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

v.

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

APPELLANTS' RETURN TO THE MOTION TO DISMISS

This appeal is from an order denying the Appellants' Motions to Dismiss/Quash a Rule to Show Cause which requires them to appear before the Honorable J. Mark Hayes, II and prove why they should not have to return attorneys' fees. Attached to their Notice of Appeal, the Appellants filed a memorandum on appealability, explaining that the Rule to Show Cause effectively deprives them of a jury trial in a related professional negligence class action that they have been defending for four years and over which Judge Hayes also presides.

Respondents have filed a Motion to Dismiss the appeal; however, the bulk of their argument does not address the issue of whether the order on appeal is subject to immediate review, but instead addresses the ***merits*** of the appeal: whether the trial court

has the authority to issue a Rule to Show Cause pursuant to Rule 23, SCRCP.[1] Despite the Respondents' concentration on the merits of the appeal, this Return focuses on appealability, which is the only issue before this Court at this early stage.

As explained more fully in the Appellants' appealability memorandum, this appeal involves two related class actions: one that was filed in 2002 in which the Appellants were the former class counsel in the above-captioned synthetic stucco litigation; and one that was filed in 2008 against the Appellants for, among other things, professional negligence in the handling of the 2002 class action. The 2002 action, which is known as the "-1377 original class action," was settled and dismissed with prejudice in June of 2010, except that "the Court [retained] exclusive and continuing jurisdiction of the Action, all Parties, and Settlement Class Members, to interpret and enforce the terms, conditions and obligations of this Settlement Agreement consistent herewith." (*See* Order Granting Settlement Agreement, p. 22 (attached to the Appealability Memo as Exhibit D)). Judge Hayes has presided over that matter since 2005.

After the 2010 settlement and dismissal of the -1377 original class action, Judge Hayes was appointed to also preside over the professional negligence action, known as the "*Treon/Tucker* case," which had been commenced two years prior. In late 2011, the Appellants moved to recuse Judge Hayes. As a result of that motion, Judge Hayes issued an Order on May 2, 2012, denying the motion to recuse and staying the *Treon/Tucker* case until he could issue a Rule to Show Cause against the Appellants in the above-

[1] The Respondents' motion to dismiss also accuses the undersigned counsel of violating the South Carolina Rules of Professional Conduct. Counsel denies those allegations and stand by our original memorandum. Unfortunately, such attacks by counsel for Respondents have permeated this litigation. (*See, e.g.*, June 22, 2012 e-mail from Respondents, copied to Judge Hayes **(attached hereto as Exhibit A)**).

captioned -1377 original class action. Specifically, Judge Hayes stated, "After extensive research on the issue of recusal and this Court's obligations under Rule 23, the better approach at this time is for the [*Treon/Tucker* case] to be temporarily stayed. The stay is effective immediately and will remain in place until this Court has issued its decision in the Rule to Show Cause [in the -1377 original class action]." (*See* Order Denying Motion to Recuse and Temporarily Staying Matters, p. 14 **(attached to as Exhibit B)**). Thus, as a result of filing a motion to recuse, the Appellants now face a Rule to Show Cause in which Judge Hayes will be the finder-of-fact in determining the same issues that underlie the *Treon/Tucker* professional negligence case. Because the Appellants have a legal right to a jury trial in the *Treon/Tucker* case, Judge Hayes' order denying them that right is immediately appealable.

This Court and the Supreme Court have consistently held that orders affecting a mode of trial to which a party is entitled by law affect substantial rights under S.C. CODE ANN. § 14-3-330(2) and must be appealed immediately. *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). In cases where legal and equitable claims are joined in the same action and there are factual issues common to both claims, the legal claims ***must*** be tried by a jury before the equitable claims can be resolved. *C&S Real Estate Servs., Inc. v. Massengale*, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986).

In the *Treon/Tucker* case, the plaintiffs sought both legal and equitable remedies, i.e., money damages and disgorgement of fees. The facts underlying the claims for these damages were the same. This commonality in facts is clearly illustrated in the *Tucker* Complaint: paragraphs 46 through 53 are labeled "Common Deficiencies Relating to Defendants' Conduct." Among those "common deficiencies" are allegations that the

Appellants received $825,000 in attorneys' fees "that would be fully payable 'after the final dismissal of the' [-1377 original class action]." (*See* Tucker Complaint ¶ 50 **(attached hereto as Exhibit C)**). Unquestionably, those common factual issues would be decided by a jury in the *Treon/Tucker* matter. *See C&S Real Estate Servs., Inc.*, 290 S.C. at 301, 350 S.E.2d at 193. This is true not only because common factual issues are involved in the legal and equitable remedies sought, but also because all of the causes of action raised – breach of fiduciary duty, civil conspiracy, fraudulent concealment, and professional negligence – are legal actions to which the defendants are entitled to a trial by jury. *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 494, 730 S.E.2d 328, 332 (Ct. App. 2012) ("Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable[.]"). Additionally, Rule 38 of the South Carolina Rules of Civil Procedure recognizes the fundamental importance of the right to a jury trial in a civil action in which the plaintiff seeks money only. *See* Rule 38(a), SCRP ("The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived.").

Here, the Appellants were actively defending the *Treon/Tucker* action for years before the Rule to Show Cause was issued. It was only when they moved to recuse Judge Hayes that he stayed the matter so that the underlying facts in that case could be

determined by him via a Rule to Show Cause in the -1377 original class action.[2]

Once Judge Hayes issued the Rule to Show Cause and denied the Appellants' motion to dismiss it, the Appellants were obligated to file this Notice of Appeal, or they would forever lose their right to complain about being deprived of a jury trial. *See Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997) (explaining that an order denying a party a mode of trial to which the party is entitled by law cannot be challenged after final judgment, but instead, must be appealed immediately); *Foggie v. CSX Transportation, Inc.*, 313 S.C. 98, 431 S.E.2d 587 (1993) (same); *Edwards v. Timmons*, 297 S.C. 314, 377 S.E.2d 97 (1988) (same); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (same).

Furthermore, to the extent the Respondents' motion briefly addresses the issue of appealability, Respondents seem to argue that the threshold for appealabilty is higher for orders in class action cases, arguing that "[the] limited appealability of intermediate orders in a class action is a function of the broad grant of power to the trial judge that is necessary for the court to manage the action and ensure class counsel and class representatives fulfill their fiduciary duties to the unnamed class members." (*See* Respondents' Motion to Dismiss, p. 13). The rules of appealability, however, are constant, and orders issued under Rule 23, SCRCP, like other interlocutory orders, are immediately appealable under the circumstances provided in S.C. CODE ANN. § 14-3-330. *See Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) ("Orders under Rule 23, SCRCP are interlocutory and thus, immediately appealable only

[2] The very same facts that are alleged in the *Treon/Tucker* case are at issue in the Rule to Show Cause. As Judge Hayes explained in his Rule to Show Cause Order, the Rule revolves around the "attorney fees allegedly received by certain Class Counsels . . . which were never disclosed to or approved by this Court." (*See* Rule to Show Cause p. 1 (attached to the appealability memo as Exhibit J)).

in certain circumstances. Here the order was in the nature of an injunction . . . . Under S.C. CODE ANN. § 14–3–330(4) (1976), injunctions are immediately appealable. Thus, the trial judge's order is properly before this Court."); *see also Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008) (holding that an order establishing an "opt-in" notification procedure in a class action is immediately appealable because it involves a mode of trial).

Citing to *Baldwin Consruction. Co.. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004), Respondents also argue that Judge Hayes' order is not subject to immediate appeal because "the appropriate analysis of appealability does not focus on the 'ultimate' effect of an appealed ruling, but rather answers the question of whether the order 'prevents a judgment from which an appeal might be taken or discontinues the action.'" (*See* Respondents' Motion to Dismiss, p. 14) Appellants agree the *Baldwin* opinion is instructive; however, rather than supporting the Respondents' position, *Baldwin* helps to underscore exactly why the Order in this case is subject to immediate review.

In *Baldwin*, the defendants requested a jury trial based on allegations in their proposed amended anwer. The trial court denied the motion to amend, and an immediate appeal was lodged. This Court entertained the appeal, finding that an immediate appeal was necessary because a legal counterclaim was asserted in the amended answer, so the order affected the defendants' right to a jury trial. *Id.* at 229, 593 S.E.2d at 147. The Supreme Court vacated the opinion, explaining that the Court of Appeals' analysis "put[] the cart before the horse" because, until a motion to amend was granted and they were permitted to file the amended answer, the defendants had no right to a jury trial. *Id.* at 230, 593 S.E.2d at 147. That is, the defendants' right to a jury trial had not changed as a

result of the order denying the motion to amend. Prior to the order, the defendants had not established a right to trial by jury. After the order, they still had no right to a jury. The order itself, therefore, did not affect a mode of trial to which the party was entitled by law. *Id.*

Unlike the defendants in *Baldwin,* whose right to a jury trial had never been established, the Appellants' right to a jury trial in the *Treon/Tucker* case had been in existence for ***for four years*** when Judge Hayes stayed that action so that the underlying facts could be determined in a Rule to Show Cause hearing ***by him***, rather than by a jury. The deprivation of the Appellants' right to a jury trial became final when Judge Hayes denied the Appellants' motions to dismiss the Rule to Show Cause. At that point, the Appellants were required to file an appeal to protect their consititutional right to a jury or risk forever losing that right.

Finally, Respondents relegate what would be their strongest argument (if it were true, which it is not) to a footnote in their motion – that the Appellants waived their right to a jury trial. (*See* footnote 7 on p. 14-15 of Respondents' Motion to Dismiss) In that footnote, Respondents claim that "[a]t a hearing on July 18, 2012, Respondents . . . made a motion on the record that the trial judge empanel a jury to make factual determinations regarding the Rule 23 proceeding. Before the judge ruled on the motion, each Appellant (through its counsel) rejected the Respondents' motion thereby waiving any argument for a jury trial in this proceeding."

The problem with this argument by Respondents, however, is that it is not supported by the evidence. As the transcript from the July 18, 2012 hearing reflects, the Appellants never waived their right to a jury trial. In fact, at the hearing, their counsel

consistently argued that the facts at issue in the Rule to Show Cause should be decided by a jury in the *Tucker/Treon* case.

On the second day of the hearing addressing the motions to dismiss the Rule to Show Cause, counsel for Respondents stated, "[W]e'd like to change our position and go ahead and join in the defendant's motion for a jury trial, ask the Court to impanel a jury to hear the factual issues, issues in this [Rule to Show Cause]." (July 18, 2012 hearing, Tr. p. 202, lines 13-19 **(attached hereto as Exhibit D)**). At that point, counsel for former class representatives (who are not appealing Judge Hayes' order), stated: "Our motion was a motion to dismiss. Not a motion for a jury trial. A jury trial is just one of many features of due process that we contended yesterday we would lose if we were compelled to respond to the Rule to Show Cause." (*Id.* at p. 204, lines 6-9).

Then, counsel for Appellant Bowen also explained that the motion before the Court was a motion to dismiss, and the issue of a jury trial had been raised because the Rule to Show Cause deprived the Appellants of "due process and a jury trial on the issue of where those $600,000 in fees came from." (*Id.* at p. 205, lines 10-15). Likewise, counsel for Appellants Mike Seekings, Tim Bouch and Jeff Leath, stated:

> [T]he issue of jury demand has been discussed and I didn't speak to it because I had not yet made my appearance, and again, I think [counsel for former class representatives] has it right. The jury issue is one of many, many, many, many issues or problems with the process that is outlined, and it can't be cured by saying let's impanel a jury [in the Rule to Show Cause action] because I assume [counsel for Resondents] envisions the jury being told that the burden of proof is upon the defendants to show what happened and that alone is a problem. But, again, there's a more fundamental problem with the process that goes way beyond the jury. Although that is part of the issue.

(*Id.* at p. 226, lines 2-12).

The attorneys for Appellant Robertson were never heard on the issue and in no way waived Robertson's right to a jury trial. Accordingly, Respondents' argument that the Appellants waived their right to a jury trial is not borne out by the transcript.

CONCLUSION

This appeal is admittedly unusual – to understand it requires knowledge of two interrelated class actions that have been ongoing for over ten years combined. Appellants' Memorandum on Appealability outlines that procedural history and explains how the issue in both actions has become identical: whether the Appellants compromised the class by receiving attorneys' fees in the -1377 original class action without disclosing them to or having them approved by the trial court. This issue was initially raised in the *Treon/Tucker* case in which the Appellants have a right to a jury trial. Two years after that case was initiated (by the same attorneys who represent the class in the -1377 original class action), Respondents moved for an accounting and Rule to Show Cause in the -1377 action. Judge Hayes did not issue a written order on that motion, and a settlement agreement between the parties in that matter was thereafter reached and approved by Judge Hayes.

Meanwhile, the Respondents pursued the *Treon/Tucker* action against Appellants and former class representatives. Judge Hayes presided over that matter, and in response to the Appellants' filing a motion to recuse him, he stayed that case for the admitted purpose of issuing a Rule to Show Cause in the -1377 original class action. The result of this decision deprives the Appellants of a mode of trial to which they have a legal right. Accordingly, to challenge this ruling on appeal, the Appellants are required to file this appeal immediately, and not wait until after a final judgment has been issued in the Rule to Show Cause.

The only issue before this Court at this point is whether Judge Hayes' order is immediately appealable. Once this appeal is allowed to proceed, the parties will have the opportunity to argue about whether Judge Hayes erred in issuing the Rule.

Respectfully submitted this 8th day of October, 2012.

[Signatures on following page]

Tanya A. Gee S.C. Bar No. 70191
tgee@nexsenpruet.com
Susan P. McWilliams S.C. Bar No. 3918
smcwilliams@nexsenpruet.com
Daniel C. Leonardi S.C. Bar No. 70569
dleonardi@nexsenpruet.com
NEXSEN PRUET, LLC
Post Office Drawer 2426
Columbia, SC 29202
Tel: 803-771-8900

Attorneys for Appellant William Dixon Robertson III

James L. Bruner S.C. Bar No. 969
jbruner@brunerpowell.com
BRUNER POWELL WALL & MULLINS, LLC
Post Office Box 61110
Columbia, SC 29260
Tel: 803-252-7673

Attorneys for William M. Bowen

Kent T. Stair S.C. Bar No. 14029
kstair@carlockcopeland.com
CARLOCK COPELAND & STAIR, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Tel: 843-727-0307

Kenneth C. Anthony, Jr.,
kanthony@anthonylaw.com
THE ANTHONY LAW FIRM, PA
250 Magnolia Street
Spartanburg, SC 29304
Tel: 864-582-2355

Attorneys for Jefferson Leath, Jr., Michael S. Seekings, and Timothy W. Bouch

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

v.

Dryvit Systems, Inc., ...Defendant.

PROOF OF SERVICE

I certify that this 8th day of October, 2012, I have served the foregoing Return to Respondents' Motion to Dismiss via U.S. Mail, first class postage prepaid, on the following counsel:

M. Dawes Cooke, Jr., Esquire
John A. Jones, Esquire
BARNWELL WHALEY PATTERSON & HELMS
Post Office Drawer H
Charleston, SC 29402

Thomas J. Finn, Esquire
Thomas E. Williams, Esquire
FINN LAW FIRM
P.O. Box 6003
Hilton Head, SC 29938

Gregory M. Alford, Esquire
ALFORD, WILKINS & COLTRANE, LLC
P.O. Drawer 8008
Hilton Head, SC 29938-8008

Rob Fields, Esquire
SASSER FIELDS, LLP
2300 Rexwood Drive, Suite 320
Raleigh, NC 27607

Robert B. Phillips, Esquire
FINKEL LAW FIRM, LLC
P.O. Box 1799
Columbia, SC 29202

Donald E. Jonas, Esquire
DONALD E. JONAS LAW OFFICE
1328 Blanding Street
Columbia, SC 29202

Susan Taylor Wall, Esquire
McNair Law Firm, PA
P.O. Box 1431
Charleston, SC 29402

Susan P. McWilliams
smcwilliams@nexsenpruet.com
NEXSEN PRUET, LLC
Post Office Drawer 2426
Columbia, SC 29202
Tel: 803-771-8900

Attorneys for Appellant William Dixon Robertson III

EXHIBIT A

From: Gregory M. Alford <gregg@awc-lawfirm.com>
Sent: Friday, June 22, 2012 11:25 AM
To: Jay Jones; gregg@alfordandwilkins.com; Willelfe@aol.com; Thomas@pendarvislaw.com; I. Gregory Hodges, J.D.; finlaw@hargray.com; thomaswilliams1@adelphia.net; jonastrialatty@netscape.net; Sam Phillips; Timothy D. Roberts, J.D.; William Bill J. Hunter, J.D.; Rob Fields
Cc: kstair@carlockcopeland.com; Wall, Susan; jbruner@brunerpowell.com; McWilliams, Susan P.; Leonardi, Daniel C.; M. Dawes Cooke; Amanda Taylor; Hayes, J. Mark; Hayes, J. Mark Law Clerk (Vollie C. Bailey IV)
Subject: RE: -1377 Rule to Show Cause
Attachments: 08-774AmendedOrder.pdf

Dear Jay:

Thank you for your e mail. My summer is going great, thanks for asking. Your e-mail was a surprise. I thought of the ESPN show "COME ON MAN" You know the one where they make fun of pro athletes for bonehead plays and act outs. So I guess my response is still "COME ON MAN."

Please allow me to respond in slightly more detail. First you need to look carefully at the un-appealed order of Judge Dukes dated November 19, 2009, attached. We can still represent our clients in 1377. Second look at Rule 11. Third, check yourself. You are asking me to ask a court to take an action for the benefit of your clients (who arguably assisted either wittingly or unwittingly, in trying to defraud a court in at least one state). That action would be to the detriment of my clients, to whom I actually speak on a fairly regular basis. COME ON MAN

If you seek "full relief" --are you threatening me with something? If so, man up and be specific. File your motions, dig the hole a little deeper. Because you bet on it like rain-- that I will be filing my own motions directed at you and anyone else who is involved with or encourages any filing that is not for a proper purpose. COME ON MAN

As to the statute of limitations, good luck with those arguments. You need to read *Premium Investments* and *Hazel-Atlas Glass Co. vs Hartford Co.*, 322 U.S. 238 1944. Also see the numerous comments to Federal Rule 60. Remember you need a good faith basis in law and fact. COME ON MAN.

I did not add your clients to the Rule. Judge Hayes did so *sua sponte*. By the way I happen to think he was correct in doing so.

I was then instructed to by the Court to have it served. Though you did not afford the courtesy to Mr. Treon or Mr. Scearce in the other cases, we would allow you to accept service on behalf of your clients should you so choose.

Well, I'm off to enjoy the rest of the day. Tide is going out and the fish are biting.

Have a great day. I look forward to seeing you in July.

Respectfully:

Gregory M. Alford
Alford, Wilkins & Coltrane, LLC
P.O. Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500
(843) 842-8400 fax

P.S. I copied Judge Hayes since you wanted me to violate his order.

From: Jay Jones [mailto:jjones@barnwell-whaley.com]
Sent: Thursday, June 21, 2012 5:47 PM
To: gregg@awc-lawfirm.com; gregg@alfordandwilkins.com; Willelfe@aol.com; Thomas@pendarvislaw.com; I. Gregory Hodges, J.D.; finlaw@hargray.com; thomaswilliams1@adelphia.net; jonastrialatty@netscape.net; Sam Phillips; Timothy D. Roberts, J.D.; William Bill J. Hunter, J.D.
Cc: kstair@carlockcopeland.com; Wall, Susan; jbruner@brunerpowell.com; McWilliams, Susan P.; DLeonardi@nexsenpruet.com; M. Dawes Cooke; Amanda Taylor
Subject: -1377 Rule to Show Cause

Dear Gregg,

I hope you're doing well and having a nice summer so far. It has recently come to my attention that you attempted to serve John and Sally Cardamone with a Rule to Show Cause and Order for Accounting ("RTSC") in the underlying -1377 Treon class action case. As you know, the RTSC was discussed in our teleconference with Judge Hayes this morning, and in advance of filing any motions for the July 18th hearing, I respectfully request that you immediately petition Judge Hayes to have this Order withdrawn and substituted with one that is not presumably directed toward my clients in the still pending -3145 ("Tucker") and -0774 ("Treon") lawsuits, and cease any further efforts to disgorge any money from my clients.

-1377 counsel was disqualified from the Tucker and Treon lawsuits. Judge Dukes' February 1, 2010 Order is clear and unambiguous- there exists an unwaived conflict of interest that prevents you from prosecuting claims against the former class representatives John & Sally Cardamone, Ramona Gianni and Benjamin & Diane Clark related to the settlement of their underlying individual lawsuits. This includes seeking to disgorge settlement proceeds.

Disqualification notwithstanding, I ask that you do not pursue disgorgement from the former class representatives of proceeds from their settlement of their individual lawsuits in -1377 because 1) those funds were not part of the the class settlement; 2) those funds came from sources beyond just Dryvit; and 3) those proceeds were used to repair actual and significant damage to my client's homes.

Also, the underlying RTSC motion which you initially filed giving rise to the recent Order was directed solely toward the former class counsel, which I believe creates jurisdictional and due process issues. Specifically, the RTSC states that:

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

None of the former class representative defendants in the Tucker and Treon lawsuits were involved in that motion, nor participated in the prior hearing. That motion was only for an accounting of attorney fees without a single mention of disgorgement of any benefits to class representatives from their individual lawsuits ("For the foregoing reasons, Original Class Counsel should be required to appear before this Court to account for any fees they received in connection with this case").

Finally, the RTSC presents statute of limitations issues. You are attempting to disgorge settlement proceeds from my clients with the full knowledge that they settled their individual cases at least dating back to the September 2005 Motion to Intervene and Substitute Class Representatives. Any concerns about individual case settlements should have been raised within three years of your entry into -1377.

Given the serious nature of the problems outlined above, I hope you will agree to immediately cease any and all efforts to disgorge from my clients any and all settlement proceeds received from their individual lawsuits, including seeking an Amended Order on the Rule to Show Cause. Otherwise, we will have no choice but to file the appropriate motions and seek the fullest relief possible. However, I am confident that will not be necessary. Please let me know by the end of the day tomorrow how you intend to proceed to allow us sufficient time to respond appropriately. Also, I would appreciate if you would forward this to any co-counsel I may have inadvertently omitted from this email, as I don't have a proper email list for the 1377 case. I have copied counsel in the Tucker and Treon cases.

I appreciate your attention to this and look forward to hearing from you.

Sincerely,

Jay

John A. "Jay" Jones

BARNWELL WHALEY
PATTERSON & HELMS LLC
Attorneys for businesses & professions since 1958

Post Office Drawer H
Charleston, SC 29402
885 Island Park Drive (29492)
(843) 577-7700
(843) 577-7708 (fax)
jjones@barnwell-whaley.com

EXHIBIT B

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

2008-CP-07-0774

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

Plaintiffs,

v.

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

Defendants.

2008-CP-07-3145

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

Plaintiffs,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

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

ORDER
DENYING MOTIONS TO RECUSE
AND
TEMPORARILY STAYING MATTERS

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

The Present Motions

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

---

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

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

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

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

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

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

---

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

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

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

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

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

Decisional Authorities[5]

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

---

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

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

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

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

Duty to Hear the Case

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

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

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

Exercise of Discretion

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

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

[6] *See infra* Note 8.

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

---

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

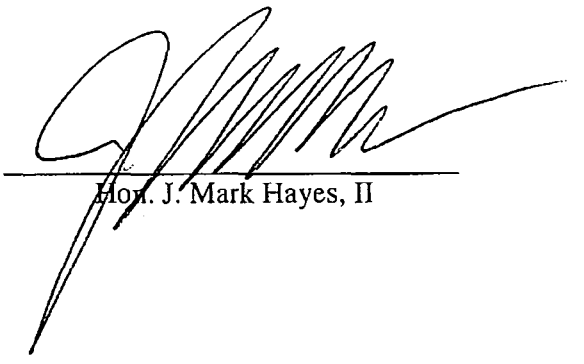
Based on the procedural history of the two present cases prior to this Court's appointment which includes, among other things, removal to federal court, various motions to dismiss and for summary judgment, motions to disqualify and relieve prior counsel, and motions to disqualify and relieve present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

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

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

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

IT IS SO ORDERED.



Hon. J. Mark Hayes, II

Date: 4/27/12
Spartanburg, SC

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

LEATH, BOUCHE & CRAWFORD, LLP, W. Jefferson Leath, Jr., William Dixon Robertson, III, Michael S. Seekings, Frank E. Grimball, MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC, William M. Bowen, John Cardamone, Sally Cardamone, Benjamin T. Clark, Diane M. Clark, Ramona Gianni, and Nathan W. Gordon,

Defendants.

CIVIL ACTION NO. 2008-CP-07-3145

CERTIFICATE OF SERVICE

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

Plaintiffs,

vs.

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

Defendants.

CIVIL ACTION NO. 2008-CP-07-0774

I, Jennifer A. Clark, paralegal for Pendarvis Law Offices, PC, hereby certify that I have served the document listed below upon all counsel of record by mailing a copy of same, postage prepaid and return address clearly indicated on said envelope, to said counsel at the following addresses:

Susan Wall, J.D.
McNair Law Firm, P.A.
PO Box 1431
Charleston, SC 29402
Attorneys for Frank Grimball
Attorneys for Mullen & Wylie, LLC

Dawes Cooke, J.D.
John Arthur Jones, J.D.
Barnwell Whaley Patterson & Helms, LLC
PO Drawer H
Charleston, SC 29402-0197
Attorneys for John & Sally Cardamone
Attorneys for Ramona Gianni
Attorneys for Benjamin & Diane Clark

James L. Bruner, J.D.
Warren C. Powell, Jr., J.D.
Bruner Powell Robbins Wall & Mullins, LLC
PO Box 61110
Columbia, SC 29260
Attorneys for William M. Bowen

Kent Stair, J.D.
M. Elizabeth Jowers, J.D.
Carlock Copeland Semler & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Attorneys for Leath Bouch & Crawford, LLP
Attorneys for W. Jefferson Leath, Jr.
Attorneys for Michael S. Seekings

Susan P. McWilliams, J.D.
Daniel C. Leonardi, J.D.
Nexsen Pruett, LLC
PO Drawer 2426
Columbia, SC 29202-2426
Attorneys for William Dixon Robertson

Documents Served: Order Denying Motions to Recuse and Temporarily Staying Matters

Jennifer A. Clark

Jennifer A. Clark

Beaufort, South Carolina

May 17, 2012

EXHIBIT C

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
	Civil Action No.: 2008-CP-07-3145
STEVEN AND JEANEEN TUCKER, CHARLES AND STEPHANIE DAVIS, TIMOTHY AND JANIE P. TREON, P. JENNINGS SCEARCE And JOHN DOE and JANE DOE individually and on behalf of Others similarly situated in the State of South Carolina, Plaintiffs, v. LEATH, BOUCHE & CRAWFORD, LLP W. JEFFERSON LEATH, JR., WILLIAMS DIXON ROBERTSON, MICHAEL S. SEEKINGS, FRANK E. GRIMBALL & MULLENWYLIE, LLC formally MULLEN, WYLIE & SEEKINGS, LLC, JOHN CARDAMONE and his wife, SALLY CARDAMONE; BENJAMIN T. CLARK and his wife, DIANE M. CLARK; RAMONA GIANNI; NATHAN W. GORDON; Defendants.	CLASS ACTION COMPLAINT (JURY TRIAL DEMANDED)

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 SCRCP, and the violation of other laws of the State of South Carolina because the Defendants participated in and facilitated the abandonment of a South Carolina class action known as John and Sally Cardamone, et. al. vs. Dryvit Systems, Inc., et al., Civil Action No. #2002-CP-07-1377, through a scheme wherein the Original Class Attorneys where paid $600,000 with a promise of an additional $225,000 upon dismissal.

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 and venue is proper in Beaufort County, South Carolina.

7. Defendant MullenWylie, LLC formally Mullen, Wylie & Seekings is a South Carolina LLC doing business in South Carolina as a law firm. This firm was appointed as class counsel in the Cardamone action. The firm subsequently entered into a settlement agreement with Dryvit and abandoned its representation of the Cardamone class.

8. Defendant Michael S. Seekings was a Partner in Mullen, Wylie & Seekings and was appointed as Class Counsel, but in violation of his fiduciary duties to the Cardamone Class, Rule 23 SCRCP, and of a Court Order, he subsequently entered into a settlement agreement with Dryvit and abandoned his representation of the Cardamone class.

9. Defendant Frank E. Grimball was appointed as Class Counsel, but in violation of his fiduciary duties to the Cardamone Class, Rule 23 SCRCP, and of a Court Order, he subsequently entered into a settlement agreement with Dryvit and abandoned his representation of the Cardamone class.

10. Defendant Williams Dixon Robertson was appointed as Class Counsel, but in violation of his fiduciary duties to the Cardamone Class, Rule 23 SCRCP, and of a Court Order, he subsequently entered into a settlement agreement with Dryvit and abandoned his representation of the Cardamone class.

11. Defendant Leath, Bouche & Crawford, LLP is a South Carolina LLP doing

business in South Carolina as a law firm. This firm was appointed as class counsel in the Cardamone action. The firm subsequently entered into a settlement agreement with Dryvit and abandoned its representation of the Cardamone class.

12. Defendant W. Jefferson Leath, Jr. was a partner in the above firm and was appointed as Class Counsel, but in violation of his fiduciary duties to the Cardamone Class, Rule 23 SCRCP, and of a Court Order, he subsequently entered into a settlement agreement with Dryvit and abandoned his representation of the Cardamone class.

13. 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.

14. 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.

15. 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.

16. Defendant Nathan W. Gordon ("Gordon") is a citizen and resident of South Carolina. Mr. Gordon was appointed as a named class representative to the Cardamone Action, but in violation of his fiduciary duties to the Cardamone Class, Rule 23 SCRCP, and a Court Order, subsequently entered into a lucrative individual settlement with Dryvit and abandoned his representation of the Cardamone class.

17. In abandoning the class, the defendants allowed Dryvit to reach final judgment in Posey in September of 2005 over three years after the Cardamone action was filed. Dryvit's primary defense in the Cardamone Class is now that *Posey* is a "final judgment" and it has a preclusive, res judicata effect and that all claims in the now not final "Cardamone Class" are barred. Plaintiffs have been left without a remedy. Additionally, while Dryvit has historically settled claims such as the Plaintiffs', Dryvit's position now is that it has already settled this case by payments to these defendants and "bought its peace." As a result, the plaintiffs have lost the settlement value of their claims.

18. Unless otherwise indicated, these Defendants are hereinafter referred to collectively as the "Original Class Counsel." and "Original Class Representatives."

19. Named Plaintiffs Timothy J. Treon, Janie Treon and P. Jennings Scearce, were absent members of the Cardamone Class (i.e. not Court Appointed Class Representatives) who intervened in the Cardamone Class Action as named class representatives because the Original Class Representatives, and the Defendant Attorneys under the believe that they were not being adequately represented. Subsequently they discovered that these defendants failed to represent the absent class members interests in favor of individual settlements for themselves and

payment of fees to defendant attorneys. Charles H. Davis, Stephanie H. Davis, Steve Tucker and Jeaneen Tucker are South Carolina residents and absent class members who were damaged by the acts of these defendants.

Factual Background

20. 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.

21. In order to contain its liability on a nationwide basis, Dryvit agreed to the certification of a National Settlement Class in Jefferson County Tennessee. On April 8, 2002, the Circuit Court for Jefferson County, Tennessee at Dandridge entered an order granting preliminary approval to a settlement class in the Posey Action.

22. The settlement class created by the Posey Court's April 8th Order included all persons who, as of June 12, 2002, in any State other than North Carolina, own Property that is clad in whole or in part with Dryvit EIFS installed after January 1, 1989. Persons who had already prosecuted or settled an EIFS claim with Dryvit were excluded from the Posey conditional settlement class. Notice of the proposed settlement class was disseminated beginning in or about June of 2002.

23. Posey class members wishing to opt-out of the proposed settlement had until September 3, 2002 to file an opt-out form with the Posey claims administrator.

24. Original Class Representatives and Counsel 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. The Cardamone Amended Complaint alleged that the Posey Settlement injured South Carolina class of homeowners by:

a. denying the Plaintiffs and the Class their due process rights;

b. imposing on the Plaintiffs and the Class the law of a state other than South Carolina;

c. preventing the Plaintiffs and the Class from recovering the damages necessary for the Plaintiffs to be made whole;

d. attempting to avoid its joint and several liability and responsibility;

e. so restricting the rights of the Plaintiffs and the Class as to make the settlement worthless, amounting to a sham;

f. avoiding responsibility for the consequential damages which occur because of defective EIF Systems;

g. avoiding its responsibility under the laws of the State of South Carolina; and

h. attempting to impose a uniform settlement on Plaintiffs and members of the Class who have suffered, continue to suffer, and will suffer damages that are unique to each Plaintiff and member of the Class.

25. In paragraph 25 of their Complaint, the Original Class Representatives stated:

Plaintiffs will fully and adequately protect the interest of Class Members. Plaintiffs have retained counsel experienced in complex class action, unfair or deceptive trade practice litigation and construction defect litigation. Plaintiffs and Plaintiffs Counsel have the necessary financial resources to adequately and vigorously litigate this class action. Plaintiffs are aware of

their fiduciary responsibilities to the Class and are determined to diligently discharge those duties, and have no interest in conflict with other members of the Class.

26. In response to the Original Class Members Motion for Class Certification, by order dated August 30, 2002 and entered on September 3, 2002 (hereinafter referred to as the August 30th Order), Judge Thomas Kemmerlin, Jr. certified a class in the Cardamone Action and designated the Original Class Representatives as Class Representatives for a class designated as:

> **"all persons in South Carolina who were members of the Posey class and who own, or have owned a one- or two-family residential dwelling or townhouse (hereinafter "structure") in South Carolina on which an Exterior Insulation and Finish System (hereinafter "EIFS") have been installed or any previous owner of such structures who incurred any costs or expenses to inspect, repair, or replace the EIFS or other EIFS-related property damage from January 1, 1989 until the date Dryvit's continuing conduct is terminated."**

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

28. Subsequent to the Judge Kemmerlin's Order certifying a Class Action in South Carolina and the Opting Out of the South Carolina Class, the Original Class Representatives and Original Class Attorneys undertook the settlements with Dryvit in order to eliminate the Cardamone class action.

29. In violation of the August 30th Order requiring, *inter alia*, that a proposed class notice plan be presented to the Court within thirty (30) days after entry of the order, and in an attempt to conceal their individual settlements, the Defendants failed and refused to file any notice plan with the Court.

Class Action Allegations

30. This action is brought by the 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 herein below.

31. The Class of the instant action is comprised of members of the class created by the *Cardamone* Action and include those members of the *Cardamone* action:

> **Who without formal notice, settled their claims against Dryvit for reduced compensation based on the assertion that the *Posey* settlement ended their right to make claims against Dryvit.**

32. Plaintiffs estimate the size of the aforementioned Class to exceed one-hundred (100) individuals and the amount in controversy for each exceeds One Hundred Dollars ($100). The Class is sufficiently numerous that joinder of all its members is impracticable.

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

34. Class action treatment provides a fair and efficient method for the adjudication of the controversy herein described, affecting a large number of persons, joinder of who is impracticable. The class action provides an effective method whereby the enforcement of the rights of Plaintiffs and class members can be fairly managed without unnecessary expense or duplication.

35. If Class Members were to pursue individual litigation, it would be unduly

burdensome to the South Carolina courts. Individual litigation would magnify the delay and expense to all parties in resolving the controversy engendered by Defendants' course of conduct with respect to EIFS. By contrast, the class action device presents far fewer management difficulties and provides the benefits of unitary adjudication, economies of scale, and comprehensive supervision by a single court.

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

37. The expense and burden of individual litigation of a case of this magnitude make it impractical for individual Class Members to seek redress for the wrongs done to them and, therefore, requires consolidation of all such claims in one action.

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

39. 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.

40. Given the scope of harm inflicted by the Defendants and the egregiousness of the misconduct, rendering an award of punitive/exemplary damages appropriate, the prosecution of separate actions by individual members of the Class would create a risk of inconsistent adjudications with respect to individual members of the Class.

41. An adjudication of an individual class member's claim would, in the absence of a class action, be dispositive of the interests of the other members not parties to the adjudication or

would substantially impair or impede the other members' ability to protect their interests thus creating the possibility of a rush to judgment as individuals seek to avoid the dispositive effect of earlier judgments.

42. A substantial claim for punitive/exemplary damages exists on behalf of all Class Members, including the Named Plaintiffs. In order to achieve maximum judicial economy and fairness to litigants, a class action is desirable to assure that an award of punitive damages is made in a single proceeding and fairly and uniformly allocated among all members of the Class.

43. Prosecution of this matter as a class action will significantly reduce the possibility of repetitious litigation, while providing redress for Class Members who would not or could not prosecute this complex litigation on an individual basis.

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

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

Common Deficiencies Relating to Defendants' Conduct

46. By undertaking to serve the Cardamone class as its attorneys, the Original Class counsel owed a fiduciary duty to their clients which included all unnamed class members.

47. The Original Class attorneys in reaching lucrative individual settlements for certain clients of theirs which Dryvit conditioned on the dismissal of the Cardamone Action, knew or should have known would violate their fiduciary duties, Rule 23 SCRCP and the duties imposed by Judge Kemmerlin's August 30th Order.

48. Upon information belief, the Original Class Counsel and Representatives failed

and refused to give notice to the Court because they knew these acts could not withstand judicial scrutiny required by Rule 23 SCRCP and other authority, because such settlements were conditioned on the abandonment and elimination of the Cardamone Action.

49. Cardamone through his counsel Seekings and Mullen, Wylie & Seekings 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."

50. In an email dated April 25, 2004, Dryvit's attorney Peter Morgan memorialized Dryvit's agreement to contribute $225,000.00 towards a fee of $825,000.00 for "S.C. Counsel" that would be fully payable "after the final dismissal of the" *Cardamone* action. (In addition to Dryvit's $225,000.00 contribution towards this fee, *Posey*'s class counsel pledged $600,000.00 to *Cardamone*'s original class counsel thus totaling the $825,000).

51. In addition to the cash settlements with the Original Class Representatives and its contribution toward the $825,000.00 attorneys' fee, Dryvit also agreed to settle cases brought against it by certain *Cardamone* class members who were being represented by the Original Class Counsel who were then representing the *Cardamone* class.

52. On February 5, 2003, settlement conferences were agreed to by *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.

53. As a result of the lack of prosecution of the *Cardamone* case *Posey* became final. Until that time South Carolina residents routinely settled their cases against Dryvit. Rarely did a case require a trial. As a result of these defendants' acts, Dryvit no longer settles such cases as they have in the past and in fact now asserts that all claims of the class are barred by *Posey*.

Common Allegations Relating to Damages

54. As a result of aforementioned acts and omissions, Plaintiffs and class members have suffered direct, actual, special and consequential damages in an amount to be proven at trial because the harm to the Plaintiffs and those similarly situated arises from the same operative set of circumstances surrounding the Defendants' participation in and facilitation of the abandonment of the Cardamone Class and the damages to be awarded to the class alleged herein are either uniform or capable of uniform calculation.

Claims for Relief

For a First Cause of Action
(Civil Conspiracy)

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

56. The Defendants combined together and engaged in improper and wrongful conduct for the purpose of injuring the Plaintiffs and all those similarly situated by proximately causing actual, special and consequential damages by agreeing to abandon and eliminate the claims of the unrepresented Cardamone Class members in exchange for individual cash settlements and the payment of $825, 000 in attorneys fees.

57. The damages to the Class are a natural and proximate result of the civil conspiracy

between the Original Class Representatives and Original Class Counsel. Such conduct on the part of the Defendants was in willful, intentional, and wanton disregard for the rights of the absent class members so as to entitle the absent class members (i.e. the Plaintiffs and those similarly situated) to actual, special, consequential and punitive damages.

For a Second Cause of Action as to the Original Class Representatives
(Breach of Fiduciary Duty)

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

59. The Original Class Representatives and Original Class Counsel owed a fiduciary duty to all of the unnamed members of the class created by the Cardamone Action. As fiduciaries, both the representatives and their counsel have an absolute obligation to notify class members of: (1) the existence of the class action, (2) any proposed compromises of the action, and (3) the settlement or dismissal of the action.

60. The aforementioned Defendants violated their fiduciary duty by acting in bad faith and without due regard to the interests of the Plaintiffs and class members because in exchange for individual settlements and attorney fees, the Original Class Representatives and Original Class Counsel agreed to abandon the Cardamone Class and as a result failed and refused to provide the class with notice of the Cardamone action, and the rights of class members there under, as required by the certifying court and Rule 23 of the SCRCP.

61. The aforementioned Defendants also breached their fiduciary duty to the Plaintiffs and class members by failing to prosecute the Cardamone action while and after they negotiated and entered into settlement with Dryvit.

62. The aforementioned Defendants further breached their fiduciary duty to the Plaintiffs and class members by failing to fully inform the Plaintiffs and class members regarding

the status and proceedings of both the Cardamone and Posey Actions.

63. The numerous acts and omissions of the Defendants as set forth in this Complaint have deprived the Plaintiffs and Class Members of the ability to fully exercise their lawful rights against Dryvit.

64. As a result of the Defendants' aforementioned breaches of fiduciary duty, Plaintiffs and class members have been damaged in an amount at be proven at trial. Damages may include but are not limited to the following: 1) the loss settlement value of their claims; 2) the loss of the right to receive damages through the litigation of claims against Dryvit.

65. Additionally, an attorney or class representative who breaches a fiduciary duty must disgorge the benefits to the client and under no circumstances are they to be permitted to profit from the breach of their duty as fiduciaries.

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

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

67. Original Class Counsel are sophisticated legal entities with extensive experience in EIFS litigation.

68 At all times relevant to this Complaint, the Original Class Counsel had a significant financial interest in resolving the claims of the South Carolina Class.

69. The Original Class Counsel knew that the Original Class Representatives owed a fiduciary duty to the Plaintiffs and the unnamed members of the class and that they knew or should have known that settling the Original Class Representatives claims with individual cash settlements and accepting the promise of the payment of $825, 000 in attorneys fees induced them to violate a Rule 23 SCRCP, a Court Order and other controlling authority, was improper

and was an act of encouraging, participating in, aiding and abetting the Original Class Representatives in their breach of their duties to the absent Cardamone Class members.

70. 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, these Original Class Attorney knew or should have known that they were requiring the Original Class Representatives to breach their fiduciary duty to the Plaintiffs and unnamed class members by settling their individual claims and by abandoning the Cardamone Class. By accepting settlements, bonuses and substantial payments to Original Class Representatives' counsel, the Original Class Counsel knowingly participated in, encouraged and aided and abetted Original Class Representatives' breach of their fiduciary duties.

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

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

For A Fourth Cause of Action
(Fraudulent Concealment)

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

74. Defendants in their capacities as participants in the Cardamone Class Action case and based on the August 30th Order of Judge Kemmerlin were in a fiduciary relationship or a relationship that was intrinsically fiduciary, to the absent Cardamone Class members.

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

76. Defendants owed a duty to make those material facts and information known to

the Cardamone unnamed, absent Class Members.

77. Defendants breached their duties and or obligations to the Cardamone unnamed, absent Class members by failing to disclose material information regarding the prosecution of and attempted compromise of the Cardamone Action. And by failing to implement a Notice Plan as ordered by the Court.

78. As a proximate result of the Defendants' fraudulent concealment of their abandonment of the class, the failure and refusal to give notice, the Plaintiffs and those similarly situated have been damaged in an amount to be proven at trial. Because the Defendants' acts of fraudulent concealment were willful, intentional, and wanton, the Plaintiffs and those similarly situated are entitled to an award of punitive damages.

For A Fifth Cause of Action
(Negligence Original Class Counsel)

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

80. These defendants as Class Counsel owed a duty of care to the plaintiffs. They were negligent, grossly negligent, wanton and willful and breached their duty of care in one or more of the following particulars:

a) Failure to give notice to the plaintiffs of the pending action;

b) Failure to allow class members to opt-out of settlement;

c) Failure to prosecute the pending action;

d) Settlement of the action without notice;

e) Failure to understand the procedural history of the *Posey* action;

f) Failure to ensure that class representatives adequately represented the absent class members;

g) Failure to seek court approval of the settlement;

h) Receiving fees for their representation of the class without notice to class or Court approval.

81. As a proximate result of the Defendants' negligence, the Plaintiffs and those similarly situated have been damaged in an amount to be proven at trial. Damages may include but are not limited to the following: 1) the loss settlement value of their claims; 2) the loss of the right to receive damages through the litigation of claims against Dryvit. Because the Defendants' acts were grossly negligent, and wanton, the Plaintiffs and those similarly situated are entitled to an award of punitive damages.

RELIEF REQUESTED

Wherefore, Plaintiffs and class members pray the Court to hold Defendants jointly and severally liable for the conduct complained of herein, to enter judgment against Defendants and in favor of Plaintiffs and class members, and to award the following relief:

A. Disgorgement of all fees and settlements paid as a result of the breach of fiduciary duty.

B. Awarding Plaintiffs and class members special, compensatory and punitive damages, and other damages, for the acts complained of herein, in an amount to proven at trial, plus interest;

C. Awarding Plaintiffs and class members' attorneys' fees and costs against Defendants, as allowed by law; and

D. Granting such other and further relief as the court deems just and proper.

COTTY & JONAS
1328 Blanding Street
Columbia, SC 29202
(803) 254-1570

Donald E. Jonas

ALFORD & WILKINS, P.C.
Post Office Drawer 8008
Hilton Head Island, SC 29938
(843) 842-5500

Gregory M. Alford

THE FINN LAW FIRM
Post Office Box 6003
Hilton Head Island, SC 29938
(843) 682-3555

Thomas J. Finn
Thomas E. Williams

August 25, 2008

EXHIBIT D

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

STEPHEN AND JEANEEN TUCKER, CHARLES AND 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, BOUCHE, & CRAWFORD, LLP, W. JEFFERSON LEATH, JR., WILLIAM DIXON ROBERTSON, III, MICHAEL S. SEEKINGS, FRANK E. GRIMBALL, MULLEN WYLIE, LLC FORMERLY MULLEN, WYLIE, & SEEKINGS, LLC, WILLIAM M. BOWEN, JOHN CARDAMONE, SALLY CARDAMONE, BENJAMIN T. CLARK, DIANE M. CLARK, RAMONA GIANNI, AND NATHAN W. GORDON,

DEFENDANTS.

TRANSCRIPT

OF

RECORD

2008-CP-07-3145

TIMOTHY TREON AND P. JENNINGS SCEARCE, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED IN THE STATE OF SOUTH CAROLINA,

PLAINTIFFS,

-vs-

DRYVIT SYSTEMS, INC., JOHN CARDAMONE AND HIS WIFE, SALLY CARDAMONE, BENJAMIN T. CLARK AND HIS WIFE DIANE M. CLARK, RAMONA GIANNI, AND NATHAN W. GORDON, JOHN DOE AND MARY ROE,

DEFENDANTS.

2008-CP-07-0774

July 18th and 19th, 2012
Spartanburg, 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:

THOMAS PENDARVIS
ESQ.
Attorney for the Plaintiffs in 2007-CP-07-0774

ROBERT B. PHILLIPS
ESQ.
Attorney for the Plaintiffs

THOMAS WILLIAMS
ESQ.
Attorney for the Plaintiffs

M. DAWES COOKE, JR.
ESQ.
Attorney for the Defendant Ramona Gianni

JAY JONES
ESQ.
Attorney for the Defendant Ramona Gianni

ROBERT E. FIELDS, III
ESQ
Attorney for Dryvit Systems, Inc.

CHRIS TOWRY
ESQ.
Attorney for Dryvit Systems, Inc.

SUSAN TAYLOR WALL
ESQ.
Attorney for Defendants Mullen Wylie, LLC and Frank Grimball

SUSAN P. McWILLIAMS
ESQ.
Attorney for the Defendant W. Dixon Robertson

DAN LEONARDI
ESQ.
Attorney for the Defendant W. Dixon Robertson

JAMES L. BRUNER
ESQ
Attorney for the Defendant William Bowen

KENT STAIR
ESQ.
Attorney for Leath, Bouche, & Crawford, LLP, W. Jefferson Leath, Jr., Tim Bouche, and Michael S. Seekings

GREG ALFORD
ESQ.
Attorney for the Intervening Class

LINDA D. MOFFITT
Circuit Court Reporter
Seventh Judicial Circuit

Transcribed by Pamela E. Green, Circuit Court Reporter

the joint motion for a jury trial in this matter.

THE COURT: Let me ask you a question.

Who is -- who's the joint motion?

Does everyone agree that that's to be done?

MR. ALFORD: Your Honor, our understanding is they filed one, and I thought Mr. Bruner said it nicely yesterday. I don't know about the collective neurosis of their joint and several neurosis, but our position is -- one of them, I don't even remember which one, made a motion for a jury trial.

To the extent that the Court -- we think you're on the right track. We think the Court can decide the issues. We think the Court's got to figure out which issues are which, if, in fact, there are any jury issues. But if there's a concern about fairness, if there's a concern about due process, let's put the jury in that box in October. Whatever the Court thinks are proper fact questions for a jury to answer. Whatever questions, questions are for the Court to answer as a matter of law.

We're not saying you're not on the right track. We're saying if it's a concern that the mode of trial would somehow effect the speed of the process, we're willing to, if, if it suits the Court's needs and desires, we're willing to put limited fact questions to the jury, and then the Court would decide whatever it needed to decide.

officiant for that.

But our whole point -- and that was our whole point is that the claims against my clients are properly cast as they are in the Tucker case, which are claims at law for breach of fiduciary duty, and we would respectfully ask for all the due process that we're entitled to in that kind of a claim.

MR. BRUNER: Your Honor, this is Jim Bruner for William Bowen.

In my return -- I did not make a motion for a jury trial. In my return I pointed out that we were losing the ability to have due process and a jury trial on the issue of where those $600,000 in fees came from. I did not ask for a jury trial in this case.

My suggestion yesterday afternoon, to which all of the codefendants agreed to my knowledge, was that we put all of these issues in one case, the Tucker case, and that there we will have a jury trial. There we are comfortable with due process.

So, the, the short answer, in response to that, is I did not request any jury trial in this case. In my return to the Rule to Show Cause I objected that I was being deprived of a jury trial on that issue, and my suggestion was that we do it in the Tucker case.

You, you have to decide at some point in time, judge,

very honestly, how many times you want to try this case, and if you do what Mr.---

MR. ALFORD: Alford.

MR. BRUNER: ---Alford has suggested, then you're gonna try it twice, and that's up to you. If you want to -- I mean how many times you want to try it, we can try it three times. We've got another case, the Treon case. So, you got an opportunity to try it three times.

I don't think it makes much sense, but I don't wear a black robe, and I trust Your Honor's judgment on that to, to you want to be economical with your limited judicial resources and just hear this case one time.

Thank you, sir.

MR. ALFORD: Your Honor, if I may, just -- the, the, the issue for us is that, that you're hearing these things raised. You're hearing them argued to you about mode of trial, jury trial, and those kind of things. That's to set up an immediately appealable issue, and thus continue ongoing saga of delay that appears to be a goal somewhere over there.

And, so, what we're trying to do is craft a way in which, if, if -- again, subject to the Court discerning and we too trust the Court to discern what issues, and we're not saying any of them are jury issues. We're thinking you're on the right track.

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

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

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

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