD MEAN THAT NONE OF US, AS LAWYERS, CAN
7 EVER HAVE A DIFFERENCE OF OPINION OR CAN SUGGEST TO THE
8 COURT AN ALTERNATIVE WAY OF PERHAPS VIEWING AND RESOLVING
9 THE CONFLICT, WHICH YOU ALWAYS HAVE WHEN YOU'RE TRYING TO
10 SETTLE A CASE. I MEAN, IT IS BY DEFINITION, A CONFLICT.
11 THE CLASS WANTS RESOLUTION, THE DEFENDANT IS ALWAYS
12 DIFFICULT, YOU KNOW, BECAUSE THEY'RE THE DEFENDANT IN
13 THAT RESOLUTION PROCESS.

14 AND THE ONLY TESTIMONY HERE, AND VERY STRONG
15 TESTIMONY, MR. GRIMBALL WHO WAS INVOLVED IN ALL OF THIS,
16 HE SAID HE STAYED THE COURSE BECAUSE HE THOUGHT HE HAD AN
17 OBLIGATION BECAUSE HE WAS CLASS CO-COUNSEL TO REMAIN WITH
18 THIS FOR THE COURT AND FOR THE CLASS. AND THAT IS
19 EXACTLY WHAT HE HAS DONE OVER THESE FIVE YEARS.

20 AND NO ONE KNOWS BETTER THAN THIS COURT THE AMOUNT
21 OF TIME THAT THIS CASE HAS TAKEN TO BRING IT TO WHAT IS
22 THE BEST SETTLEMENT IN AMERICA THAT EVERYBODY SHOULD BE
23 PROUD OF. AND I THINK, I MEAN, I'M SURE THE -- THE COURT
24 CERTAINLY SHOULD BE PROUD OF IT BECAUSE IT'S A WONDERFUL
25 SETTLEMENT.

1 BUT IT HAS BEEN A LONG PROCESS, AND MR. GRIMBALL HAS
2 BEEN THERE EVERY STEP OF THE WAY. DOES EVERYBODY LIKE
3 HIM? I DON'T KNOW THAT THIS IS A POPULARITY CONTEST.
4 DOES EVERYBODY AGREE WITH EVERYTHING THAT HE'S SAID? HE
5 HAS WRITTEN TO THE COURT. HE DID THAT. HE HAS NOTHING
6 TO HIDE. NO ONE HERE HAS ANYTHING TO HIDE. DECISIONS
7 WERE MADE, STRATEGIES MADE, HE STAYS THE COURSE, HE'S
8 THERE ALL THE TIME.

9 AND, YOUR HONOR, I WOULD JUST SUBMIT TO THE COURT
10 THAT IT WOULD BE INHERENTLY UNFAIR TO NOW, AFTER THE
11 SETTLEMENT IS CONCLUDED, AND MR. GRIMBALL HAS
12 PARTICIPATED FOR HUNDREDS AND HUNDREDS OF HOURS,
13 TRAVELING UP AND DOWN THE HIGHWAY, GOING TO ALL OF THESE
14 MEETINGS, HAVING TELEPHONE CONFERENCES AND ALL THE REST
15 THAT WENT INTO IT, TO THEN SAY, WELL, THANK YOU FOR
16 ATTENDING ALL OF THIS AND GIVING US YOUR IDEAS. MAYBE WE
17 DON'T LIKE ALL OF YOUR IDEAS, BUT YOU'RE NOT ENTITLED TO
18 ANY COMPENSATION AT ALL. THAT JUST SEEMS SO CONTRARY TO
19 EQUITY AND GOOD CONSCIENCE, YOUR HONOR.

20 THE PROBLEM IN THAT, ALSO, IS IT WAS NOT UNTIL AFTER
21 THE TIME OF THE COURT'S COMING TOGETHER WITH COUNSEL FOR
22 THE PRELIMINARY APPROVAL IN 2009 THAT ALL OF THESE ISSUES
23 GOT RAISED BY -- THROUGH MOTIONS, BECAUSE MOTIONS BEGAN
24 THAT, BY CO-CLASS COUNSEL. THEY'VE BEEN REFERRED TO AS
25 INTERVENING COUNSEL.

1 WELL, IF THEY THOUGHT THAT THESE ATTORNEYS HAD NOT
2 PERFORMED DILIGENTLY, WELL AS CLASS CO-COUNSEL, WHY WOULD
3 YOU WAIT UNTIL AFTER THE SETTLEMENT IS FORGED? THAT'S
4 INHERENTLY UNFAIR.

5 BUT, IN FACT, I WOULD SUBMIT TO YOU, YOUR HONOR, MR.
6 GRIMBALL, MR. MULLEN HAVE WORKED ON BEHALF OF THE CLASS.
7 THEY'VE WANTED TO HAVE A GOOD RESOLUTION FOR HOMEOWNERS
8 WITH DRYVIT ON THEIR HOUSE IN SOUTH CAROLINA. THERE JUST
9 ISN'T ANY QUESTION ABOUT THAT. WHAT THIS SEEMS TO BE
10 COMING DOWN TO IS PEOPLE AGREEING WITH EITHER STRATEGY,
11 OR CONCEPTS, OR RESOLUTION IDEAS, AND THEY JUST DON'T
12 AGREE WITH THAT.

13 NOW, I WOULD LIKE TO -- I DO WANT TO ANSWER THE
14 COURT'S -- IT'S INCUMBENT UPON ME TO RESPOND TO THE
15 COURT. AND I WANT TO DO SO.

16 THE ISSUE THAT THERE MAY BE SOMETHING HERE THAT
17 ANYTHING WAS KEPT FROM JUDGE KEMMERLIN, YOUR HONOR, I
18 WOULD BEG TO DIFFER ON THAT. I THINK JUDGE KEMMERLIN WAS
19 ---

20 THE COURT: THE RECORD IS CLEAR. EITHER JUDGE
21 KEMMERLIN WAS LIED TO BY MR. SEEKINGS OR HE WAS NOT TOLD
22 THE TRUTH, SOMETHING WAS MISREPRESENTED. BECAUSE THERE
23 IS A RECORD AND THERE IS A RECORD FROM -- IN THIS COURT
24 WHERE MR. SEEKINGS STOOD THERE AND SAID THAT THESE CASES
25 ARE SETTLED, THAT THIS IS CASE IS SETTLED, THAT WE'VE

1 DONE ALL OF THIS WORK.

2 MS. WALL: I BELIEVE THAT WHAT MR. SEEKINGS SAID --
3 AND IT WAS ESTABLISHED YESTERDAY THAT MR. SEEKINGS HAD NO
4 IDEA WHAT HE WAS TALKING ABOUT. HE DIDN'T EVEN GO TO
5 TENNESSEE.

6 THE COURT: I UNDERSTAND THAT'S THE TESTIMONY. BUT
7 AS MR. -- I BELIEVE AS BOTH OF THE WITNESSES WHO HAVE
8 TESTIFIED IN THIS CASE, THEY ARE CONCERNED ABOUT THESE
9 EMAILS, THAT LETTER, AND MR. SEEKINGS' APPEARANCE IN
10 FRONT OF JUDGE KEMMERLIN.

11 AGAIN, MY POINT IS I KNOW THAT MR. GRIMBALL HAS
12 ATTENDED THESE HEARINGS. I HAVE BEEN HERE. I'VE SEEN
13 HIM. I HAVE BEEN ENGAGED. I HAVE TRIED TO KEEP MY
14 FINGER ON THE PULSE OF WHAT'S BEEN GOING ON IN THIS CASE.

15 I'M NOT REALLY HEARING THAT MANY ISSUES THAT HAVE
16 ARISEN ONLY RECENTLY IN THIS CASE. I'VE BEEN HEARING
17 THESE FACTS SINCE ALMOST THE FIRST TIME BACK IN DECEMBER
18 2005.

19 THE FACTS GREW IN 2006 TO A LEVEL THAT I NEVER
20 THOUGHT THAT PEOPLE ON THAT SIDE OF THE ROOM WOULD EVER
21 BRING ME THE INFORMATION THAT THEY BROUGHT ME CONCERNING
22 THE ACTIVITIES OF LAWYERS, AND SETTLEMENTS, AND BONUS
23 PAYMENTS AND, YOU KNOW, POTENTIAL OF VIOLATIONS OF
24 ETHICAL RULES. I NEVER WOULD HAVE THOUGHT I WOULD HAVE
25 HEARD ANY OF THAT STUFF. AND ALL OF THAT, I'VE HEARD FOR

1 A LONG TIME.

2 MY BELIEF IS THAT THE RECORD THAT PERTAINS TO THIS
3 CASE SHOWS THAT A CLASS ACTION SUIT WAS FILED, THE CLASS
4 WAS CERTIFIED, THE JUDGE ASKED FOR A NOTICE PLAN TO
5 BEGIN, AND THE BALL WAS DROPPED AT THAT POINT.

6 AND NOBODY DID ANYTHING ELSE UNTIL POSEY WAS OVER IN
7 TENNESSEE, DRYVIT FILES A MOTION OR SOMEBODY FILES A
8 MOTION IN SOUTH CAROLINA IN AUGUST OR SEPTEMBER OF 2005,
9 AND I GET ASSIGNED TO BEAUFORT COUNTY FOR A NON-JURY TERM
10 OF COURT, AND I WALK IN THERE AND I MEET ALL OF THESE
11 LAWYERS. AND, THUS, IS THE REST OF MY JUDICIAL CAREER
12 FOR THE NEXT SIX YEARS.

13 MS. WALL: I UNDERSTAND, YOUR HONOR.

14 THE COURT: AND A LOT OF THAT COULD HAVE POTENTIALLY
15 BEEN AVOIDED, EVEN IF IT'S JUST WE COULD HAVE AVOIDED
16 THOSE ARGUMENTS AND THOSE HORRIBLE ALLEGATIONS THAT I'VE
17 HEARD THAT I KNOW MAKES THE PETITIONER'S UNCOMFORTABLE,
18 MAKES ME UNCOMFORTABLE, I'M SURE, HOPEFULLY, MAKES THE
19 LAWYERS ON THAT SIDE OF THE ROOM UNCOMFORTABLE TO HAVE TO
20 EVEN RAISE THEM, MAKES US ALL UNCOMFORTABLE BECAUSE WE
21 ARE IN A PROFESSION.

22 WE ARE NOT JUST ORDINARY LABORERS IN A COMMUNITY
23 THAT HAS A JOB. THIS IS THE JUDICIAL SYSTEM. WE ARE ALL
24 OFFICERS OF THE COURT. AND IT MAKES US -- I HOPE IT
25 MAKES US ALL UNCOMFORTABLE WHEN WE HAVE TO TALK ABOUT

CLOSING ARGUMENTS - MS. WALL

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1 THINGS LIKE THIS, WHEN THE SYSTEM IN CLASS ACTION
2 LAWSUITS WAS ALREADY DESIGNED, THAT THE JUDGE WILL PLAY A
3 ROLE IN THIS. HE WILL BE ABLE TO HAVE HIS WISDOM OR HIS
4 HAND INVOLVED IN BEING SURE THAT THE CLASS IS DONE
5 CORRECTLY, THE CLASS IS DONE RIGHT IN A PARTICULAR
6 LITIGATION.

7 BUT THAT REQUIRES FOR THE LAWYERS TO COME TO THE
8 JUDGE AND TELL HIM THINGS, INCLUDING YOU CAN'T GO OUT AND
9 SETTLE CASES, INDIVIDUAL CLAIMANT CASES AND THEN WAIT FOR
10 A COUPLE OF YEARS DOWN THE ROAD BEFORE YOU EVER COME AND
11 TELL THE JUDGE THAT, OH, WELL, THIS CLASS REPRESENTATIVE,
12 HE DOESN'T REALLY HAVE A STAKE IN THIS ANYMORE. HE'S
13 JUST IN HERE BY NAME. THAT SMELLS BAD.

14 MS. WALL: WELL, YOUR HONOR, I WOULD AGAIN, AS A
15 MATTER OF LAW THEN, CITE YOU TO -- AND I WILL BE HAPPY TO
16 GIVE YOU A COPY OF WHAT I'M REFERRING TO.

17 MR. ALFORD: THANK YOU.

18 THE COURT: SO YOU'RE GOING TO TAKE THE POSITION
19 THAT IT'S A-OK FOR A CLASS COUNSEL TO ALLOW A CLASS
20 REPRESENTATIVE TO SETTLE HIS INDIVIDUAL CLAIM AND NEVER
21 DISCLOSE IT TO A COURT?

22 MS. WALL: YOUR HONOR, I WOULDN'T SAY NEVER DISCLOSE
23 IT TO THE COURT. I'M SIMPLY TELLING YOU WHAT THESE RULES
24 SAY.

25 THE COURT: ALL RIGHT. WELL, WHAT -- TELL ME ---

1 MS. WALL: AND THE RULE IS THAT WHEN THE SETTLEMENT
2 BINDS, BINDS THE CLASS THROUGH CLAIM OR ISSUE PRECLUSION,
3 YOU MUST GO TO THE COURT. NOTICE IS NOT REQUIRED WHEN
4 SETTLEMENT BINDS ONLY THE INDIVIDUAL CLASS
5 REPRESENTATIVES.

6 BUT NEVERTHELESS, ---

7 THE COURT: I'M NOT SAYING ---

8 MS. WALL: --- IN RESPONSE TO YOU, I'M NOT SAYING --
9 I'M SORRY, YOUR HONOR. I DON'T MEAN TO TALK OVER YOU.
10 BUT I DO -- BEFORE I FORGET THIS THOUGHT, IT'S ---

11 THE COURT: IT IS FOREIGN.

12 MS. WALL: IT IS NOT THAT IT WAS NEVER TOLD TO THE
13 COURT BECAUSE IT WAS, YOUR HONOR.

14 THE COURT: IN 2005, IN DECEMBER OF 2005. THIS
15 SETTLEMENT TOOK PLACE IN 2003.

16 MS. WALL: THAT'S CORRECT, YOUR HONOR. THAT'S
17 CORRECT.

18 THE COURT: YOU WAIT THAT LONG TO COME AND TELL THE
19 JUDGE?

20 MS. WALL: YOUR HONOR, THERE WAS NO ---

21 THE COURT: THERE WAS ---

22 MS. WALL: THE JUDGE WASN'T TOLD AS TO THOSE TWO
23 SETTLEMENTS ---

24 THE COURT: BECAUSE THERE WAS NO NEED TO, IF I
25 UNDERSTAND YOUR ARGUMENT CORRECTLY, BECAUSE THE LAWYERS

1 HAD MADE THEIR -- IN THEIR PROFESSIONAL JUDGMENT, THEY
2 HAD MADE THE DECISION THAT IT WOULDN'T BE A GOOD IDEA TO
3 GO TELL THE JUDGE.

4 MS. WALL: NO, YOUR HONOR, I DON'T THINK THAT WAS
5 WHAT THE TESTIMONY WAS, NOT THAT IT WOULD NOT BE A GOOD
6 IDEA TO TELL THE JUDGE.

7 BUT, AGAIN, THE VARIOUS EVENTS WERE HAPPENING IN
8 THIS CASE DURING THAT TIME. THE JUDGE WAS AWARE OF WHAT
9 WAS GOING ON IN THE CASE. IT WAS JUDGE KEMMERLIN WHO
10 HELD THE HEARING ON CREASY, ISSUED AN ORDER AND THEN WAS
11 ON APPEAL WITH IT.

12 AS TO THE GIVING HIM THE ADVICE THAT THE TWO OF
13 THESE INDIVIDUALLY NAMED CLASS REPRESENTATIVES HAD
14 SETTLED, YOU'RE CORRECT, YOUR HONOR. THE RECORD DOES NOT
15 REFLECT THAT THE JUDGE WAS TOLD AT THAT POINT IN TIME.
16 BUT THERE WAS NOTHING NEFARIOUS OR UNDERHANDED IN ANY WAY
17 ABOUT THIS. BECAUSE THE ---

18 THE COURT: I HOPE THAT THERE'S NOT.

19 MS. WALL: --- UNDERSTANDING BY THE LAWYERS WAS THAT
20 THERE WAS NO ACTIVITY TO GO FORWARD IN THIS CLASS ACTION
21 AT THAT TIME, WHICH WOULD BE BENEFICIAL TO THE CLASS.
22 BECAUSE IF ANY ACTION WERE TAKEN, SUCH AS FILING MOTIONS
23 -- AS WERE SUGGESTED YESTERDAY WITH REGARD TO THE NEW
24 CASE LAW AND SO FORTH, THAT WOULD BE A DETRIMENT, NOT A
25 BENEFIT TO THE CLASS.

1 THE COURT: ALL RIGHT. I'M AFRAID THAT I'M SEEING
2 YOUR ARGUMENT, THE VALIDITY OF YOUR ARGUMENT AND THE
3 DESIGN OF CLASS ACTION LITIGATION MIGHT BE OKAY, MIGHT BE
4 PROPER IF WE ACTUALLY HAD A STAKE-HOLDER IN THE LAWSUIT
5 AT THAT TIME. WE DIDN'T HAVE A -- THIS LITIGATION -- THE
6 STAKE-HOLDERS SETTLED THEIR CASES. THE LAWYERS WERE
7 MAKING DECISIONS WITH NAMED CLASS REPRESENTATIVES THAT NO
8 LONGER HAD AN INTEREST IN THE LITIGATION.

9 MY POINT, WE'RE TALKING ABOUT PAYMENT OF A LAWYER
10 FEES. AND I HAVE -- I'M GOING TO TAKE A LOOK AT WHAT YOU
11 GIVE ME. I'M GOING TO CONSIDER YOUR ARGUMENTS, BUT I'M
12 HAVING SOME REAL ISSUES WITH THE WAY THIS CASE WAS
13 HANDLED IN THAT TIME-FRAME.

14 MS. WALL: I UNDERSTAND.

15 THE COURT: BECAUSE YOU SAY THERE'S NOTHING -- WHAT
16 WAS THAT WORD YOU SAID, DECIVIOUS?

17 MS. WALL: I THINK I SAID NEFARIOUS.

18 THE COURT: NEFARIOUS, OKAY. YOU SAID THERE'S
19 NOTHING NEFARIOUS. I WOULD HOPE THAT THAT IS CORRECT
20 BECAUSE THERE IS EVIDENCE THAT HAS BEEN PRESENTED OVER
21 THE LAST SEVERAL YEARS THAT, IT'S FLOWN AROUND IN HERE,
22 THAT SOMEONE ON THE OUTSIDE LOOKING IN VERY WELL COULD
23 SAY THAT THERE WAS THIS SCHEME AND PLAN TO SETTLE AND BUY
24 OUT THE SOUTH CAROLINA CLASS ACTION LAWSUITS, AND THAT
25 THAT COULD HAVE BEEN ARRANGED BY LAWYERS IN SOUTH

1 CAROLINA. THERE'S DOCUMENTS THAT SUPPORT THAT
2 CONCLUSION.

3 I'M NOT SAYING I'M GOING TO COME TO THAT CONCLUSION.
4 AND THAT MIGHT BE ANOTHER REASON THAT WHEN YOU ENGAGE
5 CLASS ACTION LITIGATION AND YOU HAVE A JUDGE, YOU MIGHT
6 VERY WELL WANT TO RUN AND TELL THE JUDGE WHEN THESE
7 INDIVIDUAL CLAIMANTS DO SETTLE THEIR CASES. BECAUSE THEN
8 YOU AVOID THE RISK OF BEING PUT INTO THE POSITION THAT
9 WE'RE IN NOW OF PEOPLE SAYING SOMETHING DOESN'T SMELL
10 RIGHT. SOMETHING'S GONE WRONG.

11 BECAUSE THERE IS EVIDENCE IN THIS RECORD THAT
12 SOMEONE COULD COME TO THAT CONCLUSION. I KNOW THAT YOU
13 WILL ARGUE WITH GREAT PASSION THAT IT WAS NOT, BUT
14 THERE'S EVIDENCE IN THIS RECORD THAT SOMEONE COULD COME
15 TO THAT CONCLUSION.

16 MS. WALL: YOUR HONOR, IF I MIGHT ADDRESS THAT. I
17 WILL NOT ARGUE WITH THIS COURT WITH REGARD TO ANY CLASS
18 COUNSEL OTHER THAN MY CLIENTS.

19 THE COURT: UM-HUM (AFFIRMATIVE).

20 MS. WALL: THERE IS NOT A SHRED OF EVIDENCE IN THIS
21 RECORD THAT MY CLIENTS, MR. GRIMBALL, MR. MULLEN, HAD --
22 WERE IN ANY WAY INVOLVED IN ANY AGREEMENT, ANY DISCUSSION
23 OF AN AGREEMENT TO NEGATIVELY AFFECT THE CLASS. THE ONLY
24 EVIDENCE IN THIS CASE IS TO THE CONTRARY.

25 THE COURT: OKAY. LET ME INTERRUPT YOU. AND I

GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 RULE 23, IT'S DIFFERENT. AND THIS IS THE *JURIS PRUDENCE*
2 IN SOUTH CAROLINA, PREMIUM INVESTMENTS, THAT RELATES TO
3 THOSE TYPE OF CLAIMS. ONE MOMENT, YOUR HONOR?

4 THE COURT: UM-HUM (AFFIRMATIVE).

5 MR. ALFORD: HAVE I ANSWERED YOUR QUESTION?

6 THE COURT: YEAH. BUT MY -- IN FAIRNESS TO PEOPLE
7 ON THAT SIDE OF THE ROOM, THIS IS AN ATTORNEY FEES
8 PETITION. I'M THE ONE WHO MADE THE DECISION TO HAVE
9 THESE ATTORNEYS STAY IN.

10 AND WE'RE NOW DECEMBER '05 TO JANUARY OF '11, AND I
11 CANNOT REMEMBER A TIME WHEN MR. GRIMBALL WAS NOT PRESENT.
12 SO I KNOW HE SAID THERE MIGHT HAVE BEEN ONE WHEN HE WAS
13 NOT, BUT I KNOW THAT HE'S BEEN HERE.

14 AND SO I DO FEEL THAT -- I DO FEEL AN OBLIGATION
15 FROM THE COURT'S STANDPOINT TO WANT TO TRY TO FIGURE OUT
16 WHAT IS A "FAIR" AMOUNT OF MONEY FOR THEM TO RECEIVE.
17 BUT, AGAIN, I WANT TO PUT THE WORD "FAIR" IN QUOTATION
18 MARKS.

19 BECAUSE THE WAY I EXPRESSED TO YOUR DISTINGUISHED
20 OPPOSING COUNSEL, I'M OF THE OPINION THAT WHAT DROVE THIS
21 CASE TO BEING SETTLED IS THE WORK THAT Y'ALL HAVE DONE ON
22 THAT SIDE OF THE COURTROOM RELATED TO THE SANCTIONS
23 ISSUE. AND I BELIEVE THAT, YOU KNOW, BASED ON EVERYTHING
24 THAT I'VE BEEN TOLD, THAT SIDE OF THE ROOM CARRIED THAT
25 WAGON, WENT UP THAT HILL, YOU KNOW, DUG UP INFORMATION

1 THAT I, QUITE FRANKLY, I THINK I EVEN MENTIONED TO Y'ALL
2 AT ONE TIME, YOU'VE GOT AN UPHILL BATTLE TO CLIMB BECAUSE
3 I DON'T THINK ---

4 MR. ALFORD: A MOUNTAIN.

5 THE COURT: A MOUNTAIN TO CLIMB. AND YOU DID IT.
6 AND WHILE THE SUBSTANCE OF WHAT YOU UNCOVERED IS
7 DISCOMFORTING TO ME SINCE IT DEALS WITH THE LEGAL
8 PROFESSION.

9 MR. ALFORD: IT'S DISHEARTENING TO EVERYBODY.

10 THE COURT: YEAH, IT REALLY IS. I MEAN, IT'S
11 SICKENING FROM WHERE I SIT. BUT I THINK Y'ALL WERE THE
12 ONES WHO CARRIED THAT LOAD. SO I WANT TO BE FAIR TO
13 Y'ALL AS WELL.

14 I'M ALSO OF THE OPINION THAT I BELIEVE, AS I'VE
15 STATED, MAYBE NOT PUBLICALLY ON THE RECORD, BUT THE
16 AMOUNT OF ATTORNEY FEES THAT WERE AGREED TO BE PAID BY
17 DRYVIT IN THIS PARTICULAR LITIGATION WILL NEVER PAY ANY
18 LAWYER FOR THE WORK THAT THEY HAVE DONE, AND WILL NEVER
19 PAY THE LAWYER FOR THE WORK THAT THEY'VE DONE, A
20 REASONABLE FEE. I MEAN, EVERYBODY IS TAKING A
21 DISCOUNTED, TREMENDOUSLY DISCOUNTED RATE FOR WHAT Y'ALL
22 HAVE BEEN ABLE TO ACCOMPLISH.

23 MR. ALFORD: I CAN'T AGREE MORE.

24 THE COURT: SO I'M TRYING TO COME UP WITH SOMETHING
25 THAT IS FAIR.

1 NOW, THESE OTHER ISSUES THAT I KNOW -- I MEAN, I
2 HAVE CONCERNS WITH THE NELSON, NOT NELSON MULLINS, WYLIE
3 MULLEN AND THE OTHER CLASS, ORIGINAL CLASS COUNSELS MAYBE
4 -- AND THIS MIGHT NOT BE WHAT I CONCLUDE, BUT MAYBE IN A
5 CAVALIER MANNER APPROACH TO CLASS ACTION LAWSUIT IN A BIG
6 PICTURE.

7 BECAUSE I STILL, I'M HAVING DIFFICULTY WITH
8 UNDERSTANDING WHY, WHEN THE JUDGE, IN CLASS ACTION
9 LITIGATION PLAYS SUCH AN IMPORTANT ROLE AS IT RELATES TO
10 PROTECTION OF THE CLASS, WHEN, HE, I STILL BELIEVE, WAS
11 KEPT IN THE DARK ON MANY ISSUES THAT HE SHOULD HAVE BEEN
12 MADE AWARE OF EVEN IF CLASS COUNSEL CAME TO THE VERY WISE
13 AND LEARNING DECISION THAT A PARTICULAR APPROACH IS THE
14 BEST WAY TO GO, THE JUDGE WAS NOT AWARE OF THAT. SO I'M
15 HAVING TO WEIGH THAT IN.

16 BUT THIS IDEA THAT YOU WANT ME TO FIND THAT THESE
17 TWO GENTLEMEN WHO ARE SITTING HERE, YOU KNOW, DID
18 SOMETHING THAT WOULD BORDER ON CRIMINAL IN NATURE,
19 ALMOST, YOU KNOW, OR ETHICALLY VIOLATED SOME RULE, I'M
20 NOT REAL SURE THAT I NEED TO GO THERE.

21 MR. ALFORD: AND I DON'T THINK YOU DO. AND I DON'T
22 WANT YOU TO, TODAY. I REALLY DON'T. LET ME TELL YOU WHY
23 YOU DON'T HAVE TO, OKAY? BECAUSE I THINK -- I THINK YOU
24 GET THERE WITHOUT HAVING TO MAKE THAT DETERMINATION. AND
25 LET ME, IF I MAY? OKAY.

1 FIRST OFF, YOU CAN'T PAY LAWYERS WHO DON'T HAVE
2 CLIENTS. IN SOUTH CAROLINA THREE WAYS TO GET A FEE,
3 STATUTE, CONTRACT, EQUITY.

4 THE COURT: IT'S OBVIOUSLY GOING TO HAVE TO BE THE
5 LATTER ONE IF ANY OF THEM.

6 MR. ALFORD: OKAY. LET ME TALK ABOUT EQUITY. I'M
7 NOT SAYING THEY DID EVIL, BAD THINGS. THEY MADE A
8 MISTAKE. THEY SETTLED THEIR CLIENT'S CASE. THEY
9 BREACHED THE FIDUCIARY DUTY UNDER PREMIUM INVESTMENTS.
10 THAT'S AS FAR AS YOU HAVE TO GO.

11 LET ME TELL YOU SOMETHING ELSE ABOUT -- YOU WANT TO
12 TALK ABOUT THE WORKLOAD, AND, YEAH, MR. GRIMBALL WAS
13 HERE. BELIEVE IT OR NOT, I HAVE COME TO LIKE MR.
14 GRIMBALL A GREAT DEAL. YOU MAY NOT BELIEVE THAT. I'M
15 SERIOUS. HE'S A NICE GUY. HE HAS TRIED HARD TO GET
16 ALONG WITH US.

17 WHAT DO I THINK THE MOTIVATIONS WERE FOR STAYING
18 INVOLVED IN THE CASE? I THINK THEY WANTED TO STAY
19 INVOLVED IN THE CASE TO TRY TO HAVE SOME INSIGHT AND
20 CONTROL OVER WHAT WE DID. THAT'S WHAT I THINK.

21 I'LL GIVE YOU AN EXAMPLE. WHEN WE WENT AFTER DRYVIT
22 IN THE SUMMARY JUDGMENT MOTIONS AND WE STARTED LEARNING
23 ABOUT THE CONDUCT, WHICH BASICALLY FORMED THE BASIS FOR,
24 AT LEAST SOME OF THE BASIS FOR THE COURT'S RULING IN ITS
25 SUMMARY JUDGMENT ORDER, MR. GRIMBALL SUBMITS TEN PAGES OF

1 COUNTER ORDER, BASICALLY SAYING, DON'T SIGN THAT ORDER
2 BECAUSE IT MIGHT SAY SOMETHING BAD ABOUT ME. HE HAD
3 INTERESTS THAT WERE CONTRARY TO THE CLASS.

4 I THINK THE COURT IS WELL AWARE FROM DAY ONE, IN THE
5 ORDER THAT YOU FIRST SIGNED, WE DIDN'T KNOW WHAT HAD
6 HAPPENED. NO ONE TOLD US. BUT WE KNEW WE DIDN'T LIKE
7 IT. WE KNEW SOMETHING WASN'T RIGHT, AND WE COULDN'T
8 FIGURE OUT WHAT IT WAS, BECAUSE THERE WAS THIS HUGE GAP
9 IN THE COURT FILES THAT BASICALLY STOPPED IN '03, OTHER
10 THAN THE ONE FILING FROM DRYVIT.

11 AND I SAID IN THAT DECEMBER 5TH -- I DON'T -- I HOPE
12 THEY DIDN'T DO AND I HOPE THEY DIDN'T COMMIT ANY SINS,
13 BUT I DON'T WANT TO BE HELD RESPONSIBLE FOR THEM.

14 AND THE REASON THAT ORDER TOOK A LONG TIME TO CREATE
15 -- AND YOU SCRATCHED OUT THE LANGUAGE THAT WE WANTED IN
16 THERE, WHICH WAS -- WELL, I DON'T REMEMBER THE EXACT
17 WORDS, BUT IT WAS BASICALLY, WE DON'T WANT TO BE HELD
18 RESPONSIBLE FOR THEIR SINS IF THEY'VE COMMITTED ANY. AND
19 THAT LANGUAGE GOT TAKEN OUT.

20 A NUMBER OF TIMES WHEN MR. GRIMBALL WOULD STAND UP
21 TO SPEAK, BEFORE HE SPOKE, I WOULD STAND UP, AND I WOULD
22 SAY, JUDGE, HE AIN'T SPEAKING FOR US.

23 THE COURT: I UNDERSTAND. I REMEMBER. LET ME ASK
24 YOU ABOUT THAT ORDER. WHAT WAS THE PURPOSE IN WANTING TO
25 HAVE THE CLAUSE IN THIS ORDER THAT SAYS, THAT READS,

1 INTERVENER'S COUNSEL SHALL NOT BE ENTITLED TO SHARE IN
2 ANY COMPENSATION PAID TO ANY CURRENT CLASS COUNSEL OR TO
3 BE PAID TO CURRENT CLASS COUNSEL FOR SERVICES THAT THEY
4 RENDERED PRIOR TO THE ENTRY OF THIS ORDER?

5 MR. ALFORD: YOU KNOW WHAT? WE DIDN'T PUT THAT
6 LANGUAGE IN, AND I DON'T KNOW. AND I'M AN IDIOT BECAUSE
7 IT SHOULD HAVE TIPPED ME OFF RIGHT THEN THAT THEY HAD
8 MONEY COMING IN, BUT IT DIDN'T.

9 THE COURT: WELL, I MADE THE CHANGE.

10 MR. ALFORD: I KNOW THAT. AND YOU SAID THAT IN THE
11 COURSE ---

12 THE COURT: UNLESS ---

13 MR. ALFORD: BUT I HAD NO IDEA THEY HAD MONEY COMING
14 IN. I JUST DIDN'T KNOW. AND SO ---

15 MR. PHILLIPS: YOUR HONOR, YOUR HONOR, I HEARD YOUR
16 QUESTION IS, YOU'RE ASKING WHY THE STRICKEN LANGUAGE WAS
17 PUT IN THERE?

18 THE COURT: NO, WHY THAT LANGUAGE? AND THIS WAS NOT
19 STRICKEN. THIS WAS KEPT IN. INTERVENER'S COUNSEL SHALL
20 NOT BE ENTITLED TO SHARE IN ANY COMPENSATION PAID TO ANY
21 CURRENT CLASS COUNSEL OR TO BE PAID TO CURRENT CLASS
22 COUNSEL FOR SERVICES THAT THEY RENDERED PRIOR TO THE
23 ENTRY OF THIS ORDER.

24 MR. PHILLIPS: YOUR HONOR, YOU MAY RECALL THAT DIXON
25 ROBERTSON, WHO APPEARED AT THE FIRST HEARING, THAT WAS

1 HIS INSISTENCE ON THAT TYPE LANGUAGE. HE EXCHANGED A FEW
2 LETTERS WITH MR. GLEISSNER. AND THAT'S WHY THE LANGUAGE
3 WAS PUT IN THERE.

4 MR. ALFORD: AND WE DIDN'T, I MEAN, IT DIDN'T MATTER
5 TO US BECAUSE WE DIDN'T KNOW THERE WAS ANYTHING COMING.
6 I MEAN, NAIVETE, YES.

7 SO I THINK TO TALK ABOUT -- AND I DON'T, I DON'T
8 WANT YOU TO MAKE A DETERMINATION ABOUT, YOU KNOW, I DON'T
9 WANT, I MEAN, YOU CAN DECIDE THIS WITHOUT OPENING THE
10 PROVERBIAL PANDORA'S BOX. DO THEY GET A FEE OR NOT?
11 STATUTE, CONTRACT, EQUITY.

12 AND THEY DON'T HAVE A CLIENT. TO ME, THAT'S
13 IMPORTANT. I DON'T GET TO JUST DECIDE IS THIS SETTLEMENT
14 GOOD ENOUGH? DO I THINK IT'S GOOD ENOUGH? I HAVE TO ASK
15 HIM. AND IF HE SAYS, NO, I DON'T GET TO SETTLE.

16 THE COURT: AND I NOTE, AND YOU POINT TO CLASS
17 REPRESENTATIVE ---

18 MR. ALFORD: MR. SCEARCE.

19 THE COURT: --- AND I KNOW THAT CLASS REPRESENTATIVE
20 HAS ISSUED AFFIDAVITS INDICATING THEIR ADAMANT OPPOSITION
21 TO THEM RECEIVING ANY FEES.

22 MR. ALFORD: HERE'S ANOTHER POINT, YOUR HONOR. MR.
23 GRIMBALL DIDN'T JOIN -- AND HE COULDN'T. I UNDERSTAND.
24 HE COULDN'T JOIN OUR MOTION FOR SANCTIONS. HE DIDN'T
25 JOIN IN THE WAY WE HANDLED OUR MOTION FOR SUMMARY

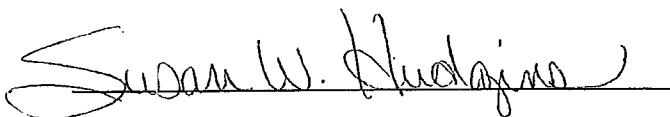
GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 CERTIFICATE OF REPORTER

2 I, THE UNDERSIGNED, SUSAN W. HUDGINS, OFFICIAL COURT
3 REPORTER FOR THE FOURTEENTH JUDICIAL CIRCUIT OF THE STATE
4 OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING
5 IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF
6 ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE
7 TRIAL/HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL,
8 IN THE CIRCUIT COURT FOR BEAUFORT COUNTY, SOUTH CAROLINA,
9 ON THE 26TH - 27TH DAY OF JANUARY 2011.

10 I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
11 COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

12 APRIL 9, 2011

13
14
15
16 

17 CIRCUIT COURT REPORTER

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

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EXHIBITS

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P-1	LETTER 3/30/10 -----	7	7
P-2	ORDER 9/3/02 -----	10	10
P-3	MEMORANDUM 10/27/02 -----	10	10
P-4	REQUEST FOR EXCLUSION 9/3/02 ----	11	11
P-5	AFFIDAVIT OF LEATH -----	12	12
P-6	LETTER 10/8/02 -----	14	14
P-7	LETTER 10/29/02 -----	14	14
P-8	LETTER 11/15/02 -----	16	16
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P-10	EMAIL 1/2/03 -----	17	17
P-11	EMAIL 1/7 -----	19	19
P-12	LETTER 2/5/03 -----	20	20
P-13	EMAIL 4/22/04 -----	21	21
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P-15	EMAIL 4/26/04 -----	22	22
P-16	EMAIL 8/23/05 -----	23	23
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D-2	TRANSCRIPT OF TENNESSEE HEARING - (2005)	110	110

1 THE COURT: GOOD MORNING. ALL RIGHT, MR. ALFORD. I
2 BELIEVE THAT WE ARE HERE ON YOUR MOTION FOR AN
3 ACCOUNTING. IS THAT CORRECT?

4 MR. ALFORD: THAT IS CORRECT, SIR.

5 THE COURT: NOW I KNOW THAT WE HAVE EXCHANGED SOME
6 EMAILS BACK AND FORTH. AND I BELIEVE THAT I HAVE MADE --
7 I'VE INDICATED YOU HAVE A SIGNIFICANT BURDEN TO CARRY
8 THIS MORNING.

9 MR. ALFORD: THAT'S WHERE I LIVE, YOUR HONOR.

10 THE COURT: I'M SURE. I'LL BE MORE THAN HAPPY TO
11 HEAR FROM YOU. LET ME ASK -- NOW, DRYVIT HAS NO
12 POSITION, IS THAT CORRECT?

13 MR. FIELDS: DRYVIT HAS NO OPPOSITION.

14 THE COURT: OKAY. NO OPPOSITION. ALL RIGHT. WILL
15 THERE BE -- IS THERE ANYONE THAT'S GOING TO TAKE A
16 POSITION THIS MORNING THAT'S CONTRARY TO WHAT YOU WILL BE
17 ARGUING, ---

18 MR. ALFORD: WELL, ---

19 THE COURT: --- THAT YOU KNOW OF?

20 MR. ALFORD: IF I MAY, YOUR HONOR, I'D LIKE TO -- I
21 RECEIVED A LETTER LAST NIGHT, IF I MAY APPROACH?

22 THE COURT: ALL RIGHT.

23 MR. ALFORD: I RECEIVED A LETTER LAST NIGHT FROM
24 ATTORNEY KENT STAIR. WE'D LIKE TO PROPOSE THAT AS
25 EXHIBIT 1, YOUR HONOR.

1 THE COURT: PLAINTIFF'S EXHIBIT 1.

2 MR. ALFORD: YES, SIR.

3 (WHEREUPON PLAINTIFF'S EXHIBIT 1 WAS ADMITTED INTO
4 EVIDENCE)

5 MR. ALFORD: AND WHAT THE LETTER BASICALLY SAYS IS
6 THAT OUR MOTION PUTS THE SETTLEMENT IN DANGER. IT
7 DOESN'T SPECIFY AS TO HOW. IT INDICATES THAT WE HAVE
8 CERTAIN ETHICAL DUTIES. IT PRESENTS US WITH THE
9 AFFIDAVIT OF A, I GUESS, ETHICAL DUTIES TO TELL YOU THAT
10 THERE WAS SOME INFORMATION CONTRARY TO THE INFORMATION
11 THAT WE INTEND TO PUT INTO THE RECORD OR AT LEAST THE
12 INFERENCE THAT WE TAKE FROM THE INFORMATION THAT WE
13 INTEND TO PUT IN THE RECORD.

14 AND SO IN THE SPIRIT OF FULL DISCLOSURE I'M LETTING
15 YOU KNOW WHAT ELSE MIGHT BE OUT THERE OR WHAT OTHER
16 POSITIONS OTHER PEOPLE MIGHT BE TAKING. AND WE'D LIKE TO
17 MAKE THIS EXHIBIT 1.

18 THE COURT: ALL RIGHT. WILL YOU -- DURING YOUR
19 ARGUMENT WILL YOU POINT THOSE THINGS OUT TO ME AS YOU
20 FEEL NECESSARY? I WILL READ IT. I MEAN, I'LL READ THE
21 INFORMATION SINCE YOU'RE MAKING IT AN EXHIBIT TO THIS
22 HEARING.

23 MR. ALFORD: YES, SIR. I GUESS I WOULD BEGIN -- IT
24 APPEARS TO BE, AND I THINK THE POSITION THAT MR. STAIR'S
25 TAKING IN THIS CORRESPONDENCE WITH THE COURT IS THAT

1 MONIES THAT WE SEEK THAT WE CONTEND BELONG TO THIS CLASS
2 AND THAT ARE BASICALLY THE PROPERTY OF THIS COURT HAVE
3 BEEN TAKEN OUT. AND APPARENTLY THESE LETTERS AND THE
4 AFFIDAVITS SEEK TO STATE AS A JUSTIFICATION THAT SOMEHOW,
5 THEN SOUTH CAROLINA CLASS COUNSEL, WERE NOT ACTING IN
6 THAT ROLE TO RECEIVE MONEY, BUT WERE ACTING IN THE ROLE
7 AS CLASS COUNSEL IN THE TENNESSEE POSEY ACTION.

8 THE COURT: OKAY.

9 MR. ALFORD: AND THAT'S SORT OF THE -- THAT'S THE
10 POSITION THAT THEY SEEM TO ANNUNCIATE IS THAT THEY
11 WEREN'T THERE FOR THE SOUTH CAROLINA CLASS, NOW THEY
12 WEREN'T THERE FOR AN OBJECTOR ANYMORE BECAUSE THAT WAS A
13 FAIRY TALE AND NOW IT'S -- WE'RE OPPOSING COUNSEL.

14 SO THAT'S, I THINK, AND I DON'T WANT TO BE UNFAIR TO
15 MR. STAIR, WHO ISN'T HERE, BUT THIS IS HIS POSITION. AND
16 HE, I GUESS, WANTED TO REMIND ME OF MY ETHICAL DUTY TO
17 ALWAYS TELL THE COURT EVERYTHING THAT'S OUT THERE.

18 THE COURT: ALL RIGHT. AND I WILL REVIEW THAT
19 INFORMATION BEFORE I MAKE ANY DECISION.

20 MR. ALFORD: YES, SIR.

21 THE COURT: ALL RIGHT. YOU WANT -- I HAVE A COPY OF
22 YOUR ---

23 MR. GRIMBALL: YOUR HONOR?

24 THE COURT: YES.

25 MR. GRIMBALL: I WOULD LIKE TO MAKE A FEW COMMENTS

GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 MOMENT.

2 MR. GRIMBALL: YES, SIR.

3 THE COURT: I RECALL AT THE VERY FIRST HEARING WE
4 HAD BACK IN 2005 THE ISSUE ACTUALLY CAME UP THEN.

5 MR. GRIMBALL: YES, SIR.

6 THE COURT: AND I ALSO RECALL THE DISCUSSIONS THAT
7 TOOK PLACE AND MY, I BELIEVE, WANTING THE ATTORNEYS TO
8 TALK AMONG THEMSELVES ABOUT THAT PARTICULAR ISSUE. SO
9 IT'S ACTUALLY BEEN AN ISSUE THAT HAS BEEN PLANTED IN THIS
10 LITIGATION THAT IS BEFORE ME THAT GOT ASSIGNED TO ME BY
11 THE CHIEF JUSTICE AS EARLY AS 2005.

12 NOW IT MIGHT HAVE COME UP AGAIN AT THAT TIME, BUT I
13 WANTED TO BE SURE THE RECORD IS CLEAR BECAUSE I WOULD NOT
14 WANT THERE TO BE A CONNECTION IN THE FACT THAT I MAY OR
15 MAY NOT MAKE A RULING IN REGARDS TO THE REQUEST THAT'S
16 BEING MADE BY CLASS COUNSEL AS HAVING ANYTHING TO DO WITH
17 WHETHER OR NOT THERE IS A THREAT TO THIS SETTLEMENT OR
18 NOT.

19 MR. GRIMBALL: I'M NOT SURE I UNDERSTAND WHERE
20 YOU'RE HEADING WITH THAT, BUT LET ME CONTINUE ---

21 THE COURT: YOU HAVE STATED TO ME, AND YOU LAID IT
22 OUT BEFORE ME THAT THERE IS SOME CONNECTION TO THE
23 DISCUSSIONS OF SETTLEMENT IN THIS CASE AND THIS ISSUE
24 THAT RELATES TO THESE ATTORNEY FEES. I VIEW THEM
25 SEPARATELY.

1 MR. GRIMBALL: THEY ARE SEPARATE, BUT ONE CAN
2 INFLUENCE THE OTHER. AND THAT'S THE POINT OF WHAT I'M
3 TRYING TO GET ACROSS IN THE BRIEF REMARKS THAT I HAVE
4 MADE.

5 AND, AGAIN, I'M NOT ARGUING AGAINST ---

6 THE COURT: I UNDERSTAND THAT. BUT THE SETTLEMENT
7 THAT I HAVE BEEN ASKED TO GIVE MY PRELIMINARY APPROVAL
8 TO, ---

9 MR. GRIMBALL: YES, SIR.

10 THE COURT: --- TO WHICH I HAVE GIVEN MY BLESSING,
11 HAS -- IN NO WAY WAS I EVER INFORMED THAT THERE WAS A
12 POTENTIAL THREAT TO THIS LITIGATION OR TO THIS SETTLEMENT
13 BASED UPON SOME COLLATERAL ISSUE THAT WAS NOT ASSOCIATED
14 WITH THAT SETTLEMENT.

15 MR. GRIMBALL: THIS IS MY FEAR, YOUR HONOR, THIS IS
16 THE -- YOU HAVE EXPRESSED MY EXACT CONCERN, WHICH IS WHY
17 I -- I THINK THERE'S A SOLUTION TO THE PROBLEM. AND I'D
18 LIKE TO GO THROUGH IT. THAT IS ---

19 THE COURT: ALL RIGHT.

20 MR. GRIMBALL: I HAVE EXPRESSED THAT CONCERN TO
21 THESE GENTLEMEN. AND I FELT AS IF I NEEDED TO ---

22 THE COURT: AND I -- AND I WANT TO HEAR YOU IN FULL.
23 BUT I WANT IT TO BE VERY CLEAR TO EVERYONE THAT IS
24 SITTING IN THIS COURTROOM THAT THESE ISSUES THAT ARE
25 BEING RAISED AND PRESENTED TO ME ARE VERY CONCERNING TO

1 ME.

2 NOT ONLY IS THERE A HISTORY THAT HAS BEEN DOCUMENTED
3 AND PRESENTED TO ME THAT TOUCHES DIRECTLY UPON RESPECT
4 AND THE ROLE OF NOT ONLY, AND I SAY THIS COURT, I MEAN
5 NOT THIS COURT AS BEING ME PERSONALLY WHO DID NOT GET
6 ASSIGNED THIS CASE BY THE CHIEF JUSTICE UNTIL 2006 AND
7 FIRST HEARD THE FIRST HEARING IN 2005, BUT ALSO THE ROLE
8 OF JUDGE KEMMERLIN WHEN HE HAD THIS CASE, BUT THOSE ARE
9 VERY CONCERNING ISSUES.

10 WHETHER IT IS DIRECT OR INDIRECT MISREPRESENTATIONS
11 THAT HAVE BEEN MADE TO A MATTER TO WHICH UNDER RULE 23
12 THIS COURT HAS THE, AND I AGREE WITH MR. ALFORD, A DUTY
13 TO MONITOR AND POLICE. THAT'S VERY CONCERNING.

14 SO I WANT TO HEAR YOU, AND I WANT TO HEAR YOU IN
15 FULL AS TO WHAT YOU THINK THOSE ISSUES ARE THAT MIGHT
16 HAVE SOME BEARING ON THE SETTLEMENT THAT I HAVE GIVEN MY
17 PRELIMINARY APPROVAL. THEN I WOULD ALSO LIKE TO ASK YOU
18 WHY AM I JUST NOW HEARING ABOUT THEM?

19 MR. GRIMBALL: HEARING ABOUT THESE ISSUES?

20 THE COURT: YES, SIR.

21 MR. GRIMBALL: WELL, LET ME PROCEED, THEN WE CAN --
22 IF I DON'T ANSWER THAT QUESTION WE CAN COME BACK TO IT.

23 THE COURT: ALL RIGHT.

24 MR. GRIMBALL: MR. PHILLIPS AND I HAD A BRIEF
25 CONVERSATION AFTER LAST TIME WE WERE HERE, I THINK, AS A

1 RESULT OF YOUR EXPRESSING A WILLINGNESS TO TRY TO RESOLVE
2 ALL OF IT. I SUGGESTED AN ACCOUNTING MOTION, OR RULE TO
3 SHOW CAUSE, SOME METHOD FOR THIS COURT TO BRING EVERYONE
4 BEFORE IT.

5 WHAT I CONTEMPLATED WITH THAT WAS A MULTI-STEP
6 PROCESS, MOTION AND ORDER, AN EVIDENTIARY HEARING, SOME
7 FURTHER ACTION IF NECESSARY. I THOUGHT IF THIS COURT GOT
8 INVOLVED WITH ALL OF THE PARTIES IN THE OTHER LITIGATION
9 THAT THIS ENTIRE MATTER COULD BE RESOLVED.

10 IT WAS A CASUAL CONVERSATION. I WAS NOT CONSULTED
11 FURTHER ABOUT THIS AND DID NOT DO ANY RESEARCH ON IT, WAS
12 NOT ASKED TO LOOK AT A DRAFT OR DO ANYTHING LIKE THAT.
13 WHAT RESULTED WAS THIS MOTION, WHICH I THINK HAS GOT A
14 PROBLEM WITH TIMING AND MAY CREATE SOME PROBLEMS FOR
15 THESE LAWYERS, ACTUALLY.

16 I DO BELIEVE THAT THERE IS A POTENTIAL SOLUTION TO
17 THIS PROBLEM. THE TOUCHSTONE, AS I SAID, HAS BEEN AND
18 CONTINUES TO BE FOR ME, WHAT'S IN THE BEST INTEREST OF
19 THE CLASS?

20 THIS COURT HAS WORKED VERY, VERY HARD. THESE
21 LAWYERS HAVE WORKED VERY, VERY HARD, TOO LONG, TOO HARD
22 TO RUN A RISK OF ENDANGERING THE CLASS OR THIS
23 SETTLEMENT. THE DELAY, IF THERE IS A DELAY IN THESE HARD
24 ECONOMIC TIMES, THAT CAN IN AND OF ITSELF HARM MEMBERS OF
25 THE CLASS. I UNDERSTAND FROM MR. PHILLIPS AT LEAST

1 SEVENTY LETTERS HAVE BEEN SENT OUT AND RETURNED BECAUSE
2 OF FORECLOSURE.

3 NOW I THINK WHAT THE -- WHAT I'M TRYING TO DO IS TO
4 POINT OUT TO THE COURT ISSUES CONCERNING THE WAY THIS
5 MOTION WAS WRITTEN AND THE WAY IT'S COUCHED. IT'S
6 COUCHED AS A REQUEST FOR MONEY DAMAGES. IT IS -- IT IS A
7 DISPUTE OVER A SUM OF MONEY THAT GOT PAID. IT COMBINED
8 SEVERAL STEPS IN ONE.

9 I THINK THIS COURT IS GOING TO HEAR, IF IT PROCEEDS,
10 WHICH, AGAIN, I'M NOT ARGUING AGAINST IT, BUT IT WILL
11 HEAR ISSUES CONCERNING CONSTITUTIONAL RIGHTS TO DUE
12 PROCESS, TO A JURY TRIAL, TO THE LACK OF THE PROCESS, TO
13 A HOST OF OTHER ISSUES.

14 RULE 38 IS ONE THAT COMES TO MIND, WHICH IS THAT
15 WHEN THERE IS A REQUEST FOR MONEY DAMAGES ONLY, THE FACTS
16 OF THAT CASE ARE TO BE DETERMINED BY A JURY. IT'S THE
17 SECOND SENTENCE OF 38(A).

18 MR. ALFORD: YOUR HONOR, I -- YOUR HONOR, IF I MAY?
19 I JUST WANT TO POINT THIS OUT FOR THE RECORD. I'VE
20 SPOKEN WITH MR. SCEARCE, I'VE SPOKEN WITH MR. TREON, I'VE
21 SPOKEN WITH MR. CHRISTIAN, HE'S NOT SPEAKING FOR THEM.

22 THE COURT: ALL RIGHT. NOW HE WAS VERY KIND, ---

23 MR. ALFORD: YES, SIR.

24 THE COURT: --- HE DID NOT STAND UP AND INTERRUPT
25 YOU WHEN YOU WERE PRESENTING YOUR LENGTHY ARGUMENT.

1 MR. ALFORD: YES, SIR. I APOLOGIZE.

2 THE COURT: I WOULD APPRECIATE IT IF YOU WOULD DO
3 THE SAME FOR HIM.

4 MR. ALFORD: YES, SIR.

5 MR. GRIMBALL: THANK YOU, SIR. BUT YOU ARE GOING TO
6 HEAR A HOST OF ARGUMENTS AGAINST TRYING TO EXTRACT MONEY
7 IN THIS SITUATION.

8 NOW THE -- WHAT YOU CAN DO WITHIN THE POWER OF YOUR
9 COURT, THAT ASPECT OF THE MOTION IS -- DIVORCED FROM THE
10 MONEY ASPECT IS, I THINK, A LITTLE BIT EASIER TO HANDLE.
11 BUT THE MONEY ASPECT IS A BIGGER CONCERN. AND DON'T
12 FORGET, THE MONEY ASPECT IS ALREADY BEING LITIGATED IN
13 TWO SEPARATE CASES. THAT CREATES ANOTHER PROBLEM THAT I
14 NEED TO TOUCH ON.

15 FROM YOUR STANDPOINT, OF COURSE, I CAN SEE YOU
16 LOOKING DOWN AT ME AND SAYING, SO WHAT, GRIMBALL?
17 LAWYERS MAKE ARGUMENTS, FILE MOTIONS, MAKE ARGUMENTS,
18 JUDGES RULE, LAWYERS APPEAL.

19 AND THAT'S THE PROBLEM, THERE COULD BE AN APPEAL,
20 WHICH IS WHY I'M TRYING TO POINT OUT THE ARGUMENTS YOU
21 CAN GET, IS THE APPEAL THAT WOULD INEVITABLY COME FROM A
22 RULING OF THIS COURT TO TRY TO DO WHAT THESE LAWYERS WANT
23 YOU TO DO THAT CAUSES ME THE CONCERN 'CAUSE NO ONE WANTS
24 THIS COURT TO LOSE JURISDICTION OVER THIS CASE.

25 SO IF THERE IS AN APPEAL, THEN THERE'S GOT TO BE A

1 FIGHT TO GET THE JURISDICTION BACK FROM THE APPELLATE
2 COURT. WHO KNOWS HOW LONG THAT'S GOING TO TAKE? THAT
3 PRESENTS AN ADMINISTRATIVE PROBLEM WITH DEALING WITH THE
4 NOTICE THAT'S ALREADY GONE OUT, THE SETTLEMENT, THE
5 CLAIMS THAT ARE BEING MADE, THE FAIRNESS HEARING IN JUNE.
6 IT IS VERY WORRISOME TO ME THAT THAT MIGHT OCCUR. AND SO
7 THE TIMING OF THIS MOTION IS A, I THINK, A REAL PROBLEM.

8 NOW THERE'S AN ADDITIONAL PROBLEM. AND I DON'T KNOW
9 HOW TO RESOLVE THIS. THESE LAWYERS, EXCEPT MR. PHILLIPS,
10 BUT THE OTHERS, THEY HAVE BEEN DISQUALIFIED FROM THE
11 OTHER TWO CASES. NOW I THINK THEY'VE APPEALED THAT
12 FAIRLY RECENTLY, BUT THEY HAVE BEEN DISQUALIFIED.

13 THEY HAVE MAINTAINED IN THOSE OTHER TWO CASES THAT
14 THOSE TWO CLASSES ARE DIFFERENT FROM THIS CLASS. SO YOU
15 NOW HAVE THESE LAWYERS WITH TWO OR THREE SEPARATE
16 CLIENTS. IT'S A CLASS HERE, PUNITIVE CLASS THERE, BUT
17 SEPARATE INTERESTS.

18 AFTER THEY WERE DISQUALIFIED THEY FILED THIS MOTION.
19 THEY ARE TRYING TO EXTRACT DAMAGES FROM THOSE TWO CASES
20 AND PUT THEM IN THIS CASE. THAT IS FAVORING ONE CLIENT
21 OVER ANOTHER. AND AT THIS POINT I'M NOT SURE WHAT THEY
22 CAN DO TO RESOLVE THAT PARTICULAR PROBLEM, BUT THAT'S A
23 PROBLEM THAT'S OUT THERE.

24 AND I'M NOT SURE OF THE PROPRIETY OF THIS COURT
25 TAKING DAMAGES FROM ONE CLASS ACTION PENDING IN BEAUFORT

1 COUNTY AND ASSERTING JURISDICTION OVER THOSE DAMAGES IN
2 ANOTHER ACTION PENDING IN BEAUFORT COUNTY.

3 AGAIN, THE PROBLEM COMES IN THAT A DELAY BECAUSE OF
4 AN APPEAL COULD SERIOUSLY JEOPARDIZE THE SETTLEMENT. IT
5 COULD END UP, IN FACT, UNRAVELING THIS SETTLEMENT.

6 AGAIN, MY JOB RIGHT NOW IS TO SPEAK AS AN OFFICER OF THE
7 COURT, COUNSEL FOR THE CLASS TO TRY TO ASK THIS COURT,
8 PLEASE BE VERY CAREFUL IN HOW IT PROCEEDS.

9 NOW I THINK THE SOLUTION TO THAT PROBLEM IS --
10 THERE'S SEVERAL DIFFERENT THINGS THIS COURT CAN DO. THIS
11 COURT CAN DO NOTHING. I DON'T THINK YOU'RE INCLINED TO
12 DO NOTHING. I THINK THAT YOU SEE THAT THERE ARE ISSUES
13 WITH THOSE EMAILS BY MR. LEATH AND THAT YOU WANT TO PRESS
14 FORWARD AND INVESTIGATE THAT.

15 THE COURT: IT WOULD BE OF GREAT COMFORT TO ME IF I
16 COULD FIND A WAY TO DO NOTHING BECAUSE WHEN THIS CASE WAS
17 PRESENTED TO ME BACK IN 2005 IN DECEMBER, AND BASED UPON
18 THE REPRESENTATIONS THAT WERE MADE TO ME WHEN I WAS IN
19 BEAUFORT, I DID NOT FORESEE IT, AND I DO NOT BELIEVE ANY
20 PERSON THAT PARTICIPATED IN THAT HEARING WOULD HAVE
21 FORESEEN THAT THE THINGS THAT HAVE BEEN UNCOVERED AS PART
22 OF THIS LITIGATION WOULD HAVE BEEN UNCOVERED.

23 NOR DO I BELIEVE ANYONE SITTING IN THAT COURTROOM
24 WOULD HAVE THOUGHT THAT WE WOULD HAVE OR THAT THE LAWYERS
25 AT SOME POINT WOULD HAVE BEEN ABLE TO REACH A SETTLEMENT

1 OF THE CASE AND CONVINCE ME OR ANY OTHER JUDGE TO APPROVE
2 THAT SETTLEMENT.

3 SO A LOT HAS TRANSPIRED SINCE I FIRST VISITED THIS
4 CASE. AND I WOULD WELCOME THE OPPORTUNITY TO DO NOTHING
5 IN REGARDS TO THIS MOTION BECAUSE THIS HAS BEEN A
6 MONUMENTAL PIECE OF LITIGATION IN THIS COURT, AND WHEN I
7 SAY THIS COURT, I MEAN ME, PERSONALLY, PROFESSIONAL LIFE
8 AS WELL AS, I BELIEVE, MOST OF THE LAWYERS THAT ARE
9 SITTING IN THIS COURTROOM.

10 SO IF YOU CAN CONVINCE ME OF A WAY THAT I CAN
11 DISREGARD MY OBLIGATIONS UNDER RULE 23, THEN I WILL BE
12 MORE THAN HAPPY TO HEAR THAT AS A VIABLE SOLUTION.

13 MR. GRIMBALL: I AM -- I'M NOT HERE TO DO THAT, YOUR
14 HONOR.

15 THE COURT: ALL RIGHT.

16 MR. GRIMBALL: I REALLY AM NOT. I -- WHAT I'M
17 ASKING YOU TO DO BECAUSE I THINK THAT WHAT -- I THINK IT
18 WOULD BE A LOT EASIER TO EFFECT WHAT YOU STARTED OFF MY
19 LITTLE DISCUSSION WITH, WHICH IS TO KEEP THE SETTLEMENT
20 DIVORCED FROM THIS.

21 I THINK IT IS A LOT EASIER IF YOU TAKE ACTION THAT
22 CAUSES AN APPEAL IF THAT ACTION IS DONE AFTER THE
23 FAIRNESS HEARING, PROBABLY AFTER THE CLAIMS DEADLINE,
24 WHICH IS IN AUGUST OF THIS YEAR. I WOULD URGE THE COURT
25 SIMPLY TO DEFER THIS MATTER FOR THAT PERIOD OF TIME SO

1 THAT THE SETTLEMENT, IF YOU DO APPROVE IT IN JUNE, CAN BE
2 -- THE SETTLEMENT CAN BE MAINTAINED, ADMINISTERED,
3 MANAGED SEPARATELY.

4 YOU ARE ABSOLUTELY CORRECT. THIS HAS BEEN TOO LONG,
5 TOO HARD, TOO BURDENSOME TO RUN A RISK. IT'S A POINT I
6 TRIED TO MAKE TO MY CO-COUNSEL IN A COUPLE OF EMAILS TO
7 SAY, LOOK, WAIT A MINUTE, GUYS, THE BENEFIT -- BECAUSE
8 WE'VE ALL SAID, WE'VE COME BEFORE THIS COURT AND SAID
9 THIS SETTLEMENT IS FAIR AND REASONABLE.

10 SO THE BENEFIT TO THE CLASS IS MARGINAL, THE RISK IS
11 -- EVEN IF IT'S A SMALL RISK IS TOO BIG OF A RISK TO BEAR
12 WITH REGARD TO THIS SETTLEMENT, PARTICULARLY IN LIGHT OF
13 THE FACT THAT THESE ISSUES ARE ALREADY BEING LITIGATED IN
14 TWO CASES THAT ARE PENDING IN BEAUFORT COUNTY.

15 THOSE ARE MY CONCERNS, JUDGE. AND, AGAIN, I AM NOT
16 HERE TO ARGUE AGAINST YOUR TAKING ACTION. I DIDN'T
17 PARTICIPATE IN THOSE EMAILS. THE INFERENCES THAT MR.
18 ALFORD HAS DRAWN FROM THERE ARE ABOUT THE, QUOTE,
19 SETTLEMENT, WAS NOT THE SETTLEMENT THAT I UNDERSTOOD
20 EXISTED WHEN -- IN DECEMBER OF '05 WHEN WE APPEARED
21 BEFORE YOU, GEORGE MULLEN AND I TO ARGUE AGAINST DRYVIT.

22 SO IT'S -- I SAY THAT SIMPLY IN PART BECAUSE I
23 THOUGHT I NEEDED TO SET THE RECORD STRAIGHT. BUT I WANT
24 THIS COURT TO KNOW THAT IF YOU WANT TO INVESTIGATE THIS
25 THING FULLY, THAT IS -- I AM ALL FOR WHAT YOU WANT TO DO

1 IN THAT REGARD.

2 WE'VE JUST GOT TO BE VERY, VERY CAREFUL NOT TO
3 INTERFERE WITH THIS SETTLEMENT. AND AN APPEAL AND THE
4 INTENDANT DELAY MAY WELL DO THAT. DID I ANSWER ALL OF
5 YOUR QUESTIONS, JUDGE?

6 THE COURT: I WILL HAVE SOME MORE LATER AFTER I HEAR
7 ALL THE ARGUMENTS. DID DRYVIT WISH TO BE HEARD OR STILL
8 JUST ...

9 MR. FIELDS: YOUR HONOR, JUST BRIEFLY. YOU ASKED IF
10 WE HAD A POSITION ON THIS. AND MY RESPONSE WAS WE HAD NO
11 OPPOSITION. I HAVE THOUGHT LONG AND HARD ABOUT WHAT OUR
12 POSITION WAS ON THIS PARTICULAR MOTION BECAUSE IT'S NOT
13 SEEKING RELIEF FROM DRYVIT.

14 BUT THERE HAS BEEN SOME QUESTIONS RAISED AND THIS
15 COURT HAS REACHED SOME CONCLUSIONS ABOUT DRYVIT'S -- THE
16 LEVEL OF DRYVIT'S ASSISTANCE AND ENCOURAGEMENT IN
17 ENABLING THIS COURT TO DO THE FULL LEVEL OF SCRUTINY TO
18 FIND AND TO REVIEW ALL OF THE ISSUES AND EVIDENCE THAT
19 THE COURT NEEDS TO IN ORDER TO FULFILL THE COURT'S
20 OBLIGATIONS UNDER RULE 23 AND OTHER ARTICLES OF THE SOUTH
21 CAROLINA LAW.

22 AND WE WANT TO MAKE VERY CLEAR THERE'S NO OPPOSITION
23 FROM DRYVIT TO THIS COURT DOING ALL OF THAT BOTH WITH
24 REGARD TO THE REVIEW OF THE SETTLEMENT, THE FAIRNESS OF
25 THE SETTLEMENT AND WITH REGARD TO REVIEW OF ANY

GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 BACK AND THEREFORE SEES THINGS THAT WE MISS DOWN IN THE
2 TRENCHES AND FROM TIME TO TIME HAS POINTED US IN
3 DIRECTIONS WHERE WE NEEDED TO BE POINTED AND THAT THAT
4 HAS LENT A GREAT DEAL OF CREDIBILITY TO THE PROCESS THAT
5 WE'VE GONE THROUGH IN ARRIVING AT THIS PARTICULAR PLACE
6 WITH THIS PARTICULAR SETTLEMENT AND OUGHT TO GIVE THE
7 COURT AS WELL AS OTHERS WHO LOOK AT WHAT WE'VE DONE SOME
8 COMFORT ABOUT THE RIGHTNESS, OR THE FAIRNESS, OR THE
9 JUSTNESS, OR THE RIGHTEOUSNESS OF THE RESULT THAT IS
10 BEING ACHIEVED IN THIS CASE.

11 THE COURT: I AM -- THANK YOU FOR YOUR RESPONSE.
12 I'M OFTEN CHALLENGED IN NON-COURT SETTINGS AS TO WANTING
13 TO RESPOND OR DEFEND THIS SYSTEM WE HAVE, ESPECIALLY IN
14 TALKING ABOUT CRIMINAL CASES. AND WHY GO THROUGH THAT
15 PROCESS WHEN YOU KNOW THE MAN'S GUILTY?

16 WHY DID WE, AS A SOCIETY IN OUR COUNTRY, EVEN BOTHER
17 WITH THE PROCESSES OF TRYING TIMOTHY McVEIGH? WE ALL
18 KNEW HE WAS GUILTY. IT WAS ON THE TELEVISION EVERY DAY.
19 HE KILLED INNOCENT CHILDREN. HE BLEW UP THE FEDERAL
20 COURTHOUSE. THEY HAD HIM DEAD TO RIGHT. WHY EVEN CARE
21 ABOUT THE PROCESS WHEN YOU KNEW THAT HE WAS GUILTY TO
22 BEGIN WITH?

23 THERE ARE CERTAIN THINGS ABOUT THIS LITIGATION THAT
24 HAS COME BEFORE ME THAT HAS BEEN CHALLENGING BECAUSE
25 THERE HAS BEEN SOME CLARITY OF SOME THINGS THAT HAVE

1 HAPPENED. MANY OF THEM TO MY SURPRISE. AND I CONTINUE
2 TO BE SURPRISED.

3 BUT I AM TRYING TO PERFORM MY ROLE AND ALSO REMAIN
4 RESPECTFUL OF THIS PROCESS, THAT THERE IS SOME VALUE IN
5 THIS PROCESS IN ATTORNEYS COMING INTO COURT AND BEING AND
6 DOING THEIR JOB WELL, AND BEING THE ADVOCATES FOR THEIR
7 CLIENTS THAT THEY NEED TO BE.

8 LAWYERS CAN BE WRONG. LAWYERS CAN BE ABSURDLY
9 WRONG. BUT IF THE LAWYERS RESPECT THE PROCESS AND THE
10 COURT'S INVOLVEMENT IN THAT PROCESS, THE END RESULT IS
11 THAT THE COURT SYSTEM FUNCTIONS PROPERLY. AND THAT
12 SUBJECTIVE WORD OF JUSTICE IS FOUND.

13 I AM STRUGGLING AT THIS POINT WITH THIS MOTION
14 BECAUSE THERE'S SOME OBVIOUS THINGS THAT TELL ME WHY NOT
15 JUST GO AHEAD AND HAVE THIS HEARING? WHY NOT JUST GO
16 AHEAD AND HAVE EVERYBODY COME IN AND EXPLAIN TO ME
17 FURTHER WHAT WENT ON WHEN I HAVE ALREADY HEARD FOR HOW
18 MANY YEARS AND HOW MUCH MOUNTAINS AND VOLUMES OF EVIDENCE
19 THAT I'VE ALREADY RECEIVED AS TO I FEEL LIKE I KNOW WHAT
20 WENT ON?

21 IN MY HUMBLE ASSESSMENT OF ISSUES THAT DO NOT
22 PERTAIN TO THIS MOTION WHAT WENT ON IN TENNESSEE IS THAT
23 WE HAD VERY SMART LAWYERS THERE. AND THEY DID NOT LIKE
24 WHAT WAS GOING ON IN TENNESSEE.

25 AND THEY CAME UP WITH A WAY, THEY DEVISED A PLAN,

1 WE'RE GOING TO DO SOMETHING. WE'RE GOING TO BRING IT --
2 AND PART OF THAT PLAN, I BELIEVE THAT MR. MULLENS EVEN
3 ACKNOWLEDGED THAT HE THOUGHT ABOUT IT IN THE CAR DRIVING
4 BACK FROM MYRTLE BEACH OR SOMEPLACE. AND HE EMPLOYED MR.
5 LEATH AND MR. -- THESE OTHER LAWYERS THAT ARE MENTIONED.
6 AND WE'RE GOING TO COME UP WITH THIS PLAN. AND PART OF
7 OUR PLAN IS GOING TO BE THAT WE'RE GOING TO FILE A CLASS
8 ACTION IN SOUTH CAROLINA. AND WE'RE GOING TO GET THESE
9 PEOPLE OUT OF TENNESSEE.

10 THE DOCUMENTS BEFORE ME THAT HAVE BEEN PRESENTED BY
11 MR. ALFORD THAT I'VE READ OVER AND OVER IS THAT WHEN THEY
12 FILED THAT LITIGATION, THERE WAS NOT EVEN A CLASS ACTION
13 THAT WAS CERTIFIED IN TENNESSEE. ONE OF THE MOTIONS THAT
14 HAS BEEN FILED BY ONE OF THE LAWYERS THAT IS NOT PRESENT
15 IN THIS COURTROOM ASSERTED THAT TO JUDGE KEMMERLIN. WE
16 KNOW THAT THERE WAS NOT AN AMENDED COMPLAINT IN THAT CASE
17 FILED UNTIL SOME YEARS LATER AND HAD TO BE FILED NUNC PRO
18 TUNC IN ORDER FOR IT TO RELATE BACK FOR IT TO BECOME A
19 NATIONAL-WIDE CLASS ACTION LITIGATION.

20 THERE ARE SOME OBVIOUS THINGS THAT I KNOW ABOUT THIS
21 CASE. I KNOW THROUGH PREMIUM INVESTMENTS, IS THAT THE
22 CASE, THAT THE DUTIES THAT ARISE TO COUNSEL IN CLASS
23 ACTION LITIGATION AND ALSO CLASS REPRESENTATIVES, THOSE
24 DUTIES CAN ARISE FAR, FAR BEYOND THE TIME WHEN A JUDGE
25 FINALLY SAYS, OKAY, I'M GOING TO CERTIFY A CLASS. THOSE

1 DUTIES CAN ARISE EARLY.

2 AND THE PERSONS WHO THAT FIDUCIARY RELATIONSHIP THAT
3 IS ESTABLISHED BY UNDER THE LAWS OF OUR COURTS, THE RULES
4 THAT APPLY IN ALL THESE ETHICAL BOOKS, THAT FIDUCIARY
5 DUTY, ONCE IT ARISES, IT POSES A VERY HIGH BURDEN ON BOTH
6 THE CLASS REPRESENTATIVE AND CLASS COUNSEL.

7 WHEN THE COURT IN SOUTH CAROLINA WAS CALLED UPON IN
8 THIS PARTICULAR CASE IN SOUTH CAROLINA THAT'S NOW BEFORE
9 ME, WHEN THE LAWYERS STARTED TO PURSUE THAT AVENUE OF
10 STRATEGY TO ADDRESS THE TENNESSEE COURT, I AM OF THE
11 OPINION DUTIES AROSE.

12 WHEN THEY WANTED TO EMPLOY THE USE OF CLASS ACTION
13 LITIGATION IN THE STATE OF SOUTH CAROLINA, THERE WERE
14 SEPARATE FIDUCIARY DUTIES THAT AROSE TO THE PEOPLE IN
15 SOUTH CAROLINA THAT WERE GOING TO CONSTITUTE THAT CLASS.
16 IT'S OBVIOUS.

17 AND I HAVE STRUGGLED WITH THIS IDEA THAT'S
18 DOCUMENTED, SO VOLUMINOUSLY, ALMOST, THAT MONEY WAS PAID
19 AND WAS PAID FOR THE SPECIFIC PURPOSE OF SHUTTING DOWN
20 THE SOUTH CAROLINA CLASS ACTION OR AT LEAST STIFLING THE
21 SOUTH CAROLINA CLASS ACTION SO THAT THE TENNESSEE CASE
22 COULD BE RIPENED AND ALL OF THE LEGAL AVENUES COULD BE
23 EXHAUSTED, I.E., UP THE APPELLATE LADDER, BACK DOWN TO
24 THE TRIAL COURT, BACK UP TO THE APPELLATE LADDER, COULD
25 BE EXHAUSTED FOR THE SPECIFIC -- AND THAT THAT MONEY WAS

1 PAID FOR THE SPECIFIC PURPOSE OF ENHANCING THAT ARGUMENT
2 AND THAT POSITION IN SOUTH CAROLINA THAT WE CAN COME INTO
3 SOUTH CAROLINA COURT AND WE CAN SAY, SOUTH CAROLINA, YOU
4 DON'T HAVE A CASE ANYMORE BECAUSE FULL, FAITH AND CREDIT
5 IS GOING TO APPLY BECAUSE THE TENNESSEE COURT HAS
6 EXHAUSTED ALL OF ITS ACTIONS. IT'S EXHAUSTED, YOU KNOW,
7 ALL POSSIBLE AVENUES OF APPEALS, AND IT IS A FINAL
8 RULING. AND, THEREFORE, BASED UPON THE CONSTITUTIONAL
9 ARGUMENT WE'RE GOING TO SHUT YOU DOWN, SOUTH CAROLINA.

10 AND IT'S SO CLEAR THAT THE SOUTH CAROLINA CASE DID
11 NOT PROCEED IN WHAT I WOULD DETERMINE AND CALL A
12 REASONABLE FASHION IN PROTECTING THE INTEREST OF THAT
13 CLASS BECAUSE THE PEOPLE WHO ARE DRIVING THAT CAR, THAT
14 WAS PULLING THAT SOUTH CAROLINA CLASS HAD DECIDED, WE GOT
15 WHAT WE WANTED IN TENNESSEE, AND SO WE'RE NOT GOING TO DO
16 ANYTHING IN SOUTH CAROLINA. AND WE'RE GOING TO LET THE
17 SOUTH CAROLINA FRUIT ON THAT TREE DIE. AND THEN WE WON'T
18 HAVE ANY PROBLEMS.

19 THOSE THINGS ARE OBVIOUS TO ME. AND I WILL WELCOME,
20 IF WE, I MEAN, IF EVER THOSE ISSUES, IF I HAVE TO DECIDE
21 THOSE ISSUES ONE DAY, I WILL WELCOME THE RECEIPT OF ANY
22 FACTUAL INFORMATION ANYBODY WANTS TO GIVE ME TO TRY TO
23 CHANGE MY OPINION OF THOSE. BUT THOSE ARE OPINIONS THAT
24 THE FACTS THAT HAVE BEEN PRESENTED TO ME ARE JUST
25 SCREAMING AND YELLING.

1 BUT I'M HERE FOR PURPOSES OF A MOTION RIGHT NOW THAT
2 DEAL WITH LAWYERS WHO RECEIVED MONEY, SUBSTANTIAL MONEY,
3 EIGHT HUNDRED SOME ODD THOUSAND DOLLARS, OR SIX HUNDRED
4 THOUSAND DOLLARS AS SOME PEOPLE WANT TO SAY, OR OTHER
5 PEOPLE WANT TO SAY ABOUT TWO HUNDRED AND FIFTY TO THREE
6 HUNDRED THOUSAND DOLLARS.

7 DEPENDS ON WHOSE FIGURES YOU WANT TO USE AND HOW YOU
8 WANT TO RELATE THAT MONEY, WHETHER IT'S MONEY PAID
9 THROUGH A SETTLEMENT IN POSEY OR WHETHER IT WAS PAID
10 THROUGH A SETTLEMENT, YOU KNOW, WHETHER IT WAS PAID
11 BECAUSE THEY DID WORK RELATED TO POSEY AND THE CARDAMONE
12 CASE OR WHETHER IT WAS PAID SOLELY FOR THE WORK IN
13 CARDAMONE. BUT IT'S A SUBSTANTIAL AMOUNT OF MONEY NO
14 MATTER HOW YOU CUT IT.

15 AND IT IS A SUBSTANTIAL AMOUNT OF MONEY TO ME WHEN I
16 HAVE APPROVED A FEE TO THE LAWYERS THAT HAVE SAT ON THAT
17 SIDE OF THE COURTROOM, OPPOSITE DRYVIT, THAT ALMOST PALES
18 IN COMPARISON TO THE AMOUNT OF TIME THAT I THINK THAT
19 BASED UPON WHAT WAS REPRESENTED TO THE JUDGE IN TENNESSEE
20 WOULD BE A THIMBLE OF TIME THAT THE LAWYERS SPENT IN
21 TENNESSEE TO WHICH THEY RECEIVED THAT MONEY TO ENHANCE A
22 SETTLEMENT COMPARED TO THE LAWYERS THAT HAVE SAT ON THIS
23 SIDE OF THE COURTROOM IN FRONT OF ME AND THE AMOUNT OF
24 MONEY THEY'VE RECEIVED.

25 THE COMPARISON OF THOSE FEES TELLS ME THAT THERE WAS

1 A SUBSTANTIAL AMOUNT OF MONEY THAT WAS PAID IN THE FORM
2 OF LAWYER FEES FOR WORK, IF YOU WANT TO SAY IT'S
3 ASSOCIATED WITH THE DRYVIT -- WITH THE POSEY CASE, YOU
4 CAN, BUT IT IS DIRECTLY RELATED TO THE LEGAL STRATEGY
5 THAT WAS DEVELOPED TO EMPLOY THE USE OF THE SOUTH
6 CAROLINA COURT TO SET UP A CLASS ACTION.

7 I HAVE READ THE JUDGE'S ORDER FOR TENNESSEE. I'VE
8 READ THE AFFIDAVIT. I CANNOT GET AROUND THE FACT THAT
9 THOSE SETTLEMENTS AND NEGOTIATIONS WOULD HAVE NEVER TAKEN
10 PLACE BUT FOR THE VERY SMART AND INTELLECTUAL STRATEGY
11 THAT WAS EMPLOYED BY THOSE LAWYERS THAT SAID, LET'S FILE
12 A CLASS ACTION IN SOUTH CAROLINA, AND LET'S SEE WHAT WE
13 CAN DO ABOUT GETTING SOMETHING DONE ABOUT THIS HORRIBLE
14 SETTLEMENT, HORRIBLE AS BEING DEFINED BY THE LAWYERS WHO
15 RECEIVED THE FEES, THIS HORRIBLE SETTLEMENT THAT WAS
16 GOING ON UP IN TENNESSEE. THOSE ARE SOME OBVIOUS THINGS
17 THAT I'M STRUGGLING WITH.

18 WITH THOSE COMMENTS BEING SHARED, I'VE GOT A COUPLE
19 OF QUESTIONS. AND, MR. ALFORD.

20 MR. ALFORD: SIR.

21 THE COURT: YOUR COUNSEL OUTSIDE OF THIS COURTROOM
22 WANTS ME TO BELIEVE, AND YOU'RE AT SOME POINT GOING TO
23 HAVE TO FACE THE ARGUMENT, AND IT'S AN ARGUMENT THAT I
24 SCRATCH MY HEAD OVER AS WELL, WHERE IS THIS LINE BETWEEN
25 GOOD LAWYERING, BETWEEN SMART LAWYERING, BETWEEN THEM --

1 BETWEEN THE LAWYERS THAT WERE PAID THE FEES, WHERE'S THAT
2 LINE BETWEEN GOOD LAWYERING AND IMPROPER LAWYERING?

3 MR. ALFORD: CANDOR TO THE TRIBUNAL, IN RULE 23.

4 THE COURT: ALL RIGHT. NOW HOW DOES THAT CANDOR --
5 I'VE REVIEWED THE TRANSCRIPT FROM THE PRECEDING HEARINGS.
6 I'VE ALSO REVIEWED MR. GRIMBALL'S ARGUMENTS TO ME WHEN HE
7 WAS EXPLAINING WHAT WENT ON IN TENNESSEE. AND MR.
8 GRIMBALL ACKNOWLEDGED WHEN I INCORRECTLY ASKED HIM, DID
9 JUDGE SLOAN APPROVE THOSE FEES? HE LET ME GO ABOUT
10 PROBABLY FIFTEEN SECONDS OR SO, BUT HE CORRECTED ME AND
11 SAID, I DON'T WANT YOU TO BE MISLED. AND I BELIEVE HE
12 INFORMED ME THAT THE JUDGE HAD NOT APPROVED THOSE FEES.

13 SO HOW DOES THAT GET YOU INTO A POSITION THAT YOU
14 WANT TO NOW ASK ME TO DIG UP ALL THIS STUFF, DIG UP HOW
15 YOU WANT ME TO REVISIT THESE ISSUES AND ASK THESE LAWYERS
16 TO COME IN TO ACCOUNT FOR THEIR FEES?

17 BECAUSE THEY DID A, I MEAN, IF IT HAD NOT BEEN FOR
18 WHAT THEY DID YOU PROBABLY WOULD NOT BE STANDING IN FRONT
19 OF ME TODAY BECAUSE THE CASE WOULD HAVE PROBABLY BEEN
20 CERTIFIED AS A CLASS ACTION IN TENNESSEE, JUDGE SLOAN
21 WOULD HAVE BEEN -- HIS RULING WOULD HAVE BEEN THAT, YOU
22 KNOW, THE CASE IS -- A NATION-WIDE CLASS ACTION, IT WOULD
23 HAVE BECOME A *RES JUDICATA*.

24 MR. ALFORD: BUT THEY DID. THEY DID. AND WHAT THEY
25 DID WAS SMART, AND IT WAS GOOD. AND IT WAS EXCELLENT

1 LAWYERING, BUT THEN IT WENT SOUTH. AND IT WENT BAD. AND
2 IT WENT BAD WHEN THEY MADE A DEAL TO TAKE MONEY OUT OF
3 TENNESSEE AND NOT TO COME BACK TO SOUTH CAROLINA AND TELL
4 THE TRUTH.

5 AND WHEN IT WENT REALLY WRONG IS WHEN WE SAT IN THE
6 COURTROOM ON DECEMBER THE 5TH, 2005, NONE OF US KNEW EACH
7 OTHER, NONE OF US REALLY KNEW, LORD, WHAT A JOURNEY WE
8 WOULD GO ON IN THIS PROCESS. BUT THEY SAT THERE, THEY
9 HAD MONEY IN THEIR POCKET, THEY HAD MADE A DEAL. AND
10 PETER MORGAN EMAILED ABOUT THE DEEP FREEZE AND TALKS
11 ABOUT THAT. THEY HAD MADE THIS DEAL.

12 AND THEY DIDN'T TELL YOU. THAT'S THE LINE FOR ME,
13 JUDGE. AND WITH DUE RESPECT, THAT'S GOT TO BE THE LINE
14 FOR THE COURT.

15 **THE COURT:** I'M HAVING -- I'M TRYING TO PERCEIVE
16 THAT -- I'M TRYING TO IDENTIFY WHERE, YOU KNOW, THEY
17 CONCEPTUALLY CAME UP WITH A STRATEGY. THEY SAID, OKAY,
18 CONCEPTUALLY WE HAVE GOT TO INCREASE OUR HAND IN
19 TENNESSEE. AND CONCEPTUALLY THEY CAME UP WITH THIS IDEA
20 THAT PART OF WHAT WE'RE GOING TO DO IS WE'RE GOING TO
21 OPT-OUT PEOPLE IN SOUTH CAROLINA -- WE'RE GOING TO OPT-
22 OUT THE PEOPLE IN SOUTH CAROLINA, AND WE'RE GOING TO
23 INCREASE OUR BARGAINING STRENGTH IN TENNESSEE.

24 NOW THE REALITY OF WHAT HAPPENED THOUGH WHERE I COME
25 INTO PLAY IS THEY INVOKED THE COURT SYSTEM IN SOUTH

1 CAROLINA. THEY ASKED FOR A CLASS ACTION SUIT TO BE
2 ESTABLISHED. THEY WENT TO A JUDGE. HE APPROVED IT.

3 MR. ALFORD: AND THAT'S THE PROBLEM. THEY TOOK THAT
4 CLOUT, OKAY, THEY TOOK THAT COLLECTIVE CLOUT NOW THAT WE
5 REPRESENT THIS BIG HERD OF PEOPLE IN SOUTH CAROLINA. AND
6 THEY WENT UP TO TENNESSEE AND THEY USED THAT CLOUT OF A
7 CERTIFIED SOUTH CAROLINA CLASS, LIKE MR. LEATH'S LETTER
8 TALKS ABOUT WHEN HE WAS TAKING THE HARD LINE WITH THEM
9 BEFORE THEY HAD A DEAL. WE'VE GOT THIS SOUTH CAROLINA
10 CLASS, WE'RE GOING TO GO TO TRIAL, AND WE'RE GOING TO
11 WHIP YOU.

12 WELL, THEN THEY SETTLED, OKAY. AND THE STORY IS,
13 WE'VE ROLLED EVERYONE -- WE'VE MADE THE SETTLEMENT
14 BETTER. AND WE EARNED MONEY BY MAKING THE SETTLEMENT
15 BETTER FOR EVERYBODY, THE POSEY SETTLEMENT'S BETTER.

16 WELL, HERE'S THE PROBLEM WITH THAT, JUDGE, NONE OF
17 THEIR CLIENTS TOOK IT. AND THEY DIDN'T COME BACK AND
18 THEY DIDN'T TELL EVERYBODY IN SOUTH CAROLINA, HEY, WE'VE
19 APPROVED POSEY, WE'RE GOING TO DO A NEW NOTICE, WE'VE
20 DONE BETTER.

21 THEY DIDN'T COME BACK AND SAY TO JUDGE KEMMERLIN,
22 HEY, WE CAME BACK WITH -- WE APPROVED A SETTLEMENT, WE
23 GOT PAID A BONUS, WE GOT PAID SIX HUNDRED THOUSAND
24 DOLLARS, WE GOT TWO TWENTY-FIVE MORE COMING THE DAY AFTER
25 THIS CASE GETS DISMISSED. THEY DIDN'T TELL HIM THAT.

1 AND THAT'S, RESPECTFULLY, JUDGE, I MEAN, I DON'T
2 KNOW WHY YOU'RE STRUGGLING SO HARD. RULE 23 PUTS IT
3 RIGHT IN YOUR -- RIGHT IN YOUR LAP. I HATE TO SAY IT.
4 AND WHAT IT IS IS THOSE FEES WERE RELATED TO THIS CASE.
5 AND THAT'S WHY I WANT YOU TO DIG IT UP. THAT'S WHY.

6 THE COURT: WELL, I APPRECIATE YOUR ADVOCACY AND
7 PUTTING ME IN THE HOT-SEAT. BUT YOU ARE CONTINUING --
8 AND IT'S WHERE I'M HAVING TO TRY TO BE SURE I AM CLEAR.
9 WHAT I'M DOING TODAY AND WHAT I'M BEING ASKED TO DO TODAY
10 IS YOU ARE ARGUING -- AND, AGAIN, THEY MIGHT CROSS OVER,
11 BUT YOU'RE STILL ARGUING THE MERITS OF YOUR LAST MOTION
12 AGAINST DRYVIT WHERE YOU WANTED ME TO GRANT SUMMARY
13 JUDGMENT AND TO DECLARE WHAT HAD GONE ON TO BE WRONG.

14 MR. ALFORD: I AM, AND I'LL -- BUT I'LL TELL YOU
15 WHY, BECAUSE IT TAKES TWO. YOU CAN'T MAKE A DEAL WITH
16 YOURSELF. YOU CAN'T CONSPIRE WITH YOURSELF. YOU ---

17 THE COURT: WELL, ---

18 MR. ALFORD: --- CAN'T -- DRYVIT COULDN'T HAVE DONE
19 IT ALONE.

20 THE COURT: DO I HAVE TO FIND IN ORDER TO PROCEED OR
21 LET'S SAY IF I FIND THAT, OKAY, I WANT TO HAVE ANOTHER
22 HEARING, DO I NEED TO BE CONVINCED THAT THERE WAS
23 MISCONDUCT?

24 MR. ALFORD: NO. NO, I DON'T THINK YOU DO.

25 THE COURT: UM-HUM (AFFIRMATIVE).

1 MR. ALFORD: OKAY. I THINK IF -- I THINK WHAT RULE
2 23 AND RULE 11 -- I THINK YOU CAN BRING ANYBODY IN HERE
3 THAT'S APPEARED BEFORE YOU AND SAY, HEY, WHAT YOU TOLD ME
4 WASN'T RIGHT, LET'S FIGURE IT OUT. I THINK YOU CAN
5 ALWAYS DO THAT. I THINK ANY JUDGE IN THE STATE CAN DO
6 THAT.

7 BUT WHAT I THINK ABOUT THIS PARTICULAR INSTANCE IS
8 THE FINDINGS, YOU KNOW, MR. STAIR WROTE ME THAT LETTER,
9 AND HE ASKED ME ---

10 THE COURT: THE LAST ONE THAT SAID BE SURE YOU TELL
11 JUDGE HAYES ---

12 MR. ALFORD: YES, SIR. YES, SIR. MAKE SURE -- I
13 WANT HIM TO KNOW THE WHOLE STORY. WELL, NOW YOU KNOW THE
14 WHOLE STORY. IT AIN'T MUCH DIFFERENT THAN, I MEAN, IT'S
15 THE SAME STORY.

16 AND THE REASON I THINK YOU FEEL LIKE I'M REARGUING
17 FORMER ARGUMENTS IS IT'S THE EXACT SAME CONDUCT, IT'S
18 JUST THE OTHER SIDE OF THE COIN. AND MY PROBLEM -- I
19 DON'T THINK YOU HAVE TO MAKE A FINDING OF MISCONDUCT. I
20 THINK YOU'VE GOT TO DECIDE WHETHER OR NOT THEY EARNED
21 THOSE FEES AND WHETHER OR NOT YOU AS THE JUDGE UNDER RULE
22 23 CAN APPROVE THOSE FEES.

23 'CAUSE I THINK IT'S JUST INSURMOUNTABLE EVIDENCE
24 THAT IT'S RELATED TO THIS CASE. THAT'S WHY THE
25 NEGOTIATIONS THAT HAVE THE DOLLAR SIGNS AND DOLLAR

1 AMOUNTS UNDERNEATH IT COME UNDER THE HEADER OF SC CLASS.

2 BECAUSE WHAT THEY DID IS THEY USED THAT CLOUT TO GO
3 UP THERE -- AND THIS IS WHERE TO ME IT RUNS OFF THE ROAD.
4 AND THIS IS WHERE THEY RUN OFF THE ROAD. THEY WERE DOING
5 A GREAT JOB. THEY WERE DOING A FINE JOB. THEY WENT UP
6 THERE, THEY HAD THE SOUTH CAROLINA CLASS, THEY TOOK
7 MONEY, THEY SAY THEY IMPROVED THE POSEY SETTLEMENT, BUT
8 THEY TOOK MONEY, THEY TOOK BETTER SETTLEMENTS FOR THEIR
9 OWN CLIENTS, AND THEN THEY NEVER CAME BACK AND BASICALLY
10 JUST THREW THE REST OF THE CLASS UNDER THE BUS.

11 MR. SCEARCE, MR. TREON, MR. CHRISTIAN, DIDN'T TELL
12 THEM ANYTHING. AND DIDN'T COME TELL YOU, HEY, THIS IS
13 WHAT WE'VE DONE, HOPE IT'S OKAY. WILL YOU, PLEASE,
14 APPROVE IT?

15 AND YOU ASKED ME THE DIFFERENCE BETWEEN GOOD
16 LAWYERING AND GOING ASTRAY IN THAT STRATEGY -- IN THE
17 REALM OF THAT STRATEGY. THAT'S WHERE IT GOES ASTRAY.
18 WHEN YOU DON'T COME BACK AND TELL THE TRUTH, THAT'S WHERE
19 IT GOES ASTRAY.

20 IT'S, I MEAN, I HATE TO BE -- MAYBE I'M JUST DUMB,
21 ---

22 THE COURT: YOU'RE ---

23 MR. ALFORD: --- BUT IT SEEMS KIND OF SIMPLE.

24 THE COURT: YOU'RE SAYING THAT PEOPLE LIKE TREON AND
25 SCEARCE, THAT THEY WERE NEVER INFORMED OF THE SETTLEMENT

GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 TRANSCRIPT, PAGE 6 THROUGH 13, IS A DISCUSSION WITH THE
2 JUDGE ABOUT A MOTION THAT HAD BEEN FILED BY ONE TENNESSEE
3 LAWYER TRYING TO DISQUALIFY ANOTHER TENNESSEE LAWYER
4 BECAUSE THEY HAD A DISPUTE OVER THE FEES THAT WERE BEING
5 PAID. SO THIS HAPPENS IN OTHER COURTS AS WELL.

6 IN ANY EVENT, THE FEE THAT THEY'RE ARGUING OVER IS,
7 AS I UNDERSTAND IT, THE LOCAL COUNSEL FEE. THERE'S THE
8 NATIONAL COUNSEL FEE, THERE'S THE LOCAL COUNSEL FEE. THE
9 LOCAL COUNSEL FEE WAS NINE HUNDRED THOUSAND DOLLARS THAT
10 THEY'RE ARGUING OVER HOW THAT'S GOING TO BE SPLIT BETWEEN
11 TWO LAWYERS THAT SERVED AS LOCAL COUNSEL TO THE CLASS IN
12 TENNESSEE.

13 THEN THE OTHER FEES THAT ARE PAID, GOT LOCAL COUNSEL
14 FEES, CLASS COUNSEL FEES. THE OTHER FEES THAT ARE PAID
15 ARE OBJECTOR'S COUNSEL'S FEES.

16 AND MY UNDERSTANDING IS THAT IF YOU ASKED MR.
17 DOFFERMYRE THE SIX HUNDRED THOUSAND DOLLARS WAS PAID TO
18 SOUTH CAROLINA WOULD BE CHARACTERIZED AS AN OBJECTOR'S
19 COUNSEL FEE.

20 THE COURT: BUT WAS THE OBJECTOR'S COUNSEL FEE
21 PRESENTED TO JUDGE SLOAN AS A LINE ITEM TO APPROVE?

22 MR. FIELDS: NOT THAT I'M AWARE OF, YOUR HONOR.

23 THE COURT: ALL RIGHT. SO IS IT MY UNDERSTANDING
24 THAT IN THE -- THAT PROBABLY WHAT HAPPENED, DOFFERMYRE,
25 I'M NOT SAYING IT UNILATERALLY AS BEING A BAD THING, BUT

1 DOFFERMYRE IS THE ONE WHO WOULD HAVE DECIDED AND WOULD
2 HAVE NEGOTIATED WITH SOUTH CAROLINA CLASS COUNSEL AT THE
3 TIME AS TO HOW MUCH MONEY THEY WERE GOING TO GET AS FAR
4 AS A FEE IS CONCERNED?

5 MR. FIELDS: THAT'S CORRECT.

6 THE COURT: ALL RIGHT.

7 MR. FIELDS: AND SO MR. DOFFERMYRE NEGOTIATES. AND
8 AS I UNDERSTAND IT, THEY GOT TO WHERE MR. DOFFERMYRE WAS
9 WILLING TO GIVE -- THERE WERE TWO NEGOTIATIONS GOING ON.
10 ONE, DRYVIT, YOU'VE GOT TO ENHANCE THIS SETTLEMENT.
11 YOU'VE GOT TO DO MORE IN POSEY THAN YOU'VE DONE, OR WE'RE
12 GOING TO OBJECT, OR WE'RE GOING TO FILE AN APPEAL, AND
13 IT'S GOING TO DELAY THIS, AND YOU WON'T GET YOUR
14 SETTLEMENT DONE, AND YOU'LL RUN THE RISK THAT OUR
15 OBJECTION WILL BE FOUND, YOU KNOW, SO YOU'VE GOT TO
16 ENHANCE THE SETTLEMENT.

17 AND SO DRYVIT DOES. DRYVIT ENHANCES THE SETTLEMENT
18 IN ORDER TO SATISFY SOUTH CAROLINA CLASS COUNSEL. THEY
19 ENHANCE THE SETTLEMENT SO THAT SOUTH CAROLINA CLASS
20 COUNSEL, AS AN OBJECTOR WILL SAY, THIS SETTLEMENT IS FAIR
21 AND ADEQUATE. IT IS SUFFICIENT FOR THE NATIONAL CLASS,
22 OKAY, INCLUDING THE OBJECTOR THAT THE SOUTH CAROLINA
23 COUNSEL ARE REPRESENTING.

24 SO ---

25 THE COURT: AND THAT OBJECTOR AT THE TIME WOULD HAVE

1 BEEN THIS MS. ---

2 MR. PHILLIPS: DeLOACHE.

3 MR. FIELDS: MS. DeLOACHE.

4 THE COURT: DeLOACHE.

5 MR. FIELDS: SO DRYVIT ENHANCES. AND THAT'S THE
6 NEGOTIATION THAT'S GOING ON WITH DRYVIT.

7 THEN THERE'S THE NEGOTIATION THAT'S GOING ON WITH
8 MR. DOFFERMYRE ABOUT FEES THAT ARE -- THAT WILL BE PAID.

9 THE COURT: NOW WHO'S DOING THIS NEGOTIATION WITH
10 DOFFERMYRE? SOUTH CAROLINA COUNSEL?

11 MR. FIELDS: SOUTH CAROLINA COUNSEL IS NEGOTIATING
12 WITH DOFFERMYRE AS TO FEES THAT WILL BE PAID TO THEM FOR
13 THE BENEFIT THAT THEY'VE CONFERRED ON THE NATIONAL CLASS
14 BY GETTING THE THING ENHANCED BY COMING IN AND OBJECTING.
15 WHAT'S THEIR OBJECTOR'S FEE GOING TO BE?

16 DOFFERMYRE IS THEN COMING TO DRYVIT AND SAYING, I
17 NEED MORE FEES 'CAUSE I GOT MORE MOUTHS TO FEED, ---

18 THE COURT: UM-HUM (AFFIRMATIVE).

19 MR. FIELDS: --- SO TO SPEAK. TO WHICH DRYVIT IS
20 SAYING, NO. YOU'VE GOT YOUR ATTORNEYS' FEES. WE'RE
21 ENHANCING THIS FOR THE CLASS. OBJECTOR COUNSEL FEES ARE
22 YOUR PROBLEM. YOU'RE, YOU KNOW, A EXPERIENCED NATIONAL
23 TRIAL COUNSEL OR CLASS ACTION TRIAL COUNSEL. YOU KNOW
24 OBJECTORS ARE COMING. YOU KNOW THEY'RE GOING TO BE
25 OBJECTOR'S FEES. THAT WAS ALL TAKEN INTO CONSIDERATION

1 WHEN WE NEGOTIATED THE ORIGINAL SETTLEMENT. THEY COME
2 OUT OF THE ELEVEN SIX THAT WE'VE PAID.

3 SO DOFFERMYRE HAS AGREED, SIX HUNDRED THOUSAND
4 DOLLARS TO OBJECTOR'S COUNSEL. THE ENHANCEMENTS HAVE
5 BEEN AGREED UPON. SOUTH CAROLINA COUNSEL IS SAYING WE
6 NEED EIGHT HUNDRED AND TWENTY-FIVE.

7 AND THE SEPTEMBER 29TH MEMO OR EMAIL THAT'S EXHIBIT
8 17 THAT INCLUDES AN APRIL 23RD, 2004 EMAIL SHOWS HOW THAT
9 DISPUTE WAS RESOLVED. AND THE WAY THAT DISPUTE WAS
10 RESOLVED WAS THERE WAS AN ADDITIONAL TWO HUNDRED AND
11 TWENTY-FIVE THOUSAND DOLLARS PROMISED.

12 AND DRYVIT MADE THAT POSSIBLE BY AGREEING TO DEFRAY
13 SOME INSPECTION COSTS, SOME ADDITIONAL INSPECTION COSTS.
14 BECAUSE WHEN DRYVIT ENHANCED THE SETTLEMENT THERE WERE
15 SOME INSPECTION COSTS THAT WERE THE CLASS' RESPONSIBILITY
16 THAT WOULD HAVE COME OUT OF THE CLASS RESOURCES OF ABOUT
17 TWO HUNDRED AND TWENTY-FIVE THOUSAND DOLLARS.

18 THERE WERE ADDITIONAL INSPECTIONS NECESSARY BECAUSE
19 OF THE ENHANCEMENTS, THE ENHANCED BENEFITS. AND THIS
20 ADDITIONAL BURDEN ON THE CLASS WAS ABOUT TWO HUNDRED AND
21 TWENTY-FIVE THOUSAND DOLLARS. AND DRYVIT HAD NOT AGREED
22 TO BEAR THAT BURDEN BECAUSE THAT WAS A CLASS BURDEN. AND
23 THE CLASS HAD TO BEAR THAT.

24 SO TO RESOLVE THIS DISPUTE DRYVIT AGREED TO BEAR THE
25 INSPECTION BURDEN AND MR. DOFFERMYRE AGREED TO AN

1 ADDITIONAL TWO HUNDRED AND TWENTY-FIVE THOUSAND DOLLARS
2 PAYABLE WHEN CERTAIN THINGS HAPPENED IN SOUTH CAROLINA.
3 AND THAT -- SO TO THAT EXTENT DRYVIT PROVIDED SOME
4 ADDITIONAL VALUE BY PAYING THESE INSPECTION COSTS ALL OF
5 WHICH HAVE BEEN PAID.

6 SO ---

7 THE COURT: TWO THINGS ---

8 MR. FIELDS: OKAY.

9 THE COURT: --- BEFORE YOU MOVE ON. ALL OF THE
10 EIGHT HUNDRED AND TWENTY-FIVE HAS BEEN PAID?

11 MR. FIELDS: NO, ---

12 THE COURT: ALL OF THE ---

13 MR. FIELDS: --- BY DRYVIT.

14 THE COURT: NOT BY DRYVIT?

15 MR. FIELDS: DRYVIT HAS PAID THE ELEVEN SIX THAT IT
16 AGREED TO PAY. IT HAS PAID THE INTEREST ON THE ELEVEN
17 SIX THAT IT AGREED TO PAY AS SET FORTH IN THE TRANSCRIPT
18 THAT IS DEFENDANT'S EXHIBIT 2. AND DRYVIT HAS PAID THE
19 TWO HUNDRED AND TWENTY-FIVE THOUSAND DOLLARS OF
20 ADDITIONAL INSPECTION COSTS THAT WOULD HAVE BEEN THE
21 CLASS BURDEN, BUT WEREN'T THE CLASS BURDEN BECAUSE DRYVIT
22 AGREED TO BEAR THEM.

23 THE COURT: WHERE DID THAT ---

24 MR. FIELDS: DRYVIT HAS PAID THOSE.

25 THE COURT: WHERE DID THAT TWO TWENTY-FIVE GO?

1 **MR. FIELDS:** THAT TWO TWENTY-FIVE WENT TO THE PEOPLE
2 WHO DID THE INSPECTIONS. IT WAS TWO HUNDRED AND TWENTY-
3 FIVE THOUSAND DOLLARS THAT DOFFERMYRE DIDN'T HAVE TO
4 SPEND OUT OF THE ELEVEN SIX THAT'S IN NATIONAL CLASS
5 COUNSEL'S HANDS.

6 **THE COURT:** SO -- OKAY. SO THAT EQUALS EIGHT
7 HUNDRED AND TWENTY-FIVE?

8 **MR. FIELDS:** THAT EQUALS EIGHT HUNDRED AND TWENTY-
9 FIVE.

10 **THE COURT:** ALL RIGHT. NOW YOUR STATEMENT OF THESE
11 THINGS, THESE OTHER THINGS WOULD BE DONE, IS THAT, THE
12 OTHER THINGS THAT WOULD BE DONE, IS THAT INCLUDED IN THE
13 EMAILS THAT ARE THE ITEMS THAT ARE REFERRED TO IN THE
14 CORRESPONDENCE AND EMAILS OF LET'S NOW STRUCTURE THESE
15 ARGUMENTS SO THAT WHEN WE GO TO SOUTH CAROLINA WE THEN
16 GET THE JUDGE DOWN THERE TO ACCEPT CLASS COUNSEL'S
17 ARGUMENT THAT THE CASE IN TENNESSEE HAS NOW BEEN
18 CONCLUDED, IT'S NOW *RES JUDICATA*, AND THEN IT'S OVER?

19 **MR. FIELDS:** THAT WOULD BE THE CLASS COUNSEL'S
20 ARGUMENT AND INFERENCES THEY MAY BE ASKING THE COURT TO
21 MAKE. THE REFERENCE I WAS MAKING WAS SPECIFICALLY TO THE
22 OTHER THINGS THAT ARE REFERRED TO IN EXHIBIT 17 HAVING TO
23 DO WITH ---

24 **THE COURT:** THE INSPECTIONS?

25 **MR. FIELDS:** WELL, I CAN'T REMEMBER. THERE'S SOME

GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 THE COURT: WELL, I SAID IT PRIOR TO LUNCH AND I'LL
2 SAY IT NOW. I APPRECIATE EVERYONE'S INPUT, AND YOUR
3 SUGGESTIONS, AND GUIDANCE AND WISDOM.

4 BUT I DID, I TOOK, MR. GRIMBALL, YOUR COMMENTS TO
5 MEAN THAT I VERY WELL MIGHT WANT TO THINK VERY HARD
6 BECAUSE FOR SOME REASON SOMEONE MIGHT WANT TO UNDERMINE
7 THE SETTLEMENT OF THE CASE BASED UPON A DESIRE TO SEEK
8 RETRIBUTION AGAINST THIS COURT IN EXERCISING ITS
9 AUTHORITY UNDER RULE 23 TO MONITOR ISSUES THAT ARE
10 RELATED TO THE CLASS.

11 AND THAT WAS CONCERNING ESPECIALLY SINCE I'D ALREADY
12 READ OF WHERE ANOTHER JUDGE HAD DISQUALIFIED CLASS
13 COUNSEL BASED UPON HIS BELIEF, AND I'M NOT GOING TO SAY
14 HE'S WRONG, BUT HIS APPLYING THE TEST OF "APPEARANCE OF
15 IMPROPRIETY" TO A LAWYER TO DISQUALIFY PRIOR CLASS
16 COUNSEL.

17 SO IF LAWYERS ARE HELD TO THAT STANDARD FOR THE
18 PURPOSES OF DISQUALIFICATION, THEN A LAWYER IS GOING TO
19 BE HELD AND LINKED INTO IF ACTION WAS DETERMINED THAT THE
20 LAWYER HAD DONE SOMETHING TO TRY TO UNDERMINE THE
21 SETTLEMENT OF THIS CASE FOR A MOTIVE THAT COULD BE LINKED
22 INTO THIS PRIOR ASSOCIATION WITH CLASS COUNSEL TO A
23 DEGREE THAT HAS ALREADY BEEN LINKED INTO DISQUALIFY A
24 PRIOR CLASS COUNSEL IN A SEPARATE LITIGATION, THAT'S A
25 PRETTY STRONG LINK TO ME. AND SO I WAS TRYING TO

1 ENVISION WHAT I MIGHT FACE LATER.

2 MR. GRIMBALL: NO, SIR. I REALLY -- I NEVER ---

3 THE COURT: OKAY.

4 MR. GRIMBALL: WHATEVER IT WAS I SAID THAT SENT YOU
5 IN THAT DIRECTION, I TAKE IT BACK, JUDGE.

6 THE COURT: ALL RIGHT.

7 MR. GRIMBALL: I DIDN'T MEAN FOR YOU TO GO IN THAT
8 DIRECTION.

9 THE COURT: AND I APPRECIATE YOUR EXPLAINING THAT
10 BECAUSE DRYVIT HAS MADE IT VERY CLEAR TO ME IN TRYING TO
11 BE CAREFUL IN RULING ON MOTIONS THAT ARE FINAL IN NATURE
12 BECAUSE THEY -- THEY'VE EDUCATED ME ON HOW EASY IT IS FOR
13 A PARTY TO WANT TO ENGAGE IN APPELLATE REVIEW OF
14 DECISIONS THAT I MAKE IN ATTEMPT TO STOP ME FROM MAKING
15 DECISIONS. AND SO, YOU KNOW, I HAVE, YOU KNOW, I
16 APPRECIATE YOUR BRINGING THAT TO MY ATTENTION.

17 MR. PHILLIPS: WELL, JUDGE, JUST FOR THE RECORD, YOU
18 KNOW, THE NATURE OF THE DECISION, WE FOCUSED ON RULE 23.
19 BUT THE PROCEEDING IS MORE LIKE A RULE 11 PROCEEDING. A
20 RULE 11, YOU DON'T STAND AS A PARTY IN THE CASE. AND
21 ONLY PARTIES HAVE THE ABILITY OR THE STANDING TO FILE AN
22 APPEAL.

23 IF YOU FIND -- IF YOU FIND IN ANY CIVIL ACTION THAT
24 A LAWYER HAS COMMITTED SOME MISCONDUCT OR PROPOSED A
25 FRIVOLOUS PROCEEDING, YOU HAVE THE AUTHORITY TO HOLD THAT

1 LAWYER, NOT AS A PARTY, BUT AS AN OFFICER OF THE COURT TO
2 COME IN FRONT OF YOU AND ACCOUNT FOR THEIR ACTIONS.

3 AND IF YOU CHOOSE TO FIND THEM IN CONTEMPT FOR THAT,
4 AND YOU CHOOSE TO ORDER THEM TO DO SOMETHING, THEY DON'T
5 HAVE STANDING TO APPEAL THE CASE. THAT IS BETWEEN THE
6 COURT AND THE OFFICERS OF THE COURT, NOT THE PARTIES.

7 AND SO THAT'S WHY WE FOCUSED ON RULE 23, OBVIOUSLY,
8 THAT'S WHAT'S GERMANE TO THIS. BUT IT IS AS TO THE
9 PROCEDURE.

10 AND I PUT THIS IN AN EMAIL TO MR. GRIMBALL. WHERE'S
11 THE HARM? THESE LAWYERS ARE NOT GOING TO BECOME PARTIES
12 IN THIS CASE. WHO ARE THEY GOING TO APPEAL? ARE THEY
13 GOING TO APPEAL THIS CASE ON BEHALF OF DRYVIT? THEY'RE
14 NOT GOING TO APPEAL IT ON BEHALF OF OUR CLIENTS. SO WHO
15 ARE THEY GOING TO APPEAL? THEY DON'T HAVE STANDING TO
16 APPEAL THIS CASE. THEY HAVE STANDING TO APPEAL WHATEVER
17 YOU MIGHT FIND UNDER RULE 11.

18 **THE COURT:** ALL RIGHT. WELL, WE ALL KNOW THAT THESE
19 LAWYERS ARE EXTREMELY GOOD LITIGANTS AND EXTREMELY GOOD
20 ADVOCATES. I DO NOT BELIEVE THAT THEY COULD HAVE DEVISED
21 A PLAN TO INVOKE THE SOUTH CAROLINA JURISDICTION FOR
22 CLASS ACTION PURPOSES FOR -- SO THAT THEY COULD GET SOUTH
23 CAROLINA OUT OF TENNESSEE, BACK DOWN HERE, SO THEY THEN
24 COULD USE THAT AS AN ENTICER TO GET MORE BENEFITS FOR
25 CLASS MEMBERS IN SOUTH CAROLINA AND THEN TO RECEIVE

1 ATTORNEY FEES IN THE AMOUNT THAT THEY RECEIVED UNLESS
2 THEY WERE VERY GOOD LITIGANTS AND STRATEGISTS. AND SO
3 THAT'S PART OF WHAT I'M EXPLORING.

4 I WANT TO DO WHAT I BELIEVE IS APPROPRIATE FOR THE
5 CLASS. AND SO WHILE AT THE SAME TIME UNDERSTANDING THAT
6 I HAVE DUTIES AND OBLIGATIONS THAT I CANNOT COMPROMISE OR
7 JEOPARDIZE IN CARRYING OUT UNDER THE RULES THAT I ALSO
8 HAVE TO DO.

9 I APPRECIATE THE COMMENTS, AND I ALSO THANK YOU FOR
10 YOUR PATIENCE WHILE I ENGAGED IN THE GIVE AND TAKE. IT
11 HELPS ME TREMENDOUSLY IN DECIDING WHAT I'M GOING TO DO.
12 ALL RIGHT.

13 MR. ALFORD, I'M GOING TO REQUEST THAT YOU BEGIN THE
14 PROCESS OF PREPARING ME A RULE TO SHOW CAUSE OR AN ORDER.
15 WELL, LET ME ASK YOU THIS. YOU HAVE TOLD ME THAT YOU
16 HAVE SOMEONE SCHEDULED TO APPEAR IN FRONT OF ME TOMORROW?

17 MR. ALFORD: YES, SIR. AND IT WAS ONLY IN THE EVENT
18 THAT WE REACHED, YOU KNOW, ALL OF OUR HEARINGS. MS.
19 DeLOACHE IS PREPARED, WAS PREPARED TO COME TOMORROW IN
20 THE EVENT HER TESTIMONY WAS NECESSARY, PROBABLY MORE IN
21 THE VEIN OF THE MOTIONS TO DISQUALIFY.

22 THE COURT: ALL RIGHT. MR. GRIMBALL HAS ALREADY
23 INDICATED TO ME HE DOES NOT WISH TO PROCEED WITH HIS
24 MOTION TO DISQUALIFY THE PEOPLE HE FILED THE MOTION
25 AGAINST. DO YOU INTEND TO PROCEED WITH THAT MOTION?

GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 MR. ALFORD: IT TOTALS SIX HUNDRED. THE TWO TWENTY-
2 FIVE IS STILL OUT THERE IN NEVER NEVER LAND.

3 THE COURT: THE TOTAL FEES THAT I WANT TO BE
4 ADDRESSED WILL BE THE EIGHT TWENTY-FIVE.

5 MR. ALFORD: YES, SIR.

6 THE COURT: I APPRECIATE MR. FIELDS' EXPLANATION.
7 TO ME DRYVIT HAS SATISFIED ITS OBLIGATIONS. AND SO I
8 WANT TO KNOW WHERE THE MONEY WENT. WE KNOW, I THINK,
9 WHERE IT CAME FROM. BECAUSE I AM LED TO BELIEVE THAT
10 BASED ON WHAT'S BEEN PROVIDED TO ME THAT THIS MONEY WAS
11 PAID TO PEOPLE TO SERVE AS LAWYERS FOR CLASS COUNSEL AND
12 THERE HAS BEEN NO ACCOUNTING PROVIDED TO ANY COURT.
13 THERE'S NOTHING IN FRONT OF ME THAT INDICATES IT.

14 AND I FEEL LIKE AS KIND ENOUGH AND AS PROFESSIONAL
15 AS MR. STAIR WAS TO GIVE US THAT INFORMATION OR TO GIVE
16 IT TO MR. ALFORD, THAT INFORMATION, IF HE HAD IT, HE
17 WOULD HAVE GIVEN IT. THAT'S ALL I -- THAT, YOU KNOW, I
18 HAVE TO MAKE THAT ASSUMPTION.

19 AND SO IN YOUR PREPARING THE RULE TO SHOW CAUSE IF
20 YOU WANT TO TRY TO BE HELPFUL TO THEM IN IDENTIFYING WHAT
21 ISSUES I NEED TO HAVE ADDRESSED, THAT WOULD BE -- AND IT
22 MAY TAKE SOME TIME, BUT, I MEAN, YOU COULD EVEN PHRASE IT
23 THAT, YOU KNOW, SHOW -- APPEAR BEFORE ME AND TELL ME WHY
24 I SHOULD NOT CONCLUDE THIS OR WHY I SHOULD NOT ASSUME
25 THIS FACT, WHY THIS IS AN INCORRECT CONCLUSION ON MY

1 PART.

2 I WANT TO MAKE IT AS EASY FOR THEM AS POSSIBLE,
3 WHILE AT THE SAME TIME PROVIDING ME WITH AS MUCH
4 INFORMATION AS REASONABLY POSSIBLE TO SATISFY MYSELF THAT
5 MONIES HAVE NOT BEEN PAID INAPPROPRIATELY OR MONIES THAT
6 SHOULD NOT HAVE BEEN PAID OR IN THE PREMIUM INVESTMENT
7 LANGUAGE, BENEFITS ARE NOT BEING WRONGFULLY RETAINED BY
8 OTHERS THAT SHOULD NOT BE.

9 AND YOU CAN USE AND BORROW THE LANGUAGE FROM PREMIUM
10 INVESTMENTS IF YOU WANT TO INDICATE MY INTENT TO SET UP A
11 CONSTRUCTIVE TRUST FOR ANY FUNDS NOT SO VERIFIED OR NOT
12 SATISFIED BY ME TO HAVE BEEN PAID APPROPRIATELY.

13 AND, AGAIN, IT'S GOING TO TAKE SOME TIME. THIS IS
14 AN IMPORTANT DOCUMENT. AND I WILL, FOR PURPOSES OF THE
15 RECORD, I BELIEVE THAT THERE IS SUFFICIENT -- THE WAY I
16 VIEW VERBAL ANNOUNCEMENTS OR ORAL ANNOUNCEMENTS THAT ARE
17 MADE BY ANY JUDGE IN THIS STATE, THEY ARE NOT CONSIDERED
18 FINAL.

19 THE JUDGES RETAIN THE ABILITY TO ALTER RULINGS AND
20 DECISIONS MADE BY THEM UP UNTIL THE TIME THAT A FINAL
21 ORDER HAS BEEN EXECUTED AND FILED. I BELIEVE JUDGE
22 ANDERSON EXPLAINED THAT TO BE A SOUTH CAROLINA RULE AND
23 COMPARED IT TO OTHER STATES THAT ACTUALLY WILL TAKE THAT
24 YOU CAN APPEAL A RULING MADE BY A COURT BASED SIMPLY ON
25 AN ORAL STATEMENT MADE IN COURT. I BELIEVE SOUTH

1 CAROLINA FOLLOWS THE RULE AND REQUIRES A WRITTEN ORDER.

2 SO I WOULD NOT WANT ANYONE TO CONSIDER THESE
3 COMMENTS TO BE FINAL AND THAT WE WILL DEVELOP THE
4 DOCUMENT BECAUSE IT WILL BE AN IMPORTANT DOCUMENT, I
5 THINK, THAT, YOU KNOW, 'CAUSE I DON'T WANT TO OVERBURDEN
6 THESE PEOPLE AND MAKE THEM DO ANYTHING MORE THAN WHAT IS
7 ACTUALLY NECESSARY TO SATISFY MY CONCERNS. OKAY?

8 MR. ALFORD: YES, SIR. AND AS USUAL, YOUR HONOR,
9 AFTER WE GET IT PREPARED YOU WOULD WANT IT IN A WORD
10 FORMAT SO THAT YOU COULD MODIFY IT?

11 THE COURT: YES, SIR, I WILL MODIFY IT. I HAVE NO
12 IDEA IF IT WAS WORD OR WORD PERFECT OR WHAT. I DON'T
13 KNOW. ALL RIGHT, GENTLEMEN AND MADAME.

14 AFTER A BENCH CONFERENCE WITH THE ATTORNEYS, MY
15 UNDERSTANDING IS WE ARE NOT GOING TO ADDRESS THE OTHER
16 MOTION OR MOTIONS THAT ARE PENDING, IS THAT CORRECT?

17 MR. ALFORD: YES, SIR.

18 THE COURT: DO Y'ALL NEED ME TOMORROW?

19 MR. ALFORD: NO, SIR.

20 MR. GRIMBALL: MAY WE TALK SCHEDULING FOR JUST A
21 MOMENT, YOUR HONOR? TWO THINGS THAT I REALLY NEED TO DO.
22 ONE IS MY SON IS GRADUATING FROM UVA AROUND MAY 22ND, PLUS
23 OR MINUS. HE'S ACTUALLY GRADUATING FROM GRADUATE SCHOOL,
24 BUT IS WALKING WITH HIS COLLEGE CLASS AS WELL. I'D ASK
25 FOR PROTECTION AROUND MAY 22ND, GO OUT THURSDAY AND COME

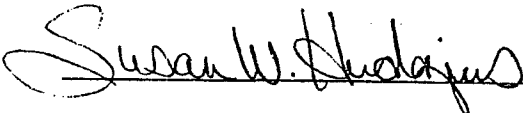
GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 CERTIFICATE OF REPORTER

2 I, THE UNDERSIGNED, SUSAN W. HUDGINS, OFFICIAL COURT
3 REPORTER FOR THE SEVENTH JUDICIAL CIRCUIT OF THE STATE OF
4 SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
5 TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL
6 THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE
7 TRIAL/HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL,
8 IN THE CIRCUIT COURT FOR BEAUFORT COUNTY, SOUTH CAROLINA,
9 ON THE 31ST DAY OF MARCH 2010.

10 I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
11 COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

12 APRIL 20, 2010
13

14
15 A handwritten signature in cursive script, reading "Susan W. Hudgins", is written over a horizontal line.

16 CIRCUIT COURT REPORTER

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS
3
4 Timothy Treon, et al.,)
5 Plaintiffs,) TRANSCRIPT OF RECORD
6 -vs-) 2002-CP-07-1377
7 Dryvit Systems, Inc.)
8 et al.,)
9 Defendants.) July 6, 2007
10 Spartanburg, South Carolina
11

12 B E F O R E:
13 HONORABLE J. MARK HAYES, II, JUDGE.
14
15

16 A P P E A R A N C E S:
17 ROBERT "SAM" PHILLIPS, ESQ.
18 RICHARD R. GLEISSNER, ESQ.
19 FRANK E. GRIMBALL, ESQ.
20 GREGORY M. ALFORD, ESQ.
21 Attorneys for the Plaintiffs
22
23 SAMUEL W. OUTTEN,
24 Attorney for the Defendants
25

Margaret A. Woods
Circuit Court Reporter

VOLUME 1

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EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
P-1	PowerPoint presentation	179	
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1 THE COURT: Good morning. I believe that we're to the
2 e-mail that I received from the plaintiffs that we were going
3 to first receive the arguments from the defendant on its
4 summary judgment motion, is that correct?

5 MR. OUTTEN: Yes, sir.

6 THE COURT: All right.

7 MR. GRIMBALL: Yes, sir.

8 THE COURT: And then we'll address the defendants' motion
9 for summary judgment and then also then the, uh, motion
10 concerning the, uh, settlement as well as if there's time any
11 collateral issues. But I'll tell you based on my reading and
12 everything we probably will be pushing it to get through -- to
13 the collateral issues today unless you all surprise me and run
14 through this stuff so. All right. Yes, sir.

15 MR. OUTTEN: May it please the Court, Your Honor. Sam
16 Outten on behalf of Dryvit Systems, Inc. Your Honor, I'd like
17 to walk through the reasons why Dryvit is entitled to summary
18 judgment and I understand in doing so that I may replot old
19 ground and I have no desire to waste the time of this court or
20 the plaintiffs' counsel, but in order for our argument to make
21 sense, Your Honor, I need to start from the beginning.

22 On September the 22nd 2005, Dryvit served a motion to
23 dismiss which was filed on September 26th 2005. This motion
24 was later converted to a summary judgment motion. The timing
25 of the filing of this motion is significant, The order and

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1 challenging whether or not the class members in Posey received
2 adequate representation, then the lawyers at this table who
3 participated in Posey I don't believe can challenge that the
4 class members were adequately represented since they were
5 there and they litigated those claims. Yes, sir, I believe it
6 is relevant.

7 THE COURT: Okay.

8 MR. OUTTEN: I I may be wrong, Your Honor, but I believe
9 it's relevant.

10 THE COURT: All right. Go ahead, sir.

11 MR. OUTTEN: In fact, Your Honor, the contributions of
12 South Carolina Counsel were specifically recognized by Judge
13 Slone. At the December the 18th 2002 fairness hearing, Mr.
14 Grimbball appeared and his contribution to the settlement was
15 acknowledged by the Court -- well, part of the transcript.
16 Mr. Grimbball said, " I appeared at the last hearing and you
17 and I spent about 45 minutes talking together, talking about a
18 bunch of issues.

19 The Court said, "And you've addressed a lot of them and
20 those modifications gave me more comfort in approving the
21 settlement."

22 And Mr. Grimbball said, "Yes, sir."

23 The Court said, "Though I haven't done it yet, you know
24 what my primary -- one of my primary concerns at this point is
25 the deadline but what else do you want me to consider?"

1 And Mr. Grimbball said, "Only, Your Honor, that one of my
2 primary goals was to increase the case and increase the
3 ability of the homeowners to cash out when they had repairs
4 that were substantial."

5 And the Court said, "All right. I commend you."

6 And Mr. Grimbball said, "And I think we have done that."

7 And the Court said, "Yeah, I commend your efforts."

8 Mr. Grimbball says, "And I think that cures a lot of the
9 problems that are being raised by the objectors here today
10 concerning reclad issues because my goal in being able to get
11 cash in the hands of the homeowners so they would have the
12 flexibility and the option to be able to reclad their houses
13 with that money in combination with whatever other money they
14 would get from other potential parties through litigation or
15 settlements. And I think that what we have done through some
16 intense negotiations with South Carolina counsel and Jeff
17 Weak, I think he means Jeff Leath, who's here with me today
18 and these gentlemen who are seated right before you has
19 accomplished the purpose of improving," and I don't believe he
20 was cut off by the Court, but here's the point, Your Honor.
21 This exchange makes it clear that Mr. Grimbball appeared at
22 least to -- at least in part to affirm the increased benefits
23 to the class which he helped negotiate. In other words,
24 Mr. Grimbball appeared at the October the 1st 2002 hearing and
25 he was sucessful in increasing the benefits to the class

1 members. And my understanding is that he withdrew any further
2 objections he had with the settlement. I think his clients
3 were the DeLoaches and those objections he had were withdrawn.

4 Here's what Judge Slone had to say in his final approval
5 settlement dated January the 14th 2003, "Class counsel,
6 together with counsel for certain objectors including those
7 representing a proposed litigation class in South Carolina,
8 have been engaged in negotiations with the defendant. Their
9 negotiations and discussions have resulted in an enhancement
10 in the rights and options of the class members and a
11 substantial increase in the value of the benefits made
12 available to persons who make claims under the settlement."

13 So what has happened is Mr. Grimball apparently did some
14 successful lawyering in the *Posey* case to have benefits
15 substantially increased and then withdraw his objections.
16 Your Honor, Finkel & Altman represented Harry and Trudy
17 Creasy, homeowners from Greenville, who were members of the
18 *Posey* class. I believe they filed a claim in the *Posey* case.

19 On September 13th 2003, Finkel & Altman filed a 12-page
20 memorandum in opposition to the settlement in *Posey* stating in
21 part that they desire to challenge the fairness,
22 reasonable-ness and adequacy of the proposed settlement. And
23 this memo had the *Posey* caption on it. Finkel & Altman wrote
24 in their memorandum that, "The settlement deprives the class
25 members of their day in court." And they say, "The settlement

1 fails to pass constitutional muster."

2 Rick Gleissner, who's with us today submitted an
3 affidavit in Posey and in Paragraph 10 of Mr. Gleissner's
4 affidavit he says, "This proposed Tennessee national
5 settlement is woefully inadequate and will only benefit Dryvit
6 and class counsel and will adversely affect Dryvit homeowners
7 nationwide."

8 Sam Phillips of Finkel & Altman appeared at the December
9 18th 2002 fairness hearing before Judge Slone. And I'm not
10 gonna go through all the testimony. We have it here if Your
11 Honor would like to see it. Mr. Phillips starts and says,
12 "Your Honor, I think you asked a relevant question at the
13 start of this: 'Why are we here in Dandridge, Tennessee
14 trying to settle claims brought in 49 other states?' And I
15 would add to that why are we here when the main class
16 representatives aren't even residents of this county?"
17 Incidentally, some indication of the litigation of the
18 jurisdictional issue raised here by Mr. Phillips, but it goes
19 on for a page or two and then at the end ---

20 THE COURT: Let me ask you this: Is the stuff that
21 you're reading from that you provided to me in this paper
22 clipped set of documents, is that part of the notebooks that
23 you all submitted?

24 MR. OUTTEN: Yes, sir. Those transcripts are in the
25 record, yes, sir.

1 THE COURT: All right. Now, the notebooks that you
2 submitted to the Court, did you also submit a set to the clerk
3 of court?

4 MR. OUTTEN: Um, I do not know the answer to that, Your
5 Honor.

6 MR. GRIMBALL: Didn't you do it as soon as -- as you did
7 it you filed it? As you did that I think you filed it sort of
8 in pieces.

9 Judge, I believe that ---

10 MR. OUTTEN: I've been filing files, yes, sir.

11 MR. GRIMBALL: --- they filed it in pieces with the clerk
12 of court as they did it.

13 THE COURT: All right.

14 MR. GRIMBALL: It was not all put together in notebooks.
15 It's pieces of evidence.

16 THE COURT: 'Cuz the notebooks that we have we were -- we
17 viewed them as I believe your office indicated they were
18 provided to us for convenience purposes and not for purposes
19 of the record. So I didn't want you to assume that because
20 we've received it in our office that that you should naturally
21 think that it's already part of this record.

22 MR. OUTTEN: I believe it's part of the record, Your
23 Honor, ---

24 THE COURT: Okay.

25 MR. OUTTEN: --- and I and if I'm wrong and I I stand to

1 be corrected, okay. But I think it's in the record.

2 THE COURT: Well, I mean, if you're using stuff, you
3 know, you want it part of the record, be sure that it gets
4 into ---

5 MR. OUTTEN: Yes, sir.

6 THE COURT: --- the record, okay?

7 MR. OUTTEN: Yes, sir.

8 THE COURT: Thank you.

9 MR. OUTTEN: Anyway, Your Honor, I won't go through with
10 this. You you understand the point. They end up by
11 saying -- Mr. Phillips says, "We've had no opportunity to
12 explore that and I think at this stage we're approving the
13 settlement when I think there's a substantial argument to be
14 made." Obviously, Mr. Phillips may mean an argument to be
15 made that it should be approved.

16 The Court then says, "Well, I haven't approved anything
17 yet. I'm just telling you you have 20 days from October to
18 file whatever you wanted me to consider. But I'm going to
19 read your brief anyway. Is there anything else you want me to
20 consider?"

21 Mr. Phillips says, "Merely a response to the final
22 proposed order."

23 Um, the -- what's the point here, Your Honor? The point
24 is Finkel & Altman appeared in Posey and they litigated
25 objections on behalf of the Creasys in the Posey case. After

1 litigating those issues, Finkel & Altman chose to settle the
2 Creasy's claim which as we all know results in withdrawing
3 their objections. I believe I'm correct in saying the Creasy
4 claim was settled in the Fall of 2003 after being negotiated
5 for several months.

6 And what were the terms of that settlement? The Creasys
7 received \$40,936 to settle their claims against Dryvit,
8 \$12,500 was described by Mr. Gleissner in a letter to counsel
9 for Dryvit as an additional payment for their efforts in
10 promoting the interest of South Carolina homeowners. Dryvit
11 paid Mr. -- paid Finkel & Altman attorneys fees of \$45,000 and
12 in addition the correspondence which confirms an agreement
13 with plaintiffs' class counsel in Tennessee which resulted in
14 Finkel & Altman being paid another hundred thousand dollars
15 (\$100,000).

16 Now, I need to tell the Court this: I wanted to make
17 sure our representations about the payment by plaintiffs'
18 class counsel was accurate because we're not plaintiffs' class
19 counsel. So we called Gary Mason's office and he confirmed
20 that \$80,000 had been paid. He could not confirm another 20.
21 I haven't discussed it with Mr. Gleissner. I don't know
22 whether it's ---

23 MR. GLEISSNER: It's not true.

24 MR. OUTTEN: --- been paid or not.

25 MR. GLEISSNER: Your Honor, didn't get a dime.

1 MR. OUTTEN: Okay. But in any event -- well, that's not
2 what Mr. Doffermyre says that that he paid \$80,000. That's
3 that's the information that he gave to us.

4 Now, I understand, Your Honor, that Mr. Gleissner's
5 response is gonna be there's there are letters in settlements
6 which accompany this which say, um, which we say to
7 Mr. Gleissner, "This this settlement is without prejudice for
8 you to make these arguments later." And I want to give the
9 Court a complete picture. Yes, we said that, um that it was
10 without prejudice to make their -- any arguments later but,
11 Your Honor, this agreement has no relevance to the issues
12 before the Court today.

13 Um, the letter described in this agreement was written in
14 September 2003 two years before Posey became a final judgment.
15 If Finkel & Altman had other claimants who wanted to object in
16 Posey to Cardamone then fine. One thing this letter shows is
17 the allegation from plaintiffs' counsel is that we settled
18 with the Cardamones and others that Dryvit was trying to make
19 deals to silence these class members from making objections.
20 What this letter confirms is far from it. If class members
21 have objections then then certainly come forward. We're not
22 trying to prevent that. Let ---

23 THE COURT: Well, let me -- I I feel that out of fairness
24 I need to stop you and tell me where my thoughts are ---

25 MR. OUTTEN: Yes, sir.

1 THE COURT: --- and let you go ahead and address it.

2 MR. OUTTEN: Yes, sir.

3 THE COURT: Now, I asked you if you want to take this
4 rabbit down this path and you said you did. Based upon, you
5 know, my reading of the United States Supreme Court's analysis
6 of class action suit, settlement class action suits especially
7 one that involves non, you know, unknown potential class
8 members out there, conduct of the lawyers is relevant in
9 determining whether or not adequate representation has
10 occurred. The inferences that by what you've just put up to
11 me and you're tying these, the plaintiffs' lawyers, in the
12 Tennessee case that participated in approving the settlement
13 and then these same lawyers sitting here, creates an inference
14 that is not in favor of your client.

15 MR. OUTTEN: Well, my -- here's -- I respectfully
16 disagree with that.

17 THE COURT: I mean, the United States Supreme Court case
18 made clear Ruth Bader Ginsburg, they reversed that settlement
19 of the asbestos people not based on something necessarily that
20 they wrote in the opinion that the -- of -- that in this case
21 would have been the defendant but the settling party the, I
22 think, the asbestos company did but they took a look at the
23 conduct of the plaintiffs' lawyers that participated in the
24 settlement. And they said, you know, "We can't approve the
25 settlement based on the conduct of those lawyers."

1 Now, ---

2 MR. OUTTEN: Are you talking about the *Amchem* case, Your
3 Honor?

4 THE COURT: The -- well, whatever the asbestos case is
5 where they had I think it was, uh, Motley and Rice were the
6 participants from South Carolina in the settlement.

7 MR. OUTTEN: Well, here's the point I'm trying to make.
8 When you boil it down, we believe there are two issues this
9 court should look at in deciding whether to grant summary
10 judgment. One is sufficient notice. Were there sufficient
11 safeguards in place to guarantee sufficient notice? That's
12 one. And two is adequate representation.

13 The point in mentioning these lawyers involvement in that
14 case is not to say that they did a poor job. I think all the
15 evidence is that Mr. Grimball did a very very good job.
16 Apparently, he increased the benefits to the class members
17 significantly and so anticipating that their argument they
18 have to attack either notice or adequate representation.
19 Those are the only two places they have to go, Your Honor,
20 under *Hospitality Management*. And the notice plan is so
21 extensive that I don't believe there can be much of a credible
22 challenge to the notice plan. So if they're challenging
23 adequate representation and and I believe that's what we've
24 got hints of in the past about deals or whatever between
25 Mr. Leath and Dryvit's counsel, then the fact that they

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CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter and Notary Public in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on July 6, 2007 at the time and place heretofore set forth; and that the foregoing pages numbered from 4 through 196, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

WITNESS MY HAND AND SEAL at Greenville, South Carolina, this 22nd day of August, 2007.

Margaret A. Woods

Margaret A. Woods, Notary Public

in and for the State of South Carolina at Large.

My commission expires: 06/09/2009.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

COURT OF COMMON PLEAS
02-CP-07-1377

SALLY CARDAMONE AND
JOHN CARDAMONE

-VS-

DRYVIT SYSTEMS, INC.,
ESTATE BUILDERS, INC., AND
AMERICAN WAY APPLICATORS

:
:
:
: TRANSCRIPT OF RECORD
:
:
:

DECEMBER 5, 2005
BEAUFORT, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J. MARK HAYES, II, JUDGE.

A P P E A R A N C E S:

WILLIAM M. BOWEN, ESQUIRE
W. JEFFERSON LEATH, JR., ESQUIRE
MICHAEL S. SEEKINGS, ESQUIRE
GEORGE E. MULLEN, ESQUIRE
W. DIXON ROBERTSON, ESQUIRE
FRANCIS E. GRIMBALL, ESQUIRE
ATTORNEYS FOR THE PLAINTIFFS

RALPH E. TUPPER, ESQUIRE
HADA V. HAULSEE, ESQUIRE
ERIN D. DEAN, ESQUIRE
ATTORNEYS FOR THE DEFENDANTS

GREGORY M. ALFORD, ESQUIRE
DONALD E. JONAS, ESQUIRE
RICHARD R. GLEISSNER, ESQUIRE
ROBERT B. (SAM) PHILLIPS, ESQUIRE
THOMAS J. FINN, ESQUIRE
THOMAS E. WILLIAMS, ESQUIRE
ATTORNEYS FOR THE INTERVENORS TREON AND SCEARCE

DAPHNE D. HELMS
CIRCUIT COURT REPORTER

1 THE COURT: THANK YOU. YOU MAY BE SEATED. ALL
2 RIGHT. DID THE LAWYERS HAVE A CHANCE TO HAVE ANY DISCUSSIONS
3 AMONG THEMSELVES?

4 MR. ROBERTSON: YOUR HONOR, MY NAME IS DIXON
5 ROBERTSON. I'M ONE OF THE COUNSEL FOR THE PLAINTIFF CLASS,
6 AND I -- I ACCEPT FULL RESPONSIBILITY FOR THE DELAY IN THIS
7 HEARING GETTING STARTED, AND I REGRET TO REPORT TO YOU THAT
8 WE WERE UNABLE TO REACH AN AGREEMENT.

9 THE COURT: ALL RIGHT. THE MOTIONS THAT WE HAVE
10 TODAY IN THIS CASE, WE'VE GOT -- WE'VE GOT A MOTION FOR A
11 CONTINUANCE; IS THAT CORRECT?

12 MS. DEAN: YES, SIR.

13 MS. HAULSEE: YES, YOUR HONOR.

14 THE COURT: ALL RIGHT. WHEN YOU STAND, IF YOU WOULD
15 HELP ME AND THE COURT REPORTER OUT AND IDENTIFY YOURSELVES
16 AND WHO YOU REPRESENT.

17 MR. GLEISSNER: MAY IT PLEASE THE COURT? I'M RICK
18 GLEISSNER. I'M HERE ON BEHALF OF THE INTERVENORS, AND WE
19 ALSO FILED A MOTION FOR A CONTINUANCE AS IT RELATES TO THE
20 MOTION TO DECERTIFY THE CLASS.

21 THE COURT: ALL RIGHT.

22 MR. TUPPER: YOUR HONOR, I'M NED TUPPER ON BEHALF OF
23 DRYVIT, AND WE'RE HERE TO OPPOSE THE MOTION FOR A CONTINUANCE
24 AND TO MOVE FORWARD WITH OUR MOTION TO DECERTIFY.

25 THE COURT: AND THOSE ARE THE ONLY TWO MOTIONS THEN

1 THAT THE COURT NEEDS TO ADDRESS TODAY?

2 MR. ALFORD: NO, SIR, YOUR HONOR. I'M GREGG ALFORD
3 AND WE FILED A MOTION TO INTERVENE, MR. GLEISSNER AND MYSELF
4 AND MR. PHILLIPS, TO INTERVENE ON BEHALF OF THE TIMOTHY TREON
5 AND SCEARCE AND TO BE SUBSTITUTED AS CLASS COUNSEL. SO
6 THERE'S SOME QUESTION, YOUR HONOR, AS TO HOW BEST TO SEQUENCE
7 IT. IF WE WERE ALLOWED TO INTERVENE, WE WOULD ASK FOR MORE
8 TIME TO PREPARE TO MAKE THE ARGUMENT VIS A VIS
9 DECERTIFICATION. OKAY. I MEAN, WE'RE NOT IN THE CASE YET,
10 SO WE'RE NOT PREPARED TO GO FORWARD. I MEAN, WE'RE NOT
11 PREPARED TO GO FORWARD ON THE DECERTIFICATION ISSUE IF WE'RE
12 NOT IN THE CASE OR WE DON'T KNOW WE'RE IN THE CASE.

13 THE COURT: ALL RIGHT. WELL, BASED ON WHAT LIMITED
14 INFORMATION I HAVE HAD ACCESS TO, ONE OF THE PRIMARY -- ONE
15 OF THE MATERIAL ISSUES AS TO WHERE I GO WITH THIS IS GOING TO
16 BE ON THE ISSUE OF THE NOTIFICATION, WHETHER OR NOT THE
17 PEOPLE WHO ARE NOT NAMED IN THE CLASS BUT YET ARE PART OF THE
18 CLASS, YOU KNOW, WHETHER OR NOT THE NOTICES -- NOTIFICATIONS
19 WERE PROPER TO THEM AND WHETHER OR NOT THEY WOULD HAVE HAD AN
20 ADEQUATE OPPORTUNITY TO BE ABLE TO HAVE THEIR INTERESTS
21 PROTECTED. SO...

22 MR. ALFORD: YOUR HONOR, I DON'T THINK ANYONE WOULD
23 DISAGREE THAT IN THE SOUTH CAROLINA CLASS THERE HAS BEEN NO
24 NOTIFICATION.

25 MS. HAULSEE: YOUR HONOR, ON BEHALF OF DRYVIT MY

1 NAME IS HADA HAULSEE, AND I'M HERE PRO HAC VICE AND I THANK
2 THE COURT FOR THE OPPORTUNITY TO APPEAR. YOUR HONOR, WHETHER
3 THERE WAS NOTICE TO THE SOUTH CAROLINA CLASS IS AN ISSUE THAT
4 IS INTERTWINED WITH ALL OF THE MATTERS BEFORE THIS COURT AND
5 THAT HAVE TO DO WITH DRYVIT'S MOTION TO DISMISS. THIS IS A
6 MATTER THAT HAD TO DO WITH TWO -- TWO CLASS ACTIONS THAT WERE
7 GOING ON AT THE SAME TIME, ONE OF WHICH CAME TO A FINAL
8 JUDGMENT BEFORE THE OTHER AND, THEREFORE, IS ENTITLED TO FULL
9 FAITH AND CREDIT, AND WHETHER OR NOT THE TIMING OF THE NOTICE
10 TO THE SOUTH CAROLINA CLASS WAS APPROPRIATE OR NOT IS ALL
11 INTERTWINED WITH THOSE ISSUES.

12 I CAN'T -- IT ALL HAS TO BE HEARD TOGETHER. IT DOES
13 NOT MAKE SENSE UNLESS THE ENTIRE STORY IS TOLD TO UNDERSTAND
14 WHAT HAPPENED WHERE AND WHEN AND WHY. AND SO IT IS NOT -- IN
15 ORDER TO -- IN ORDER TO UNDERSTAND WHY WHAT HAPPENED HERE DID
16 HAPPEN, IT IS NECESSARY TO UNDERSTAND THE GROUNDS FOR
17 DRYVIT'S MOTION AND ALL OF THE FACTS AND THE LAW BEHIND THAT.

18 THE COURT: ALL RIGHT.

19 MS. HAULSEE: AND SO IF YOU WANT TO HEAR ABOUT THE
20 NOTICE, THEN I WOULD SAY THAT WE WOULD NEED TO HEAR DRYVIT'S
21 MOTION, YOUR HONOR.

22 THE COURT: ALL RIGHT. THEN WHY DON'T WE START --
23 CHRONOLOGICALLY WHO FILED THE FIRST MOTION?

24 MS. HAULSEE: YOUR HONOR, DRYVIT'S MOTION TO
25 DECERTIFY WAS FIRST FILED IN FEBRUARY OF 2004.

1 MR. ROBERTSON: YOUR HONOR?

2 THE COURT: YES, SIR.

3 MR. ROBERTSON: DIXON ROBERTSON AGAIN. I CAN SPEAK
4 FOR SOME OF THE CURRENT CLASS COUNSEL, PLAINTIFFS' COUNSEL IN
5 THE CLASS, AND SAY TO YOU THAT -- THAT SOME OF US DO NOT
6 OPPOSE THE INTERVENTION OF THESE -- THE GROUP OF LAWYERS WHO
7 NOW SEEK TO BE SUBSTITUTED AS CLASS COUNSEL. WE DO OPPOSE
8 THEIR SUBSTITUTION AS SOLE CLASS COUNSEL. I DON'T SPEAK FOR
9 ALL OF US THOUGH. MISTERS MULLEN AND GRIMBALL, AS I
10 UNDERSTAND IT, OPPOSE THE PARTICIPATION IN THE LAWSUIT BY THE
11 NEW GROUP OF LAWYERS.

12 WITH RESPECT TO THE MOTION FOR A CONTINUANCE THAT
13 THEY HAVE FILED, THAT IS, MR. GLEISSNER AND HIS GROUP, I
14 DON'T BELIEVE THAT ANY OF CURRENT CLASS COUNSEL OPPOSE THAT
15 MOTION, BUT AGAIN I DON'T WANT TO PRESUME TO SPEAK FOR
16 MISTERS MULLEN OR GRIMBALL.

17 MR. ALFORD: YOUR HONOR, GREGG ALFORD. I THINK THE
18 PROBABLY IS IF YOU WANT TO HEAR DRYVIT'S MOTION TO DECERTIFY
19 FIRST, THEN I THINK THESE LAWYERS NEED TO STEP UP AND ARGUE
20 IT TO YOU BECAUSE WE'RE INTERVENING BECAUSE THIS CASE IS
21 ABOUT TO GO AWAY WITHOUT ANY NOTICE TO THE CLASS AND WE
22 NEEDED TO GET IN AND STOP IT. HAD WE NOT DONE THAT, I DON'T
23 KNOW THAT -- I MEAN, I DON'T KNOW WHAT THEY -- WHAT POSITIONS
24 THEY WOULD HAVE TAKEN. CERTAINLY NOTHING HAS BEEN FILED. SO
25 WE WERE UNABLE TO---

1 THE COURT: WELL, BEFORE I WOULD RULE ON THAT --
2 RULE ON A MOTION TO DISMISS, I WOULD DEFINITELY HEAR THE
3 MOTION OR CONSIDER THE MOTION TO INTERVENE JUST TO BE SURE
4 THAT THEY HAD HAD AN OPPORTUNITY TO BE HEARD. WHETHER OR NOT
5 I ALLOWED THE MOTION -- ALLOWED THE INTERVENTION OR NOT IS
6 ANOTHER THING.

7 MR. ALFORD: SURE. OKAY.

8 MS. HAULSEE: IF I MAY, YOUR HONOR, ON BEHALF OF
9 DRYVIT, WE NEED -- WE -- DRYVIT DOES NOT OPPOSE THE MOTION TO
10 INTERVENE. HOWEVER, IT IS DRYVIT'S POSITION THAT THE MOTION
11 TO INTERVENE IS UNNECESSARY. THESE FOLKS HAVE STANDING AS
12 CLASS MEMBERS TO COME IN AND OPPOSE ANY MOTION. THEY ARE
13 REPRESENTED BY ABLE COUNSEL, AND THEY CAN COME IN AND OPPOSE
14 DRYVIT'S MOTION AND FOR THAT -- AND FOR THAT REASON THE
15 CONTINUANCE IS NOT NECESSARY, YOUR HONOR, BECAUSE DRYVIT'S
16 MOTION HAS BEEN PENDING.

17 THESE ATTORNEYS REPRESENTING THESE CLASS MEMBERS
18 HAVE BEEN AWARE OF IT. IT WAS SERVED ON THEM BECAUSE THEY
19 HAD ALREADY MADE THEIR MOTION TO INTERVENE. DRYVIT'S --
20 DRYVIT'S BRIEFS AND SUPPORTING PAPERS FOR THIS MOTION WERE
21 SERVED ON COUNSEL, WHO ARE HERE ASKING FOR A CONTINUANCE,
22 OVER TWO MONTHS AGO, AND THEIR CLIENTS ARE CLASS MEMBERS WHO
23 HAVE STANDING. IT IS NOT NECESSARY FOR THEM TO INTERVENE IN
24 ORDER TO ARGUE AGAINST DRYVIT'S MOTION, AND, THEREFORE, IT IS
25 DRYVIT'S POSITION THAT ITS MOTION SHOULD BE HEARD. THERE HAS

1 BEEN PLENTY OF NOTICE AND PLENTY OF AN OPPORTUNITY TO PREPARE
2 BUT FOR PARTIES WHO HAD STANDING TO OPPOSE IT AND WHO WERE
3 GIVEN NOTICE.

4 THE COURT: SO THE---

5 MS. HAULSEE: THANK YOU, YOUR HONOR.

6 THE COURT: SO YOU DO NOT OPPOSE THEIR INTERVENTION
7 IN THE LAWSUIT.

8 MS. HAULSEE: WE TAKE NO POSITION OTHER THAN THAT IT
9 IS UNNECESSARY BECAUSE THEY HAVE STANDING TO APPEAR AND
10 OPPOSE OUR MOTION AS CLASS MEMBERS. THEY DO NOT HAVE TO BE
11 SUBSTITUTED AS CLASS REPRESENTATIVES OR AS CLASS COUNSEL IN
12 ORDER TO COME IN AND OPPOSE DRYVIT'S MOTION; THEY'RE CLASS
13 MEMBERS. THANK YOU, YOUR HONOR.

14 MR. GLEISSNER: MAY IT PLEASE THE COURT? I'M RICK
15 GLEISSNER.

16 THE COURT: GIVE ME ONE SECOND. YES, SIR?

17 MR. GLEISSNER: AND, YOUR HONOR, WE REPRESENT WHAT
18 YOU COULD COMMONLY REFER TO AS A COUPLE, TWO, ABSENT CLASS
19 MEMBERS. THEY WERE NOT REPRESENTED IN THIS LITIGATION.
20 THEY -- AND MS. HAULSEE IS ABSOLUTELY CORRECT. I MEAN, WE DO
21 HAVE STANDING. YOU KNOW, HOWEVER, YOUR HONOR, OUR POSITION
22 ON WHETHER OR NOT WE HAVE STANDING OR NOT STANDING ISN'T THE
23 POINT. THE POINT IS THAT NOT ONLY DO ABSENT CLASS MEMBERS
24 TREON AND SCEARCE NEED NOTICE OF THIS PARTICULAR DE-
25 CERTIFICATION PROCEEDING AND THIS PARTICULAR CLASS ACTION,

1 BUT ALL THE OTHER ABSENT CLASS MEMBERS NEED TO HAVE NOTICE
2 AND THE OPPORTUNITY TO PARTICIPATE IN THE DECERTIFICATION OR
3 THE DISMISSAL OR ACTUALLY JUST PARTICIPATE IN THIS CLASS
4 ACTION, YOUR HONOR. AND THAT'S OUR POSITION AS IT RELATES TO
5 THE REASON WHY WE NEED A CONTINUANCE IS WE NEED A CONTINUANCE
6 TO ALLOW US TO INTERVENE, TO ALLOW US TO PROVIDE NOTICE TO
7 THE CLASS, AND THEN SEE WHETHER OR NOT THERE'S ANY OTHER
8 ABSENT CLASS MEMBERS WHO WANT TO JOIN IN, WANT TO INTERVENE,
9 WANT TO BE INVOLVED AND PARTICIPATE IN THIS CLASS ACTION.

10 THIS ALL GETS DOWN TO A QUESTION OF DUE PROCESS.
11 DID I GET A COPY OF THIS MOTION TO DECERTIFY? WELL, I DIDN'T
12 GET A COPY OF THE ONE THAT WAS FILED IN 2004. I DID GET A
13 COPY OF ONE THAT WAS FILED ON SEPTEMBER 23RD, 2005. I MEAN,
14 IF WE'RE ARGUING THE MOTION THAT WAS FILED IN SEPTEMBER OF
15 2005, I GOT A COPY OF IT. IF WE'RE ARGUING THE ONE THAT WAS
16 FILED IN FEBRUARY OF 2004, I DIDN'T GET A COPY OF IT. I
17 MEAN, IN FACT, FRANKLY I THINK THAT'S THE FIRST TIME I KNEW
18 THAT THERE WAS ONE FILED IN 2004, BUT... SO, ANYWAY, THE
19 LONG STORY SHORT, JUDGE, IS I THINK WE NEED TO HAVE NOTICE TO
20 THE CLASS FIRST, AND THEN AFTER WE HAVE NOTICE TO THE CLASS,
21 THEN WE CAN ADDRESS THE ISSUES OF DECERTIFICATION, DISMISSAL,
22 ET CETERA. THANK YOU.

23 MS. HAULSEE: MAY I RESPOND, YOUR HONOR?

24 THE COURT: HANG ON A SECOND. YES, SIR.

25 MR. GRIMBALL: JUDGE, FRANK GRIMBALL FROM

1 CHARLESTON. ONE OF THE REASONS WHY THIS CLASS ACTION WAS
2 FILED BACK IN AUGUST OF 2002 WAS TO PRESERVE IN SOUTH
3 CAROLINA THE STATUS QUO AT THAT TIME WHICH WAS TO ALLOW
4 RESIDENTS OF SOUTH CAROLINA TO BRING THEIR ACTIONS AGAINST
5 DRYVIT AND WHATEVER OTHER PARTIES WERE RESPONSIBLE FOR THE
6 DAMAGES TO THEIR REAL PROPERTY, SUBJECT TO OUR LAWS, OUR
7 STATUTES OF LIMITATIONS, AND OUR STATUTES OF REPOSE.

8 IF THE POSEY CLASS ACTION HAD FAILED FOR THE PURPOSE
9 FOR WHICH THIS CLASS ACTION WAS FILED -- WOULD NO LONGER --
10 THERE WOULD NO LONGER BE A PURPOSE FOR THIS CLASS ACTION. IT
11 WAS TO PROTECT SOUTH CAROLINIANS FROM THE EFFECT OF A
12 JUDGMENT IN A FOREIGN STATE. AND SO THIS WHOLE PROBLEM THAT
13 HAS BEEN RAISED ABOUT NOTICE AND LACK OF NOTICE I THINK IS A
14 RED HERRING. IT'S TO PUSH THIS COURT DOWN A RABBIT HOLE
15 WHERE IT DOES NOT NEED TO GO.

16 WE WELCOME THESE LAWYERS - MR. ALFORD, MR. FINN, MR.
17 WILLIAMS, FOLKS FROM FINKEL AND ALTMAN - TO THIS CASE. WE
18 JOIN -- WE WANT THEM TO JOIN WITH US IN THIS MATTER. AND SO
19 WE DO NOT OPPOSE THE INTERVENTION AS LONG AS THEY UNDERSTAND
20 -- AND WE HAVE HAD DISCUSSIONS PREVIOUS TO THIS MORNING ABOUT
21 THE PURPOSE OF THIS LAWSUIT WHICH IS TO ALLOW THESE CASES TO
22 PROCEED ON AN INDIVIDUAL BASIS.

23 BUT IT WAS -- WHAT WE DID BACK IN AUGUST OF 2002 WAS
24 A TWO-PRONG ATTACK. WE HAD A CLIENT. THIS GROUP HAD CLIENTS
25 WHO MADE AN APPEARANCE IN TENNESSEE, AND I WANT THIS COURT TO

1 UNDERSTAND AND REALIZE THAT WE DID A SUPER JOB IN IMPROVING
2 THE CLASS ACTION IN TENNESSEE. WE MADE A TREMENDOUS
3 DIFFERENCE IN WHAT HAPPENED AND IN THE BENEFITS FOR THE CLASS
4 MEMBERS WHICH, IF THIS CLASS FAILS, ULTIMATELY HAS BENEFITTED
5 EVERYBODY IN SOUTH CAROLINA.

6 BUT AT SOME POINT THIS MOTION WOULD HAD TO HAVE BEEN
7 HEARD. IT WAS NOT APPROPRIATE FOR IT TO HAVE BEEN HEARD
8 UNTIL THAT CLASS ACTION IN TENNESSEE WAS FINALIZED. THAT HAS
9 NOW HAPPENED, AND AT THIS POINT WE AT LEAST, GEORGE MULLEN
10 AND I, ARE PREPARED TO ARGUE AGAINST THE DECERTIFICATION AND
11 MOVE FORWARD WITH THE CLASS. IF THESE FOLKS WANT A
12 CONTINUANCE, WE DON'T OPPOSE IT.

13 MS. HAULSEE: MAY I BE HEARD, YOUR HONOR?

14 THE COURT: AND YOUR MOTION IS A MOTION TO DECERTIFY
15 THE CLASS.

16 MS. HAULSEE: IT'S A MOTION TO DISMISS, YOUR HONOR,
17 ON THE GROUNDS OF RES JUDICATA AND SETTLEMENT AND RELEASE AND
18 FULL FAITH AND CREDIT. AND THAT IS THE REASON WHY, YOUR
19 HONOR, THESE -- THE WHOLE NOTION OF GIVING NOTICE IS A RED
20 HERRING. THERE IS NO NEED TO GIVE NOTICE OF SOMETHING THAT
21 HAS -- THAT IS TRUMPED BY ANOTHER SETTLEMENT IN ANOTHER
22 LAWSUIT THAT IS ENTITLED TO RES JUDICATA.

23 THE COURT: ALL RIGHT. LET ME ASK---

24 MS. HAULSEE: AND AS TO THE WORKINGS---

25 THE COURT: LET ME ASK A QUESTION.

1 MS. HAULSEE: I'M SORRY.

2 THE COURT: NOW, WHO IS GOING TO BE ARGUING AGAINST
3 THAT MOTION?

4 MS. HAULSEE: (POINTS TO MR. GLEISSNER.)

5 MR. GRIMBALL: JUDGE, I---

6 MS. HAULSEE: ALL -- ALL -- I MEAN, ANY COUNSEL CAN.

7 THE COURT: WELL, WHO IS GOING TO ARGUE IT FOR
8 TODAY'S PROCEEDING?

9 MS. HAULSEE: I WOULD---

10 MR. GRIMBALL: IF I HAVE TO, I WILL---

11 THE COURT: ALL RIGHT.

12 MR. GRIMBALL: ---BUT I WANT THESE GENTLEMEN --
13 JUDGE, I THINK IT WOULD BE FROM THE -- LET ME BACK UP. I'VE
14 DONE A LOT OF READING IN A LOT OF CASES INVOLVING CLASS
15 ACTION OVER THE LAST FEW DAYS, AND MY UNDERSTANDING -- AND I
16 CAN'T CITE YOU A CASE BECAUSE I HAVE GONE THROUGH SO MANY
17 CASES FOR OTHER PURPOSES BUT BUMPED INTO THIS ISSUE. IF WE
18 DON'T ALLOW THEM TO INTERVENE IN A MEANINGFUL WAY, THAT'S
19 JUST GOING TO RESULT IN AN APPEAL FROM WHAT WE DO HERE TODAY,
20 AND THAT'S WHAT -- NONE OF US WANT THAT.

21 THE COURT: BUT IF HER MOTION IS DENIED, THEN --
22 THEN WOULD THEY STILL -- THEN WOULD SHE APPEAL IF I DO GRANT
23 THEIR MOTION FOR INTERVENTION?

24 MR. GRIMBALL: I'M NOT SURE I EXACTLY FOLLOW YOU.
25 IF YOU GRANT THEIR MOTION TO INTERVENE -- HEAR IT TODAY AND

1 DENY HER MOTION, THE INTERVENE -- THE MOTION TO INTERVENE
2 WILL JUST BE A WASH. NOBODY IS GOING TO WORRY WITH THAT.
3 THEY'LL BE HERE, THEY'LL BE IN THE CASE, AND I THINK THEIR
4 POSITION IS THAT THEY HAVE STANDING---

5 THE COURT: I MEAN, SHE'S -- SHE'S CONFIDENT ENOUGH
6 THAT SHE CAN TAKE ON EVERYBODY IN THE ROOM AND SHE COULD WIN.

7 MR. GRIMBALL: SHE IS CONFIDENT. I LIKE THAT.

8 THE COURT: BUT WHAT IF SHE'S WRONG AND SHE DOESN'T
9 WIN AND THEN I MAKE -- AND THEN I ADDRESS THE ISSUES OF
10 WHETHER OR NOT TO ALLOW THEM TO INTERVENE OR WHETHER OR NOT
11 TO ALLOW THE CONTINUANCE TO DISCUSS THE DECERTIFICATION?

12 MR. GRIMBALL: WELL, I THINK THAT IF YOU -- I DON'T
13 THINK THAT IT IS WITHIN THE REALM OF POSSIBILITY TO DENY THEM
14 THE RIGHT TO INTERVENE. AT SOME POINT THAT'S GOING TO
15 HAPPEN. THEY'VE GOT -- THEY'VE ALREADY AGREED THEY HAVE
16 STANDING TO BE HERE. THAT'S JUST -- TO ME THAT'S NOT A
17 PROBLEM.

18 THE COURT: ALL RIGHT.

19 MR. GRIMBALL: BUT THE QUESTION IS I THINK FOR THIS
20 COURT TO CONSIDER WHEN THAT'S DONE IS TO -- WHEN YOU ALLOW
21 SOMEBODY TO INTERVENE, YOU WANT THEM TO HAVE THE OPPORTUNITY
22 TO BE PREPARED AND BE HEARD.

23 THE COURT: SO IT'S A QUESTION OF -- NOT A QUESTION
24 OF WHETHER THEY INTERVENE BUT TO WHAT DEGREE TODAY DO THEY
25 INTERVENE.

1 MR. GRIMBALL: TO WHAT DEGREE AND TO GIVE THEM --
2 WHETHER OR NOT THEY SHOULD HAVE THE OPPORTUNITY TO DO
3 WHATEVER RESEARCH THEY NEED AND TO -- TO LOOK AT THIS --
4 EXAMINE THIS FULLY AND COMPLETELY SO THAT THE COURT CAN BE
5 FULLY BRIEFED ON THESE ISSUES.

6 THE COURT: SO -- AND THE QUESTION OF INTERVENTION
7 IS TO WHAT I BELIEVE... I'M TRYING WITH THESE NAMES. YOU --
8 YOU HAD SAID THAT YOU DID NOT OPPOSE THEM TO -- NO, THE
9 GENTLEMAN BEHIND YOU.

10 MR. ROBERTSON: I'M SORRY.

11 MR. GRIMBALL: MR. ROBERTSON.

12 THE COURT: YEAH, MR. ROBERTSON.

13 MR. ROBERTSON: YOUR HONOR, I'M CO-COUNSEL WITH
14 MISTERS MULLEN AND GRIMBALL. WE DO NOT OPPOSE THEIR JOINING
15 AS COUNSEL FOR THE CLASS. WE DO OPPOSE THEM BEING
16 SUBSTITUTED AS CLASS COUNSEL.

17 MS. HAULSEE: AND, YOUR HONOR, IT MAY BE THAT IF I
18 CLARIFIED DRYVIT'S POSITION IT WOULD HELP. AS I SAID BEFORE,
19 IT IS NOT -- DRYVIT'S POSITION IS THAT INTERVENTION IS
20 UNNECESSARY AND THAT THESE FOLKS HAVE STANDING TO OPPOSE ITS
21 MOTION. HOWEVER, DRYVIT WOULD ALSO STRONGLY OPPOSE ANY
22 NOTION THAT ALLOWING THEM TO INTERVENE ALSO MEANS THAT
23 THERE'S GOING TO BE SOME CLASS-WIDE NOTICE GIVEN BEFORE
24 DRYVIT'S MOTION COULD BE HEARD.

25 THAT WOULD BE A DISASTER. WHAT WOULD THAT MOTION

1 SAY? WE'RE GIVING YOU NOTICE THAT THERE IS A CLASS ACTION
2 THAT'S PROBABLY NOT VALID BECAUSE IT'S -- BECAUSE THERE'S
3 ANOTHER CLASS ACTION THAT WAS ALREADY SETTLED THAT'S -- THAT
4 MAY BE ENTITLED TO FULL FAITH AND CREDIT? THAT IS NONSENSE,
5 YOUR HONOR. WHOEVER INTERVENES DRYVIT'S MOTION NEEDS TO BE
6 HEARD, AND THERE IS NO NEED TO GIVE ANYONE ANY NOTICE ABOUT A
7 MOTION THAT IS BASED PURELY ON THE APPLICATION OF
8 CONSTITUTIONAL LAW.

9 MR. MULLEN: YOUR HONOR, IF I MAY ADDRESS THE COURT.

10 THE COURT: ONE SECOND, PLEASE. YES, SIR.

11 MR. MULLEN: I'M GEORGE MULLEN. I PRACTICE IN
12 HILTON HEAD. I'M FRANK GRIMBALL'S PARTNER. I JUST WANT TO
13 CLARIFY WHAT HE WAS JUST SAYING AS FAR AS OUR POSITION ON THE
14 INTERVENTION BY THESE GENTLEMEN IN FRONT OF US. THEIR MOTION
15 TO INTERVENE WAS NOT ONLY TO INTERVENE BUT TO ALSO SUBSTITUTE
16 THEMSELVES AS COUNSEL FOR US. AND THERE ARE TWO ISSUES THAT
17 I WOULD LIKE THE COURT TO UNDERSTAND.

18 OUR POSITION IS, FIRST, IS WE OBJECT TO THEM
19 ATTEMPTING TO SUBSTITUTE THEMSELVES FOR US. PROBABLY MORE
20 THAN JEFF, I FIND IT SOMEWHAT OFFENSIVE THE METHOD IN WHICH
21 THEY APPROACHED IT. SECONDLY, AS FAR AS OUR CONSENTING TO
22 THEIR INTERVENTION, I HAVE NO OBJECTION TO THEM INTERVENING
23 AS LONG AS THEIR PURPOSE OF INTERVENING AND HANDLING THE CASE
24 IS THE SAME AS THE PURPOSE OF WHICH THIS CASE WAS FILED.

25 WE FILED THIS CASE IN AUGUST 2002, JUST A FEW WEEKS

1 BEFORE THE OPT-OUT DATE OF THE TENNESSEE POSEY CASE WAS ABOUT
2 TO RUN. AND PERHAPS IT WOULD HELP YOU IF YOU UNDERSTOOD THE
3 BACKGROUND OF HOW THIS CAME ABOUT AS TO WHAT THE OBJECTIVES
4 ARE THAT WE WERE LOOKING TO ACCOMPLISH. LITERALLY I WAS
5 DRIVING BACK FROM MY MYRTLE BEACH OFFICE ONE DAY, AND I WAS
6 TRYING TO FIGURE OUT: HOW DO I GET AROUND THIS POSEY
7 SETTLEMENT? BECAUSE, QUITE FRANKLY, THE TERMS OF IT WERE NOT
8 VERY GOOD.

9 I GOT ON THE PHONE WITH MY PARTNER AND I GOT ON THE
10 PHONE WITH DIXON ROBERTSON AND SAID, "WE NEED TO ATTACK THIS
11 IN SOME WAY." SO WE CAME UP WITH A TWO-PRONG APPROACH. ONE
12 IS THAT WE HAD A CLIENT THAT APPEARED AT THE TENNESSEE
13 SETTLEMENT HEARING, AND WE PRESENTED OUR ARGUMENTS THERE.
14 MR. GRIMBALL ARGUED ON BEHALF OF, I GUESS, ALL OBJECTORS FOR
15 OVER AN HOUR. THE RESULT OF THAT WAS THEY WENT BACK AND RE-
16 NEGOTIATED AND SUBSTANTIALLY INCREASED THE BENEFITS OF THE
17 TENNESSEE POSEY SETTLEMENT.

18 OUR SECOND APPROACH TO -- OR SECOND PRONG OF THE
19 ATTACK OF WHAT WAS TAKING PLACE IN TENNESSEE WAS TO FILE OUR
20 OWN CLASS ACTION IN SOUTH CAROLINA FOR THE PURPOSE OF OPTING
21 OUT THE PEOPLE OF SOUTH CAROLINA. NOT ONLY DID WE BRING
22 DIXON ROBERTSON IN, BUT FRANK THEN WENT TO TALK TO JEFF
23 LEATH, BROUGHT HIM IN WHO BROUGHT IN BILL BOWEN. IF MR.
24 GLEISSNER OR TOM FINN OR TOM WILLIAMS, IF ANY OF THEM WOULD
25 HAVE COME AT THAT TIME AND SAID, "GUYS, WE WANT TO COME IN

1 AND JOIN WITH YOU IN THIS ATTEMPT TO OPT OUT THE STATE OF
2 SOUTH CAROLINA FROM POSEY," WE WOULD HAVE WELCOMED THEM. WE
3 WELCOMED THESE OTHER PEOPLE WHO CAME WITH US. THEY WEREN'T
4 DOING THAT BACK IN 2002. IN 2002 THEY WERE DOING QUITE
5 FRANKLY NOTHING ALONG THESE LINES.

6 WHEN WE FILED THAT TO OPT OUT, WE HAD JUDGE
7 KEMMERLIN HEAR THIS, AND HE HEARD THE ARGUMENTS ABOUT THREE
8 DAYS BEFORE THE SEPTEMBER 3RD OPT-OUT DATE BY THE -- THAT WAS
9 PROPOSED BY THE TENNESSEE COURTS, AND HE WENT AHEAD AND
10 CERTIFIED AND UNDERSTOOD OUR PURPOSE. WHAT MADE THIS UNIQUE
11 AND THE REASON WE WERE ATTEMPTING TO OPT OUT THE STATE OF
12 SOUTH CAROLINA WAS THIS -- A COUPLE OF THINGS. IF YOU LOOKED
13 AT THE TENNESSEE INFORMATION THAT IS -- WAS IN THE FILES
14 ABOUT THE PERCENTAGE OF DRYVIT THAT IS SOLD THROUGHOUT THIS
15 COUNTRY, ABOUT A THIRD OF ALL DRYVIT WAS SOLD IN NORTH
16 CAROLINA AND SOUTH CAROLINA. THE OTHER 48 STATES HAD THE
17 OTHER TWO-THIRDS OF ALL DRYVIT EVER SOLD.

18 WELL, BY THEIR VERY ACTIONS IN TENNESSEE, THEY HAD
19 ALREADY OPTED OUT THE STATE OF NORTH CAROLINA, BUT THEY LEFT
20 THE STATE OF SOUTH CAROLINA IN THERE WHICH I THINK
21 REPRESENTED 13 PERCENT OF ALL THEIR SALES EVER, BUT STILL
22 LEFT IN SOUTH CAROLINA. THE PROBLEM WITH THIS PRODUCT THOUGH
23 WHEN THEY DID THEIR NOTIFICATIONS AND DID THEIR ADVERTISING
24 OF THEIR PLAN OF NOTIFICATION, THEY DIDN'T GIVE YOU A WAY TO
25 IDENTIFY YOUR PRODUCT. YOU KNOW, IF A HOMEOWNER HAD DRYVIT

1 ON HIS HOUSE, HE WOULDN'T KNOW IF HE HAD DRYVIT OR IF HE HAD
2 A HARD COAT STUCCO UNLESS HE WAS IN THE CONSTRUCTION
3 INDUSTRY.

4 EVEN IF HE WAS IN THE CONSTRUCTION INDUSTRY, HE
5 WOULDN'T KNOW, IF HE HAD THE SYNTHETIC STUCCO, IF IT WAS
6 DRYVIT, IF IT WAS STOW (PHONETIC) OR IF IT WAS ANY, YOU KNOW,
7 SENERGY OR ANY OF TWO DOZEN DIFFERENT MANUFACTURERS OF THIS.
8 THERE'S NO WAY OF LOOKING AT YOUR HOUSE THAT YOU COULD KNOW
9 IT. NOT ONLY WOULD HE NOT KNOW IF HE HAD THE PRODUCT ON
10 THERE, HE WOULDN'T KNOW IF HE HAD DAMAGES CAUSED BY THIS
11 PRODUCT IF IT WAS ON THERE.

12 SO OUR PROBLEM WAS THAT WHEN DRYVIT GOES AND THEY DO
13 THIS CLASS NOTIFICATION AND THEY RUN THEIR ADS IN THE
14 "PARADE" MAGAZINES IN CHARLESTON AND HILTON HEAD, OUR CLIENTS
15 WHO HAD THE STUFF ON THEIR HOUSE WHO MAY NOT EVEN KNOW THEY
16 HAD IT ON THEIR HOUSE AT THAT TIME WOULDN'T HAVE ANY WAY OF
17 HAVING THE ABILITY TO DETERMINE IF THEY NEEDED TO GO AND OPT
18 OUT, IF THEY NEEDED TO SEND SOME NOTIFICATION TO TENNESSEE
19 BECAUSE THERE'S NO WAY OF TRULY IDENTIFYING THE PRODUCT TO
20 THE NORMAL HOMEOWNER IN SOUTH CAROLINA. THAT'S WHY WE
21 THOUGHT IT WAS NECESSARY THAT WE FILE THE SEPARATE CLASS
22 ACTION THAT ALLOWED THE ENTIRE STATE TO OPT OUT OF IT. JUDGE
23 KEMMERLIN UNDERSTOOD THAT. JUDGE KEMMERLIN GRANTED HIS ORDER
24 TO DO THAT.

25 THE ISSUE THAT YOU'VE HEARD TALKED ABOUT TODAY AS

1 FAR AS THIS NOTIFICATION AND A PLAN OF NOTIFICATION AND WHY
2 THAT HAS NOT BEEN AN ISSUE RAISED UNTIL TODAY IS THAT IT WAS
3 ONLY TWO MONTHS AGO THAT THE POSEY TENNESSEE CLASS ACTION WAS
4 FINALIZED. THEY HAVE BEEN GOING BACK AND FORTH BETWEEN THE
5 LOWER COURT IN CLEVELAND TO THE COURT OF APPEALS IN KNOXVILLE
6 TO THE SUPREME COURT, BACK TO THE COURT OF APPEALS, BACK TO
7 THE LOWER COURT AND BACK UP AGAIN. IT'S BEEN GOING ON AND
8 ON. AND UNTIL THERE WAS A FINAL DETERMINATION OF WHAT
9 HAPPENED IN TENNESSEE, THERE WAS NO NEED FOR US TO MOVE
10 FORWARD WITH THE CLASS ACTION WE FILED IN SOUTH CAROLINA AND
11 THIS IS WHY: IF TENNESSEE NEVER ACCEPTED THE POSEY
12 SETTLEMENT, THE POSEY CLASS ACTION, THERE WOULD BE NOTHING
13 FOR US HERE TO OPT OUT OF.

14 SO IT WAS ONLY IN THE LAST TWO MONTHS -- WHICH IS
15 WHY YOU NOW SEE THIS FLURRY OF ACTIVITY OF DRYVIT COMING
16 FORWARD TO PRESS ON THEIR MOTIONS OR THESE PEOPLE COMING TO
17 INTERVENE TODAY AND US, QUITE FRANKLY, UP HERE PROTESTING THE
18 POSEY SETTLEMENT TODAY. IT'S ONLY BECAUSE IN THE LAST TWO
19 MONTHS THAT THIS HAS BEEN FINALIZED. HAS THIS CASE SAT THERE
20 FOR THE PAST TWO AND A HALF YEARS WITHOUT A LOT OF ACTIVITY?
21 ABSOLUTELY. THE REASON FOR THAT IS VERY SIMPLE: THERE WAS
22 NO NEED TO DO ANYTHING UNTIL TENNESSEE HAD ACTUALLY ACCEPTED
23 POSEY.

24 I GIVE YOU THAT HISTORY JUST TO BRING IN THE ISSUE
25 ABOUT THE INTERVENTION OF THESE PEOPLE WHO ARE SITTING IN

1 FRONT OF YOU TODAY. AND LIKE I SAID, I HAVE NO OBJECTION TO
2 THEM INTERVENING BUT WITH ONE CAVEAT AND THAT CAVEAT IS THIS.
3 MR. FINN TOLD FRANK, MY PARTNER, THAT THEIR INTENT WAS TO
4 TAKE THIS CLASS ACTION AND MAKE IT INTO A COMPREHENSIVE
5 SETTLEMENT CLASS FOR THE STATE OF SOUTH CAROLINA, ONE IN
6 WHICH THEY WOULD GO IN AND SETTLE THIS VERY MUCH LIKE
7 TENNESSEE WAS DONE ON A CLASS BASIS WHICH PRESUMABLY THERE
8 WOULD BE LOTS OF FEES OUT THERE.

9 WHEN MY FIRM FILED THIS IN 2002, IT WAS NOT OUR
10 INTENT TO APPROACH THAT WAY. IT WAS OUR INTENT TO OPT OUT,
11 TO GIVE THE OPTION TO THE HOMEOWNERS OF SOUTH CAROLINA TO BE
12 OPTED OUT OF THAT TENNESSEE THING SO THEY COULD APPROACH
13 THEIR CASES ON AN INDIVIDUAL BASIS. SINCE 2002 WE HAVE
14 CONTINUED TO DO THAT IN OUR FIRM. I KNOW OTHER FIRMS HAVE,
15 TOO, APPROACHED THIS ON INDIVIDUALS. WE STILL HAVE NINE
16 INDIVIDUALS THAT WE REPRESENT IN OUR HILTON HEAD OFFICE THAT
17 HAVE DRYVIT THAT THIS IS A -- THE SOLE REMEDY IS APPROACH IT
18 ON AN INDIVIDUAL BASIS ASSUMING THAT THE TENNESSEE CLASS
19 ACTION DOES NOT BAR THEM.

20 SO THAT IS THE ONLY RESERVATION I PUT ON THESE
21 GENTLEMEN INTERVENING. IF THEY HAD COME IN 2002, I WOULD
22 HAVE WELCOMED THEM. TODAY I WELCOME THEM AS LONG AS THEIR
23 GOALS IN THIS CLASS ACTION IS THE SAME AS WHAT WE INITIALLY
24 DID IN TEN -- WHEN WE INITIALLY FILED IT WHICH WAS TO OPT OUT
25 THE STATE OF SOUTH CAROLINA.

GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

1 ATTACHED TO IT.

2 THE COURT: ALL RIGHT. SO YOUR POSITION THEN ON THE
3 -- ON YOUR FOURTH POINT IS THAT SINCE THEY HAVE -- SINCE THE
4 OTHER LAWYERS, AS YOU ALLEGE, HAVE SETTLED THEIR CLAIMS
5 WITH -- WITH---

6 MR. ALFORD: DRYVIT.

7 MR. GLEISSNER: WITH DRYVIT, THE DEFENDANT.

8 THE COURT: ---DRYVIT, THAT THEN THEY HAVE NO
9 INCENTIVE TO WANT TO ADEQUATELY REPRESENT THE -- ANY UNKNOWN
10 CLAIMANTS THAT ARE OUT THERE OR YOUR CLIENTS.

11 MR. GLEISSNER: IT'S THE -- THEIR CLIENTS WHO -- I
12 REFERRED TO THEM EARLIER AS PUTATIVE CLASS MEMBERS, AND THAT
13 WAS WRONG. THEY'RE NOT PUTATIVE; THEY'RE CLASS
14 REPRESENTATIVES. THEIR CLIENTS, THE CURRENT CLASS
15 REPRESENTATIVES, HAVE SETTLED THEIR INDIVIDUAL CLAIMS AND,
16 THEREFORE, AS THEIR CLIENTS, THEY NO LONGER HAVE A STAKE IN
17 THIS LITIGATION, AND THAT'S THE REASON WHY WE BELIEVE WE
18 SHOULD BE SUBSTITUTED BECAUSE TREON AND SCEARCE HAVE AN
19 ACTIVE STAKE IN THIS LITIGATION. AND AS THE COURT IS AWARE,
20 ATTORNEYS REPRESENT CLIENTS, AND IF YOUR CLIENT SETTLES, THEN
21 YOU'RE -- THEN YOU'RE OUT, AND THAT'S THE REASON WHY WE
22 SHOULD BE SUBSTITUTED, YOUR HONOR.

23 THE COURT: ALL RIGHT. DO YOU WISH TO BE HEARD
24 FURTHER ON ANY OF -- I MEAN, MY UNDERSTANDING IS Y'ALL DO NOT
25 NECESSARILY OBJECT TO THEIR BEING -- JOINING IN WITH THE

1 LITIGATION, BUT YOU DO HAVE CONCERNS AND YOU OBJECT TO THEIR
2 TAKING OVER THE LITIGATION. IS THAT CORRECT?

3 MR. MULLEN: THAT IS A FAIR ASSESSMENT OF HOW I SEE
4 IT, YOUR HONOR.

5 THE COURT: ALL RIGHT.

6 MR. MULLEN: AND ON THE OTHER ONE THE -- MY FIRM
7 REPRESENTED JOHN CARDAMONE WHICH WAS ONE OF THE NAMED CLASS
8 MEMBERS. HE DID SETTLE HIS INDIVIDUAL CLAIM. THAT
9 SETTLEMENT DID NOT HAVE ANY TERMS WHATSOEVER AFFECTING HIS
10 REPRESENTATION OF THE CLASS ACTION. AND AS FAR AS WE HAVE AN
11 ACTIVE INTEREST IN PURSUING THIS, WE HAVE NINE OTHER MEMBERS
12 WHO ARE THE IDENTICAL SITUATION OF WHERE MR. GLEISSNER'S
13 CLIENTS ARE, THE TWO THAT HE HAS.

14 IT IS PROBABLY APPROPRIATE THAT SOME OF THESE OTHER
15 PEOPLE BE SUBSTITUTED IN NAME, AS A NAMED MEMBER. THAT
16 PROBABLY WOULD BE, YOU KNOW, AN APPROPRIATE MOTION THAT, AS
17 MR. GLEISSNER SAW IT, THAT WE WOULD ORALLY JOIN IN ON THAT AT
18 THIS TIME AND SUBSTITUTE SOME OTHERS THAT HAVE NOT SETTLED
19 OUT THEIR CLAIMS THAT ARE MORE DIRECTLY AFFECTED.

20 MS. HAULSEE: YOUR HONOR, MAY I BE HEARD ON BEHALF
21 OF DRYVIT?

22 THE COURT: YES, MA'AM. JUST GIVE ME A MOMENT.

23 MS. HAULSEE: CERTAINLY.

24 THE COURT: BUT IF THEY ARE -- IF THEY ARE ALLOWED
25 TO INTERVENE AND THEN JOIN IN IN THE REPRESENTATION, WHAT

1 HAPPENS -- AND MAYBE IT'S NOT FOR THIS COURT TO DECIDE, BUT
2 WHAT HAPPENS IF THE LAWYERS DISAGREE ON THE BEST ROUTE TO
3 PURSUE?

4 MR. MULLEN: PROBABLY THAT'S SOMETHING THIS COURT
5 ULTIMATELY WOULD HAVE TO TAKE UP. IT'S JUST AS IF -- IF MR.
6 LEATH AND MR. SEEKINGS AND MR. ROBERTSON AND MR. BOWEN OR US,
7 IF WE HAD SOME DIFFERING POSITIONS -- AND FORTUNATELY WE WERE
8 ABLE TO WORK TOGETHER. I HAVE WORKED WITH THREE OF THESE IN
9 THE PAST. TWO OF THEM ARE FORMER EMPLOYEES OF MINE. I LIKE
10 TO THINK I HAVE VERY GOOD RELATIONSHIPS WITH THEM. I HAVE
11 NEVER DEALT WITH MR. GLEISSNER BEFORE, BUT I HAVE NO
12 OBJECTION TO IT. AND, YOU KNOW, MY GUESS IS IF YOU ASK HIM,
13 HE PROBABLY WILL TELL YOU HE WOULD HAVE NO OBJECTION TO
14 WORKING WITH ME.

15 I THINK ONE OF THE THINGS THAT, YOU KNOW, IS
16 CERTAINLY FAIR TO SAY IS THAT AMONG LAWYERS IN THE STATE THAT
17 DO PLAINTIFFS CONSTRUCTION LITIGATION, BETWEEN MR. LEATH'S
18 FIRM AND MYSELF AND MY FIRM, WE CERTAINLY ARE -- AS FAR AS
19 THE -- THE AMOUNT OF WORK THAT WE DO IN THIS STATE AND
20 HOPEFULLY AS FAR AS THE RESPECT OF THE STATE BAR, I THINK
21 THAT -- THAT OUR FIRMS CERTAINLY ARE UP THERE. I THINK WE
22 PROBABLY DO MORE CONSTRUCTION LITIGATION ON PLAINTIFFS' SIDE
23 THAN ANYBODY ELSE IN THIS STATE.

24 YOU KNOW, THE -- THE ONLY APPROACH OF THE CASE THAT
25 I COULD SEE AN IMMEDIATE TAKING A DIFFERING POSITION IS: ARE

1 WE GOING TO HANDLE THIS TO WHERE ALL WE WANT TO DO IS OPT OUT
2 THE PEOPLE OF SOUTH CAROLINA FROM TENNESSEE AND THEN LET EACH
3 INDIVIDUAL TAKE IT ON AN INDIVIDUAL BASIS OR DO WE TRY TO,
4 ONCE WE OPT OUT THE STATE OF SOUTH CAROLINA, THEN RE-
5 INCORPORATE OUR OWN CLASS FOR PURPOSES OF SETTLEMENT?

6 IN TALKING WITH MR. GLEISSNER EARLIER AND MR.
7 WILLIAMS EARLIER, THEY SAID, "NO, INITIALLY OUR APPROACH IS
8 THE SAME AS WHAT YOU'RE SAYING; DO IT ON AN INDIVIDUAL
9 BASIS." BUT IT MAY BE THAT HIS HONOR WOULD RULE WE CAN'T OPT
10 OUT THE STATE IN A REPRESENTATIVE CAPACITY IN WHICH CASE WE
11 WOULD NEED TO THEN BACK UP AND HANDLE THIS AS A CLASS. YOU
12 KNOW, THOSE SORT OF DECISIONS I THINK WOULD BE DETERMINATIVE
13 ON HOW THIS COURT ULTIMATELY RULED.

14 THE COURT: THAT THIS COURT'S RULING TODAY WOULD
15 AFFECT THAT?

16 MR. MULLEN: I DON'T BELIEVE THIS -- NO, NOT TODAY.
17 IT WOULDN'T AFFECT IT AT ALL.

18 THE COURT: RIGHT. OKAY. IF -- IF I ALLOW THE
19 CERTIFICATION TO TAKE -- IF I DON'T GRANT DRYVIT'S MOTIONS.

20 MR. MULLEN: IF YOU GRANT DRYVIT'S MOTIONS, IT ALL
21 BECOMES SOMEWHAT MOOT.

22 THE COURT: YEAH, IT DOES. ALL RIGHT. YES, SIR.

23 MR. ROBERTSON: YOUR HONOR, CURRENTLY, AS I
24 UNDERSTAND IT, THERE ARE THREE POSSIBLE PATHS THAT THIS CASE
25 CAN TAKE IF DRYVIT'S MOTIONS ARE DENIED. ONE IS -- AND I

1 WILL CONFESS TO YOU THAT SOME OF US WHO ARE CURRENT CLASS
2 COUNSEL BELIEVE THIS: THAT WE ARE DONE, THAT BY CERTIFYING A
3 CLASS OF FOLKS IN SOUTH CAROLINA THAT JUDGE KEMMERLIN
4 EFFECTIVELY REMOVED THEM FROM THE PRECLUSIVE EFFECT THAT
5 POSEY WOULD OTHERWISE HAVE ON THEIR CLAIMS, AND THAT ISSUE
6 WILL BE DECIDED ONE DAY, MAYBE TODAY, SINCE IT'S PART OF
7 DRYVIT'S MOTIONS OR MAYBE ON THE TRIAL OF THE CLASS ACTION.

8 THE SECOND POSITION, ONE THAT I THINK MR. MULLEN
9 ARTICULATED VERY WELL, WAS WE FILED THIS CLASS SO THAT ALL OF
10 US WHO ARE OUT THERE EVERY DAY GETTING THESE CASES READY FOR
11 TRIAL, NOT SETTling THEM BUT TRYING THEM, CAN GO AHEAD AND
12 TRY OUR CASES AGAINST DRYVIT WITHOUT REGARD TO WHAT -- WHAT
13 SUCCESS DRYVIT AND ITS COUNSEL MAY HAVE HAD IN TENNESSEE.
14 AND THEN THERE IS A THIRD PATH WHICH IS TO PRESERVE JUDGE
15 KEMMERLIN'S ORDER AND THEN TRY TO FORGE A SETTLEMENT OF ALL
16 OF THE CLAIMS IN SOUTH CAROLINA. AND I THINK THAT WHERE YOU
17 SEE DIVISIONS AMONG THE LAWYERS ON THE NORTH SIDE OF THE V.
18 IN THIS CASE IS WHICH OF THOSE THREE PATHS THEY WILL TAKE,
19 BUT I DON'T KNOW THAT IT'S ANY DIFFERENT IN ANY OTHER CLASS
20 ACTION WHERE THE ISSUES ARE CONTESTED, WHERE THERE IS
21 DISAGREEMENT OVER THE BEST INTERESTS OF THE CLASS.

22 THESE ARE EXACTLY THE KIND OF ISSUES THAT ARE
23 DETERMINED IN EVERY CLASS ACTION THAT IS LITIGATED IN THE
24 COUNTRY, AND SO I DON'T KNOW THAT THAT REALLY HAS ANY EFFECT
25 ON WHETHER THESE GENTLEMEN ARE PERMITTED TO PARTICIPATE. I

1 THINK IT MAY HAVE AN EXTREMELY RELEVANT EFFECT ON WHETHER
2 THEY ARE ALLOWED TO BE SUBSTITUTED IN PLACE OF CURRENT CLASS
3 COUNSEL. I THINK THAT THERE ARE THOSE OF US CURRENTLY
4 REPRESENTING THE PUTATIVE CLASS AND THE INDIVIDUAL CLASS
5 REPRESENTATIVES WHO BELIEVE VERY STRONGLY THAT THE REASON WE
6 DID THIS IS SO THAT WE CAN CONTINUE TO TRY OUR CASES AND WE
7 DON'T WANT TO BE BOTHERED BY FOLKS WHO MIGHT BELIEVE THAT
8 THIS -- THAT SOME SETTLEMENT ALONG THE TERMS IN POSEY WOULD
9 BE APPROPRIATE IN SOUTH CAROLINA AS WELL.

10 THE COURT: ALL RIGHT. YOU -- YOU ACKNOWLEDGE THE
11 FACT THAT THIS -- THAT HE HAS NINE OTHER CLIENTS THAT ARE
12 INVOLVED IN THE LITIGATION?

13 MR. GLEISSNER: WELL, YOUR HONOR, I -- THE ANSWER TO
14 YOUR QUESTION IS I DON'T KNOW. I MEAN, I DO NOT DOUBT MR.
15 MULLEN'S VERACITY AT ALL. I MEAN, I WOULD NEVER DOUBT MR.
16 MULLEN'S VERACITY OR THE VERACITY OF ANY OTHER MEMBER OF THE
17 SOUTH CAROLINA BAR. IF HE MAKES THE REPRESENTATION THAT HE
18 HAS NINE OTHER INDIVIDUALS THAT ARE PROCEEDING AS INDIVIDUAL
19 LAWSUITS AGAINST DRYVIT, THEN, YOU KNOW, AS IT RELATES TO --
20 YOU KNOW, IF WE PROVIDE NOTICE TO THE CLASS AND HE STEPS IN
21 WITH A MOTION TO INTERVENE, THEN, YOU KNOW, WE EVALUATE IT AT
22 THAT TIME. YOU KNOW, THE PROBLEM THAT WE'VE GOT IS -- I
23 MEAN, THIS CLASS ACTION WAS CERTIFIED IN TWO THOUSAND AND---

24 MR. ALFORD: TWO.

25 MR. GLEISSNER: ---TWO. SEPTEMBER OF 2002. I DON'T

1 KNOW WHEN THE CARDAMONES SETTLED, AND WE DON'T HAVE ANY
2 SUBSTITUTION OF ANY PARTIES FOR A LENGTHY PERIOD OF TIME.
3 OUR UNDERSTANDING IS THAT THE -- WELL, I MEAN, I DON'T KNOW
4 WHO THESE PEOPLE ARE. AND SO, YOUR HONOR, I GUESS THE LONG
5 AND THE SHORT OF IT IS: FOR TODAY'S HEARING WE BELIEVE THAT
6 IT'S APPROPRIATE FOR YOU TO ALLOW US TO BE SUBSTITUTED AS
7 COUNSEL BECAUSE THAT'S THE MOTION BEFORE YOU. AND THEN AS IT
8 RELATES TO AFTER WE PROVIDE NOTICE, IF MR. GRIMBALL OR MR.
9 MULLEN BELIEVES THAT WE'RE NOT PROVIDING ADEQUATE
10 REPRESENTATION, THEN I BELIEVE IT'S HIGHLY APPROPRIATE FOR
11 THEM TO FILE A MOTION TO INTERVENE AND GET BACK IN THE CASE.
12 BUT FOR TODAY, YOUR HONOR, WE BELIEVE THAT IT'S MORE
13 APPROPRIATE FOR US TO PICK UP THE NOTICE BALL THAT'S BEEN
14 DROPPED AND ALLOW US TO CARRY THAT NOTICE BALL FORWARD AND
15 ALLOW US TO PROVIDE NOTICE TO THE ABSENT CLASS MEMBERS.

16 THE COURT: ALL RIGHT. NOW, ON THIS ISSUE DID
17 YOU---

18 MS. HAULSEE: YES, YOUR HONOR---

19 THE COURT: ---WISH TO BE HEARD?

20 MS. HAULSEE: ---I'D LIKE TO BE HEARD.

21 THE COURT: YES, MA'AM.

22 MS. HAULSEE: YOUR HONOR, ON BEHALF OF DRYVIT I WILL
23 REITERATE: DRYVIT HAS NO -- NO COMMENT WITH RESPECT TO THE
24 MOTION TO SUBSTITUTE COUNSEL OTHER THAN WHAT IS IN OUR BRIEF,
25 THAT IN OUR OPINION COUNSEL FOR THE -- ORIGINAL COUNSEL FOR

1 THIS CLASS DID A VERY GOOD JOB OF REPRESENTING THEIR CLASS
2 AND COST DRYVIT SOME MONEY IN TENNESSEE BY INCREASING THE
3 BENEFITS TO THE CLASS.

4 HOWEVER, THE ONE THING THAT WE DO -- THAT ON BEHALF
5 OF DRYVIT I WOULD LIKE TO STRESS VERY STRONGLY IS: HOW EVER
6 THE COURT DECIDES ON THE CLASS REPRESENTATION ISSUE, THE
7 WHOLE CONCEPT OF GIVING NOTICE TO THIS CLASS SHOULD NOT BE
8 DECIDED UNTIL THIS COURT HAS HEARD DRYVIT ON ITS MOTION BASED
9 ON RES JUDICATA AND FULL FAITH AND CREDIT. THE -- DRYVIT'S
10 MOTION BASED ON RES JUDICATA AND FULL FAITH AND CREDIT IS
11 CRITICAL, AND IT SHOULD FACTOR INTO WHETHER THERE IS ANY
12 NOTICE GIVEN TO THIS CLASS OR THERE IS ANY NEED TO GIVE ANY
13 NOTICE TO THIS CLASS.

14 AND SO THAT'S ALL I WOULD SAY, YOUR HONOR, IS THAT
15 -- THAT IS THE ONLY THING THAT WE WOULD HAVE TO SAY WITH
16 RESPECT TO THE MOTION THAT THE COURT IS DECIDING IS THAT
17 THERE ARE TWO THINGS BEING PROPOSED HERE. ONE HAS TO DO WITH
18 SUBSTITUTION OR ADDITION OF COUNSEL AND CLASS
19 REPRESENTATIVES. ON THAT THE ONLY THING DRYVIT HAS TO SAY IS
20 THAT SO FAR AS DRYVIT IS CONCERNED, THE ORIGINAL COUNSEL DID
21 A GOOD JOB. BUT ON THE NOTION OF GIVING NOTICE, THERE IS A
22 LOT TO BE HEARD THERE THAT HAS TO DO WITH DRYVIT'S MOTION ON
23 RES JUDICATA, AND THAT ASPECT SHOULD NOT BE DECIDED UNTIL
24 DRYVIT HAS HAD AN OPPORTUNITY TO PRESENT ITS CASE ON WHY
25 NOTICE IS NOT REQUIRED BECAUSE THIS CASE IS SUBJECT TO

1 DISMISSAL ON RES JUDICATA BECAUSE NOTICE WAS GIVEN IN
2 CONNECTION WITH THE POSEY CLASS AND SO FORTH. AND I WILL
3 NOT -- IF THE COURT WANTS ME TO ADDRESS THAT AT THIS POINT, I
4 WILL, BUT I THINK IT WOULD BE -- I THINK AT THIS POINT IT'S
5 APPROPRIATE FOR ME TO SIT DOWN AND LET THE COURT---

6 THE COURT: I DO, TOO.

7 MS. HAULSEE: ---TELL ME WHEN YOU WANT ME TO SPEAK.

8 THE COURT: ALL RIGHT. YES, SIR.

9 MR. MULLEN: YOUR HONOR, PROBABLY THE ONLY TIME
10 TODAY, BUT I'M IN AGREEMENT WITH WHAT COUNSEL JUST SAID. THE
11 ISSUE OF NOTICE, WHICH IS THE ONE ISSUE THAT THE INTERVENORS
12 HAVE BROUGHT TO YOUR ATTENTION, TO SAY THAT WE HAVEN'T DONE
13 OUR JOB BECAUSE WE HAVE NOT SUBMITTED A PLAN OF NOTICE TO
14 THIS COURT -- YOU HAVE TO LOOK AT THIS TYPE OF CLASS ACTION
15 AND WHAT WE FILED AND WHY THERE HAS NOT BEEN NOTICE SENT OUT
16 TO ALL THESE PEOPLE IN SOUTH CAROLINA YET AND WHY IT WASN'T
17 NECESSARY AND WHY THERE'S BEEN ABSOLUTELY NO EFFECT BY IT.

18 FIRST, THOUGH, THE JUDGE'S ORDER CERTIFYING THE
19 CLASS DOES HAVE ONE SENTENCE IN THERE THAT SAYS YOU'LL
20 PRESENT ME WITH A PLAN IN 30 DAYS WHICH WAS NOT COMPLIED
21 WITH. QUITE HONESTLY, I CAN'T TELL YOU HOW THAT GOT INTO HIS
22 ORDER. IT WAS NOT ONE OF THE THINGS HE SAID ORALLY. I CAN'T
23 TELL YOU WHY IT DIDN'T GET DONE.

24 I WILL TELL YOU THIS THOUGH: THERE WAS NOTHING TO
25 SEND NOTICE TO THE HOMEOWNERS OF UNTIL WE KNEW WHAT THE

1 RESOLUTION WAS OF POSEY. IF TENNESSEE COURTS HAD REJECTED
2 POSEY, THE CLASS ACTION THAT WE FILED HERE IN SOUTH CAROLINA
3 WOULD GO AWAY. IT WOULD HAVE NO EFFECT. IT WOULD HAVE NO
4 PURPOSE ANYMORE BECAUSE IF TENNESSEE REJECTED POSEY, WE
5 WOULDN'T NEED TO OPT OUT AS A STATE. THAT ONLY HAPPENED TWO
6 MONTHS AGO. THAT'S WHY THERE'S BEEN NO NEED FOR A PLAN OF
7 NOTICE TO BE BROUGHT TO THIS COURT.

8 I'LL ALSO POINT OUT THAT THE MOTION THAT DRYVIT HAS
9 FILED TO DISMISS OR DECERTIFY OUR CLASS HERE IN SOUTH
10 CAROLINA DID NOT HINGE ON THE FACT THAT WE FAILED TO PROVIDE
11 A NOTICE OF PLAN TO THE COURT OR THAT WE HAVE FAILED TO GIVE
12 NOTICE. THAT ISN'T WHAT THEY'RE MOVING FOR AT ALL TODAY.
13 WHAT THEY'RE MOVING FOR TODAY IS THAT TENNESSEE SHOULD BE --
14 HAVE RES JUDICATA EFFECT ON US AND THAT WE SHOULD GIVE FULL
15 FAITH AND CREDIT TO WHAT THEY DID IN TENNESSEE, NEITHER OF
16 WHICH WOULD BE IMPACTED ON GIVING NOTICE TO THE SOUTH
17 CAROLINA CLASS.

18 IT'S ONLY WHEN THIS COURT HAS ADOPTED OUR POSITION
19 THAT TENNESSEE'S NOT ENTITLED TO FULL FAITH AND CREDIT THAT
20 WE WOULD THEN GIVE NOTICE TO THE PEOPLE OF SOUTH CAROLINA
21 SAYING, "THE COURT HAS OPTED US OUT IF YOU WANT. YOU CAN
22 AFFIRMATIVELY OPT IN BY FILING YOUR CLAIM." THAT'S WHY THE
23 NOTICE ISSUE DOESN'T RAISE ANYTHING TODAY EXCEPT THAT IT
24 GIVES THESE INTERVENORS THAT ARE SITTING IN FRONT OF ME
25 SOMETHING TO SAY: HERE'S ONE THING THAT THOSE FIVE LAWYERS

1 SITTING BACK THERE DIDN'T DO RIGHT.

2 THE COURT: BUT---

3 MR. MULLEN: AND I HAVEN'T GOTTEN AN EXCUSE FOR IT,
4 YOUR HONOR, EXCEPT TO TELL YOU THAT THERE'S BEEN NO HARM DONE
5 TO THE MEMBERS OF THE SOUTH CAROLINA CLASS, AND DRYVIT'S NOT
6 USED THAT AS A BASIS FOR MOVING FOR DISMISSAL OR
7 DECERTIFICATION.

8 THE COURT: BUT YOU WOULD -- IF I DON'T SUBSTITUTE
9 YOU AS THE ATTORNEY, YOU WOULD INTEND TO OPPOSE DRYVIT'S
10 MOTION BASED ON RES JUDICATA AND THE FULL FAITH AND CREDIT.

11 MR. MULLEN: ABSOLUTELY, YOUR HONOR. WE'RE PREPARED
12 TO GO FORWARD TODAY IF YOU WOULD LIKE.

13 THE COURT: YES, SIR.

14 MR. GLEISSNER: YOUR HONOR, I'M HEARING -- I'M
15 HEARING A COUPLE OF DIFFERENT THINGS, AND I JUST WANT TO
16 UNDERSTAND. I'M HEARING FROM DRYVIT'S COUNSEL THAT THE
17 CURRENT PLAINTIFFS' COUNSEL DID A GREAT JOB NEGOTIATING A
18 RESOLUTION IN TENNESSEE, AND THEN I'M HEARING FROM
19 PLAINTIFFS' COUNSEL: WE DID A GREAT JOB OPTING THE STATE OF
20 SOUTH CAROLINA OUT OF THE TENNESSEE CLASS ACTION.

21 THOSE APPEAR TO BE MUTUALLY EXCLUSIVE. I MEAN, IF
22 WE OPTED THE STATE OF SOUTH CAROLINA OUT OF TENNESSEE, THEN
23 HOW DID WE NEGOTIATE A BETTER SETTLEMENT IN TENNESSEE FOR THE
24 SOUTH CAROLINA PEOPLE? BECAUSE THEY'RE OPTED OUT. SO THOSE
25 APPEAR TO BE MUTUALLY EXCLUSIVE.

1 NOW, AS IT RELATES TO WHAT THEY DIDN'T DO, I SUSPECT
2 AND HAVING READ THEIR BELIEF -- HAVING READ THEIR BRIEF, IT'S
3 A PRETTY GOOD SUSPICION. WHAT THEY'RE ARGUING IS THE FINAL
4 ORDER IN TENNESSEE BEAT A FINAL ORDER IN THE SOUTH CAROLINA
5 CLASS ACTION, THAT YOU DON'T TAKE IT FROM THE SEPTEMBER 3RD,
6 2002, ORDER, THAT INSTEAD YOU TAKE IT FROM A SUBSEQUENT FINAL
7 ORDER RESOLVING THE LITIGATION, AND THAT FINAL ORDER CAN'T
8 HAPPEN WITHOUT NOTICE. AND I THINK WHAT THEY'RE GOING TO
9 ARGUE IS RES JUDICATA SHOULD AFFECT THE SOUTH CAROLINA CLASS
10 ACTION BECAUSE, AHA, OUR FINAL ORDER IS FINAL BEFORE THEIR
11 FINAL ORDER.

12 SO WHAT DIDN'T THEY DO? THEY DIDN'T PROSECUTE
13 PURSUANT TO THE SEPTEMBER 3RD ORDER IN A TIMELY FASHION TO
14 GET A QUOTE/UNQUOTE FINAL ORDER SO THAT DRYVIT WOULDN'T BE
15 ABLE TO ARGUE, AHA, OUR FINAL ORDER BEAT YOUR FINAL ORDER.
16 AND THAT'S NOT ADEQUATE REPRESENTATION.

17 THE COURT: ALL RIGHT.

18 MR. GLEISSNER: THANK YOU, YOUR HONOR.

19 THE COURT: ALL RIGHT. NOW, DID YOU MENTION -- DID
20 DRYVIT IN ITS MATERIALS THAT IT FILED ADDRESS THE ISSUE OF
21 THEIR INTERVENTION? ANYTHING THAT YOU WOULD LIKE ME
22 PARTICULARLY TO TAKE A LOOK AT IF YOU DID?

23 MS. HAULSEE: YOUR HONOR, DRYVIT FILED TWO THINGS.
24 ONE WAS A RESPONSE THAT ESSENTIALLY INCORPORATES ITS MOTION
25 TO DISMISS BECAUSE, AS I HAVE SAID OVER AND OVER AGAIN, THE

1 NOTION OF NOTICE BEING REQUIRED AND THE NOTION OF WHETHER THE
2 CLASS WAS PROPERLY REPRESENTED HERE IS FULLY ADDRESSED IN
3 DRYVIT'S BRIEFS AND IT'S -- WHICH EXPLAINS THAT IT'S
4 IMPORTANT TO KNOW THE HISTORY, THE SEQUENCE OF EVENTS, WHAT
5 HAPPENED WHEN, THINGS -- VERY IMPORTANT THINGS.

6 FOR EXAMPLE, YOUR HONOR, SOMETHING THAT HASN'T EVEN
7 BEEN MENTIONED HERE BUT THAT IS CRUCIAL IF I CAN GET... THAT
8 PART OF THE TENNESSEE COURT'S ORDER IS ESSENTIAL TO WHAT
9 HAPPENED IN THIS CASE AND TO WHY NOTICE COULDN'T BE GIVEN.
10 UNDER THE VERY TERMS OF THE SETTLEMENT AGREEMENT IN POSEY
11 WHICH HAD ALREADY BEEN PRELIMINARILY APPROVED BEFORE
12 CARDAMONE WAS EVEN FILED, THERE COULD NOT BE GROUP REQUESTS
13 TO OPT OUT. IT HAD TO BE DONE INDIVIDUALLY.

14 THE COURT: ALL RIGHT. SO YOU'RE---

15 MS. HAULSEE: SO THAT WHILE CLASS COUNSEL HERE
16 VALIANTLY TRIED TO OPT OUT THE ENTIRE STATE OF SOUTH
17 CAROLINA, THEY WERE FACED WITH A SITUATION IN WHICH THEY KNEW
18 THAT WAS PROBABLY NOT VALID. AND SO -- AND TO ANSWER WHAT
19 WAS ALREADY RAISED HERE BY OPPOSING COUNSEL, THAT'S WHY YOU
20 GO BOTH WAYS. HERE I AM ARGUING FOR MY OPPONENT WHO COSTS MY
21 CLIENT A LOT OF MONEY, BUT I UNDERSTAND WHAT THEY DID BECAUSE
22 HAD I BEEN IN THEIR SHOES THAT'S WHAT I WOULD HAVE DONE,
23 PURSUE BOTH -- BOTH COURSES OF ACTION BECAUSE YOU ARE FACING
24 SOMETHING LIKE THAT---

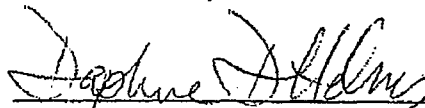
25 THE COURT: ALL RIGHT.

GAP IN TRANSCRIPT BASED ON
PARTIES' DESIGNATIONS OF MATTER

I, THE UNDERSIGNED DAPHNE D. HELMS, OFFICIAL COURT REPORTER FOR THE ELEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR BEAUFORT COUNTY, SOUTH CAROLINA, ON THE 5TH DAY OF DECEMBER, 2005.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

JANUARY 5, 2006



DAPHNE D. HELMS, COURT REPORTER