THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Honorable J. Mark Hayes, II

RECEIVED
OCT 1 1 2012
SC Court of Appeals

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

v.

Dryvit Systems, Inc..Defendant.

RESPONDENTS' RETURN TO APPELLANTS' MOTION TO HOLD APPEAL IN ABEYANCE

Appellants appeal from a Rule to Show Cause and Order for Accounting filed by the Honorable J. Mark Hayes, II on June 5, 2012 ("June 5th Order"). Judge Hayes is the presiding judge in the instant action which was filed and certified as a class action pursuant to Rule 23, SCRCP in September of 2002. Each Appellant served as counsel to the class of South Carolinians created by this action hereinafter referred to as the "South Carolina Class." In his June 5th Order, Judge Hayes required Appellants to appear at a hearing scheduled on October 1, 2012 to account for certain attorneys' fees that Appellants negotiated for themselves while

serving as class counsel. These fees were not disclosed to the presiding judge or the unnamed members of the South Carolina Class as required by South Carolina law. *See e.g.* Rule 23(c), SCRCP (agreements to compromise or dismiss class actions, including provisions in those agreements for the payment of attorneys' fees, must be disclosed to unnamed class members and reviewed by the presiding trial judge). Appellant William Bowen was served with the June 5th Order on June 11, 2012. Appellant William Dixon Robertson was served the Order on June 13, 2012. Appellants Timothy W. Bouch, W. Jefferson Leath, and Michael S. Seekings were served on June 22, 2012. Proof of Service documents are attached hereto as Exhibit A.

Respondents ask this Court to dismiss Appellants' *Motion to Hold Appeal in Abeyance* and *Notice of Intent to Appeal*, to include all amendments, on the following grounds:

1) *Notice of Appeal* was not timely filed and served pursuant to Rule 203(b)(1), SCACR.
2) The appeal is interlocutory and impermissible pursuant to S.C. Code Ann. §14-3-330.
3) The *Notice of Appeal* and *Motion* are interposed for purposes of causing delay and to gain an improper procedural advantage.

Argument

1) Appellants' Notice of Appeal Was Not Timely Served.

An appeal from a decision of the Court of Common Pleas requires a notice of appeal to be served on all respondents within thirty (30) days after appellant's receipt of the order appealed from. Rule 203(b)(1), SCACR. The thirty day service period is a jurisdictional requirement that cannot be waived by the consent of the parties or excused by order of a court. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) ("The notice of appeal in a case appealed from the Court of Common Pleas must be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment. The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate

court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.") (citations omitted). Only the filing of a **timely** motion to reconsider the order appealed from tolls the thirty-day service requirement. Rule 203(b)(1), SCACR; *Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 2-3, 518 S.E.2d 56, 57 (Ct. App. 1999) ("[w]hen a **timely** ... motion to alter or amend the judgment ... has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.") (emphasis in original). A timely motion to reconsider must be filed within ten (10) days of receipt of written notice of the entry of the original order appeal from. *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999). An untimely motion does not stay the time for appeal. *Id.*

In the instant matter, Appellants failed to file a timely notice of appeal or toll the period with a lively motion. The June 5th Order was served on the Appellants, or their counsel, from June 11 to 22 of 2012 (see service documents attached as Exhibit A). Appellants filed their joint *Notice of Appeal* on September 27, 2012, nearly three (3) months after service of the June 5th Order and well after the expiration of the thirty day service period. The thirty day appeal deadline was not tolled by the service of a timely motion to reconsider the Order. Appellant Bowen's attorney was served with the Order on June 11, Appellant Robertson's attorney was served on June 13 and the remaining Appellants were personally served on June 22, 2012. All served their Motions to Dismiss the June 5th Order on July 17, 2012, well after the ten (10) day period for tolling the time of appeal. Appellants' Motions are attached hereto as Exhibit B.

2) The Order Appealed From is Interlocutory.

The June 5th Order is obviously interlocutory as it neither decides the merits of the case, nor determines the action in a manner that prevents a judgment from which an appeal may be taken. *See* S.C. Code Ann. §14-3-330(1) & (2). On the contrary, the June 5th Order merely requires Appellants to appear and account for their undisclosed conduct and financial gain realized while serving as class counsel before Judge Hayes. Nevertheless, Appellants filed seek to appeal the Order on the grounds it meets the Mode of Trial exception to Section 14-3-330. *See Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000)("Pursuant to § 14-3-330(2), this Court has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.").

Appellants cite no authority, in either their *Memorandum on Appealability* or *Return to Respondents' Motion to Dismiss Appeal*, in support of their "mode of trial" argument for a simple reason, none exists. No jurisdiction subject to a version of Federal Rule of Civil Procedure 23 has stripped the presiding trial judge of the power to: review the conduct of the lawyers appearing before him, inquire into undisclosed agreements that attempt to compromise the prosecution of a class action, or review an out-of-court agreement to pay attorneys' fees to withdrawing class counsel. In fact, the trend in Rule 23 jurisprudence is the exact opposite and requires the trial court to make just these types of inquiries. "Because the class itself typically lacks the motivation, knowledge, and resources to protect its own interests, [the trial judge] need[s] to critically examine the class certification elements, the proposed settlement, terms, and the procedures set out for implementing the proposed settlement." Barbara Rothstein & Thomas Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 8-9 (Federal Judicial

Center 2005). Some courts have characterized the trial judge's role in class action settlements as that of "a fiduciary to the class" with "the high duty of care that the law requires of fiduciaries." *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 280 (7th Cir. 2002). Appellants seek to avoid such scrutiny and place themselves beyond Judge Hayes's authority as the presiding judge to prevent him from fulfilling his fiduciary duty to the South Carolina Class. If allowed to succeed, Appellants will have removed a major safeguard against the abuse of unnamed class members to the determinant of future unnamed plaintiffs in every subsequent Rule 23 action. The more sensible approach is that which has been adopted in South Carolina and elsewhere, namely that a judicial inquiry into counsel's conduct is equitable in nature and should be conducted by the presiding trial judge. *Motion to Dismiss Appeal*, pp19-20.

3) Appellants' Appeal is Interposed to Cause Delay and Gain an Improper Procedural Advantage.

Lacking any support for their position, Appellants first attempted to support their appeal by asking this Court to misapply our joinder rules to create a nexus between this and a separate malpractice action. In their *Return*, Appellants rely on the notion that "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." *Appellants' Return to the Motion to Dismiss*, p.3 (emphasis in original). Of course, where legal and equitable actions are **joined in the same action**, then legal claims should be decided by a jury, but that is not the case in this matter. This is a separate and distinct action that has not been joined (nor has there been any motion to join) with the legal malpractice action. No authority requires such joinder, nor would joinder be appropriate given differences in counsel, class representatives, and the subject matter of the litigations. Additionally, there is no support for the claim that the pending malpractice action takes precedence over this action. Such a finding would require a

hierarchy amongst our circuit courts that does not exist. *See Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another.").

Having failed to articulate any support for their "mode of trial" argument, Appellants filed this *Motion to Hold Appeal in Abeyance* in order to return to the trial court so they may cast about for an appealable issue. Said *Motion* is improper in that it seeks further delay in a case that is already ten (10) years old. In the summer of this year, the trial judge candidly informed counsel for all parties that the court's calendar for the foreseeable future only allowed for two (2) time periods where it could take up this matter, one in October and the other in December. Appellants avoided the October hearing dates by filing this spurious appeal. With this *Motion*, Appellants seek to consume the December availability with a hearing of successive motions to reconsider. *See Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 599, 713 S.E.2d 624, 629 (2011) (sanctioning trial counsel for filing a successive removal petition on the eve of trial that the trial judge characterized as "a thinly veiled effort at a continuance.").

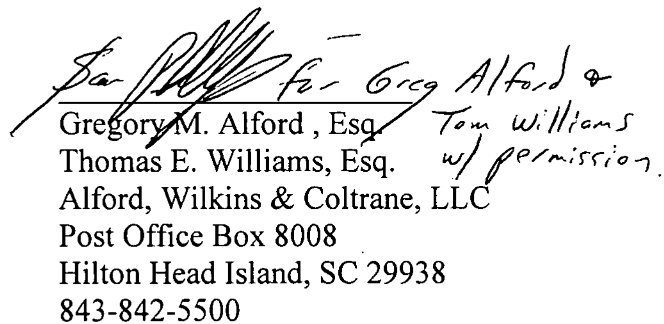
Additionally, Appellants impermissibly seek to have this Court allow them to bring successive motions to reconsider the trial court's order while maintain the tolling effect of their notice of appeal. Ordinarily, successive motions do not toll the time for appeal. *See Elam v. S. Carolina Dept. of Transp.*, 361 S.C. 9, 19, 602 S.E.2d 772, 777 (2004) (explaining how successive written motions do not toll the time for filing a notice of appeal).

Conclusion

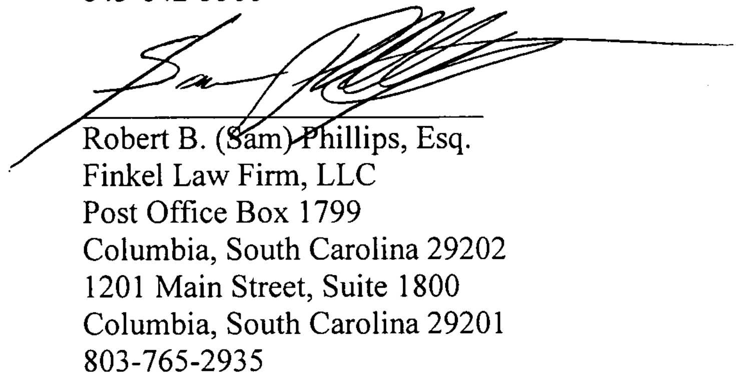
Respondents ask this Court to dismiss Appellants Motion for Abeyance and this Appeal in its entirety. The order appealed from is clearly interlocutory and not subject to any recognized

exception that would allow an immediate appeal. The inquiry contemplated by the trial judge's June 5th Order is well within the traditional authority of a Rule 23 court and recognized by the laws of this and many other states as well as federal courts. There is no authority for relieving Judge Hayes' of his duty to unnamed class members in this action and Appellants' arguments to the contrary give this Court no reason for crafting one. It is vital for the integrity of our Rule 23 class action jurisprudence that the presiding judge maintain the power and authority to inquire into allegations of conflicts and antagonism between unnamed class members and their legal representatives. Such an erosion of the power of a Rule 23 judge would be unprecedented and deeply destructive to those who will be subject to class action decrees in the future.

Respectfully submitted,



Gregory M. Alford , Esq.
Thomas E. Williams, Esq.
Alford, Wilkins & Coltrane, LLC
Post Office Box 8008
Hilton Head Island, SC 29938
843-842-5500



Robert B. (Sam) Phillips, Esq.
Finkel Law Firm, LLC
Post Office Box 1799
Columbia, South Carolina 29202
1201 Main Street, Suite 1800
Columbia, South Carolina 29201
803-765-2935

This 11th day of October, 2012
Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From the Beaufort County
Court of Common Pleas

The Honorable J. Mark Hayes, II
Civil Action 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, Frances Treon, P. Jennings Scearce,
and Steven Christian, individually and on behalf of others similarly
situated in the State of South Carolina..Respondents.

v.

Dryvit Systems, Inc..Defendant.

PROOF OF SERVICE

I, the undersigned Legal Secretary, of the law offices of Finkel Law Firm LLC, attorneys for the Respondent, do hereby certify that I have served the below named Appellants this October 11, 2012, in this action with a copy of the Respondents' Return to Appellants' Motion to Hold Appeal in Abeyance, by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Tanya A. Gee, Esquire
Special Counsel
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, South Carolina 29202

Robert E. Fields, III, Esquire
Sasser Fields LLP
Post Office Box 12047
Raleigh, North Carolina 27607

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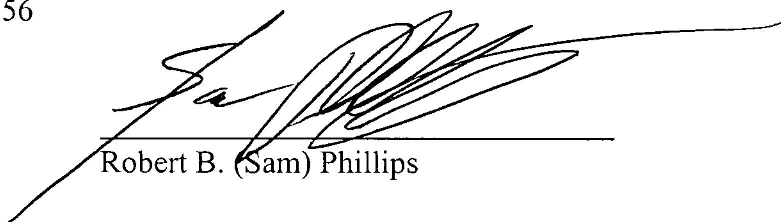
M. Dawes Cooke, Jr., Esquire
John A. Jones, Esquire
Barnwell Whaley Patterson
& Helms, LLC
Post Office Drawer H
Charleston, South Carolina 29402-0197

Susan Taylor Wall, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, South Carolina 29401-3156



Robert B. (Sam) Phillips

Columbia, South Carolina
October 11, 2012

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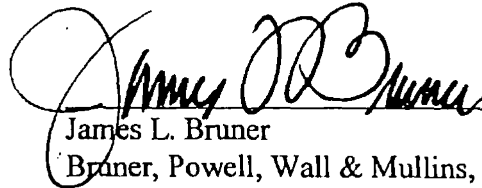
SC Court of Appeals

State Of South Carolina	)	In the Court of Common Pleas
	)	Fourteenth Judicial Circuit
County Of Beaufort	)	
		Civil Action No.: 2002-CP-07-[illegible]
Timothy J. Treon and his wife, Jane Treon, and P. Jennings Scearce, individually, and on behalf of others similarly situated in the State of South Carolina,	)	
Plaintiffs,	)	Acceptance of Service
vs.	)	
Dryvit Systems, Inc., Estate Builders, Inc., and American Way Applicators of South Carolina, Inc.,	)	
Defendants.	)	

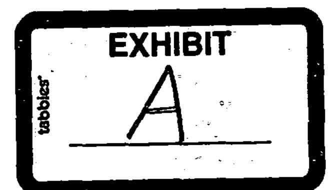
2012 JUN 13 AM 11:35
BEAUFORT COUNTY, S.C.
CLERK OF COURT

The undersigned does hereby accept service of the Rule to Show Cause and Order for Accounting on behalf of William Bowen, Esq., in the above-mentioned civil action.



James L. Bruner
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260-1110

June 11, 2012



State Of South Carolina County Of Beaufort	)))	In the Court of Common Pleas Fourteenth Judicial Circuit Civil Action No.: 2002-CP-07-1377
Timothy J. Treon and his wife, Jane Treon, and P. Jennings Scearce, individually, and on behalf of others similarly situated in the State of South Carolina, Plaintiffs, vs. Dryvit Systems, Inc., Estate Builders, Inc., and American Way Applicators of South Carolina, Inc., Defendants.	)))))))))))))))	**ACCEPTANCE OF SERVICE**

2012 JUN 21 PM 3:12

Subject to and without waiving any and all defenses or motions with respect to the Rule to Show Cause and Order for Accounting in the above-mentioned civil action, the undersigned does hereby accept service of the Rule to Show Cause on behalf of William Dixon Robertson III, Esq.

By: Susan P. McWilliams
Susan P. McWilliams
Nexsen Pruet, LLC
PO Drawer 2426
Columbia, SC 29202

June 13, 2012

AFFIDAVIT OF SERVICE

State of South Carolina | **County of Beaufort** | **Common Pleas Court**

Case Number: 2002-CP-07-1377

Plaintiff:
TIMOTHY TREON, ET AL

vs.

Defendant:
DRYVIT SYSTEMS, INC., ET AL

For:
Gregory M. Alford, Esq.
Alford & Wilkins, P.C.
18 Executive Park Rd., Bldg. 1
P. O. Drawer 8008
Hilton Head Island, SC 29938

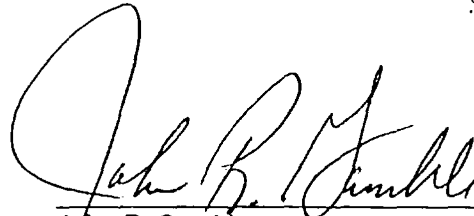
Received by PROCESS SERVICE, INC. to be served on **Timothy Bouche Esq., Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401**.

I, John R. Gamble, being duly sworn, depose and say that on the **22nd day of June, 2012** at 11:09 am, I:

PERSONALLY served by delivering a true copy of the **COVER LETTER, RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING** with the date and hour of service endorsed thereon by me, to: **Timothy Bouche Esq.** at the address of: **Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401**, and informed said person of the contents therein.

I am over eighteen and have no interest in the above action.

2012 JUN 26 PM 2:38

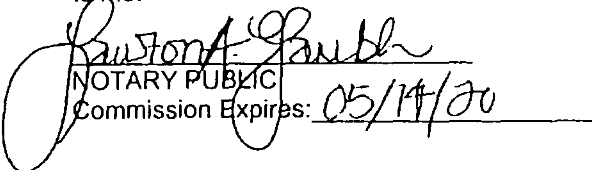


John R. Gamble
PROCESS SERVER

PROCESS SERVICE, INC.
P.O. Box 20097
Charleston, SC 29413
(843) 577-2355

Our Job Serial Number: 2012001746

Subscribed and Sworn to before me on the 22nd day of June, 2012 by the affiant who is personally known to me.



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Commission Expires: 05/14/20

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AFFIDAVIT OF SERVICE

State of South Carolina **County of Beaufort** **Common Pleas Court**

Case Number: 2002-CP-07-1377

Plaintiff:
TIMOTHY TREON, ET AL

vs.

Defendant:
DRYVIT SYSTEMS, INC., ET AL

For:
Gregory M. Alford, Esq.
Alford & Wilkins, P.C.
18 Executive Park Rd., Bldg. 1
P. O. Drawer 8008
Hilton Head Island, SC 29938

Received by PROCESS SERVICE, INC. to be served on **Michael Seekings Esq., Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401**.

I, John R. Gamble, being duly sworn, depose and say that on the **22nd day of June, 2012** at 10:40 am, I:

PERSONALLY served by delivering a true copy of the **COVER LETTER, RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING** with the date and hour of service endorsed thereon by me, to: **Michael Seekings Esq.** at the address of: **Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401**, and informed said person of the contents therein.

I am over eighteen and have no interest in the above action.

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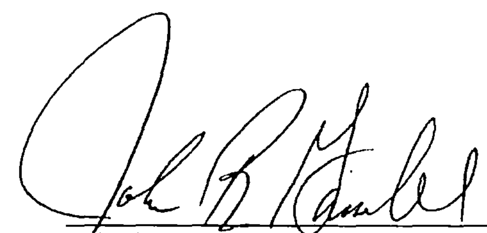
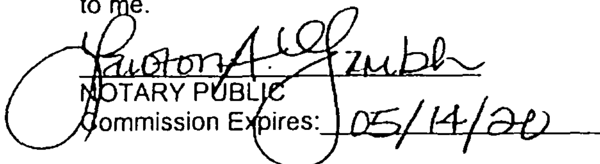


John R. Gamble
PROCESS SERVER

PROCESS SERVICE, INC.
P.O. Box 20097
Charleston, SC 29413
(843) 577-2355

Our Job Serial Number: 2012001745

Subscribed and Sworn to before me on the 22nd day of June, 2012 by the affiant who is personally known to me.



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AFFIDAVIT OF SERVICE

State of South Carolina | **County of Beaufort** | **Common Pleas Court**

Case Number: 2002-CP-07-1377

Plaintiff:
TIMOTHY TREON, ET AL

vs.

Defendant:
DRYVIT SYSTEMS, INC., ET AL

For:
Gregory M. Alford, Esq.
Alford & Wilkins, P.C.
18 Executive Park Rd., Bldg. 1
P. O. Drawer 8008
Hilton Head Island, SC 29938

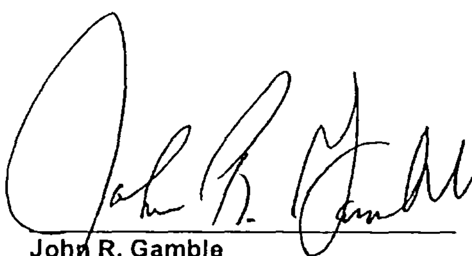
Received by PROCESS SERVICE, INC. to be served on **W. Jefferson Leath Jr., Esq., Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401**.

I, John R. Gamble, being duly sworn, depose and say that on the **22nd day of June, 2012** at 11:07 am, I:

PERSONALLY served by delivering a true copy of the **COVER LETTER, RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING** with the date and hour of service endorsed thereon by me, to: **W. Jefferson Leath Jr., Esq.** at the address of: **Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401**, and informed said person of the contents therein.

I am over eighteen and have no interest in the above action.

2012 JUN 26 PM 2:38

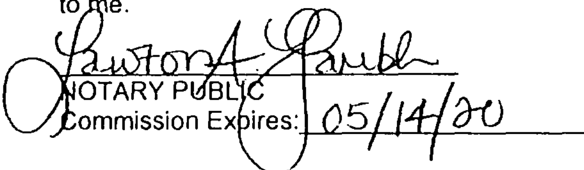


John R. Gamble
PROCESS SERVER

PROCESS SERVICE, INC.
P.O. Box 20097
Charleston, SC 29413
(843) 577-2355

Our Job Serial Number: 2012001747

Subscribed and Sworn to before me on the 22nd day of June, 2012 by the affiant who is personally known to me.



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State Of South Carolina

County Of Beaufort

In the Court of Common Pleas
Fourteenth Judicial Circuit

Civil Action No.: 2002-CP-07-1377

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vs.

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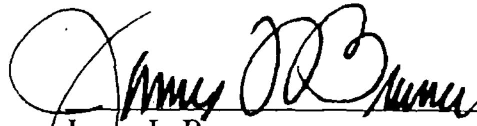

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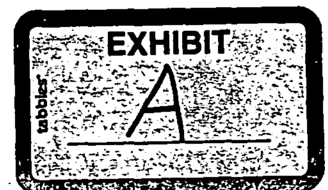
June 11, 2012



State Of South Carolina	)	In the Court of Common Pleas
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DRYVIT SYSTEMS, INC., ET AL

For:
Gregory M. Alford, Esq.
Alford & Wilkins, P.C.
18 Executive Park Rd., Bldg. 1
P. O. Drawer 8008
Hilton Head Island, SC 29938

Received by PROCESS SERVICE, INC. to be served on **Timothy Bouche Esq., Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401**.

I, John R. Gamble, being duly sworn, depose and say that on the **22nd day of June, 2012** at 11:09 am, I:

PERSONALLY served by delivering a true copy of the **COVER LETTER, RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING** with the date and hour of service endorsed thereon by me, to: **Timothy Bouche Esq.** at the address of: **Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401**, and informed said person of the contents therein.

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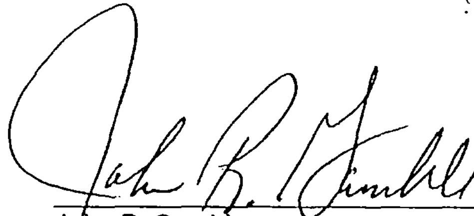

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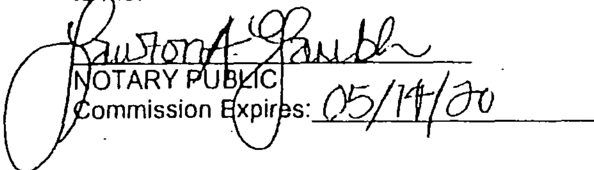

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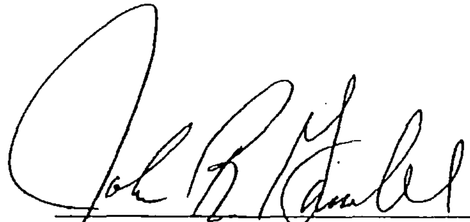
PERSONALLY served by delivering a true copy of the **COVER LETTER, RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING** with the date and hour of service endorsed thereon by me, to: **Michael Seekings Esq.** at the address of: **Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401**, and informed said person of the contents therein.

I am over eighteen and have no interest in the above action.

2012 JUN 26 PM 2:38

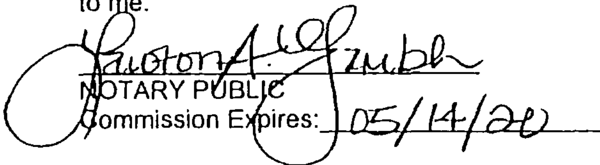


John R. Gamble
PROCESS SERVER

PROCESS SERVICE, INC.
P.O. Box 20097
Charleston, SC 29413
(843) 577-2355

Our Job Serial Number: 2012001745

Subscribed and Sworn to before me on the 22nd day of June, 2012 by the affiant who is personally known to me.



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AFFIDAVIT OF SERVICE

State of South Carolina | County of Beaufort | Common Pleas Court

Case Number: 2002-CP-07-1377

Plaintiff:
TIMOTHY TREON, ET AL

vs.

Defendant:
DRYVIT SYSTEMS, INC., ET AL

For:
Gregory M. Alford, Esq.
Alford & Wilkins, P.C.
18 Executive Park Rd., Bldg. 1
P. O. Drawer 8008
Hilton Head Island, SC 29938

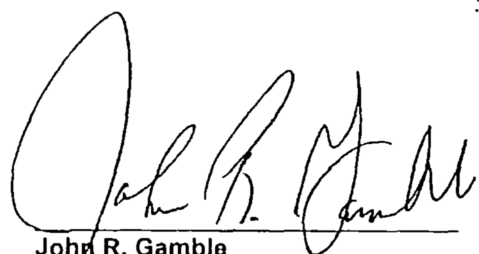
Received by PROCESS SERVICE, INC. to be served on **W. Jefferson Leath Jr., Esq., Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401**.

I, John R. Gamble, being duly sworn, depose and say that on the **22nd day of June, 2012** at 11:07 am, I:

PERSONALLY served by delivering a true copy of the **COVER LETTER, RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING** with the date and hour of service endorsed thereon by me, to: **W. Jefferson Leath Jr., Esq.** at the address of: **Leath, Bouch & Seekings, Llp, 92 Broad Street, Charleston, SC 29401**, and informed said person of the contents therein.

I am over eighteen and have no interest in the above action.

2012 JUN 26 PM 2: 38

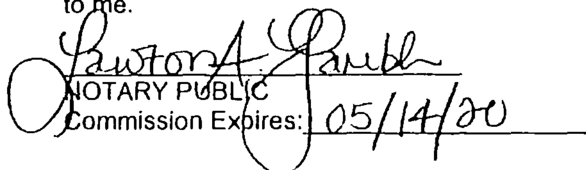


John R. Gamble
PROCESS SERVER

PROCESS SERVICE, INC.
P.O. Box 20097
Charleston, SC 29413
(843) 577-2355

Our Job Serial Number: 2012001747

Subscribed and Sworn to before me on the 22nd day of June, 2012 by the affiant who is personally known to me.



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SC Court of Appeals

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF BEAUFORT	)	
Timothy J. Treon and his wife, Jane Treon, and P. Jennings Scearce and Steven Christian individually, and on behalf of others similarly situated in the State of South Carolina,	)	Civil Action No.: 2002-CP-07-1377
Plaintiffs,	)	**RETURN TO RULE TO SHOW CAUSE and ORDER FOR ACCOUNTING by WILLIAM M. BOWEN**
v.	)	
Dryvit Systems, Inc.,	)	
Defendant.	)	

By way of a return to this Court's Rule to Show Cause and Order for Accounting dated June 1, 2012, William M. Bowen ("Bowen") responds and alleges the following:

1. The Court's Order recites that it was issued in response to the "Plaintiffs' Motion for an Accounting of attorney fees allegedly received by certain Class Counsels and for benefits paid to prior Class Representatives which were never disclosed to or approved by this Court". The Plaintiffs' Motion for Accounting was dated January 12, 2010 and addressed only fees allegedly received by former Class Counsel, not funds allegedly paid to former Class Representatives. Subsequently, Plaintiffs' counsel filed a Motion for the Issuance of an Order Requiring Former Class Counsel to Appear Before the Court. Again, the Motion was addressed only to former Class Counsel and not to former Class Representatives. Bowen contends that it is improper for the Court to attempt to assert jurisdiction over the former Class Representatives based upon Motions which sought no relief against the former Class Representatives.

2. Plaintiffs' attorneys were disqualified from representing class claimants against these former Class Representatives by the Honorable Marvin H. Dukes, Special Circuit Judge,

EXHIBIT B

Order dated February 1, 2010. It is improper for Plaintiffs' counsel to prosecute their motion against former Class Representatives when they have been disqualified from suing these Class Representatives in related litigation.

3. By reason of those matters set forth in Paragraphs 1 and 2 above, Bowen contends that the Rule to Show Cause should be dismissed and withdrawn as to the former Class Representatives or, if it is not, Plaintiffs' counsel should be disqualified from prosecuting the motion against the Former Class Representatives.

4. This Court does not have subject matter or *in personam* jurisdiction to do what it proposes to do. In the Rule to Show Cause, the Court recognizes that an issue of fact exists concerning whether the fees that were paid to former Class Counsel were paid for work in this case, known as Cardamone, or in another case in Tennessee, known as Posey. The Court said:

> "One theory proffered by Original Class Counsel is that the monies were paid solely for the representation of Posey Objectors William and Allison Deloach. Another theory is that it was for work done for the Posey class. However, from the documents in the record in this case, one can reasonably conclude that the payments were based on Original Class Counsel's status as being named "Class Counsel" and the agreement to compromise and ultimately dismiss this case; ..." (See Rule to Show Cause, Page 8 of 11)

5. Thus, the Court recognizes that a question of fact exists about the source of any fees received – legal work in the Posey case or in this case. However, the Court has erroneously and improperly decided that question of fact when it makes its own "reasonable conclusion" from the documents in the case.

6. This Court does not have the authority under Rule 23 to decide the question of the source of those fees – the Posey case or the Cardamone case. This underlying question of fact is for a jury to decide in another pending related proceeding - not for the Court to decide in this case. By deciding that question on its own, the Court is committing reversible error.

7. If

a.) a jury in another proceeding decided that the $600,000 in fees paid to the former Class Counsel were not earned in Posey but rather were earned as class counsel in the Cardamone case, or

b.) if former Class Counsel were to stipulate or agree that $600,000 in fees paid to the former Class Counsel were not earned in Posey but rather were earned as class counsel in the Cardamone case, then this Court's jurisdiction under Rule 23 to issue the Rule to Show Cause would not be in question.

8. However, neither of those situations is present here. By issuing its Rule to Show Cause, the Court has

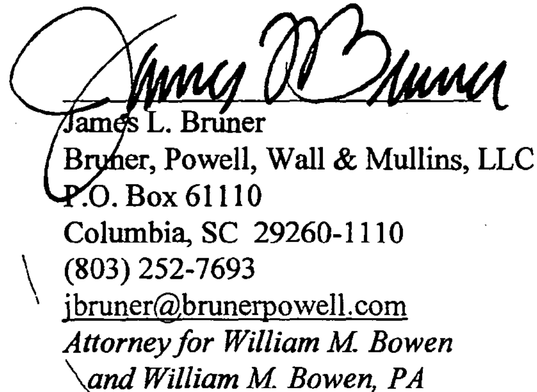
a.) improperly placed the burden of proving that the fees were not earned in the Cardamone case on former Class Counsel rather than upon the accusing parties seeking the relief;

b.) improperly denied former Class Counsel a trial before a jury for that issue of fact to be decided;

c.) improperly denied former Class Counsel due process in that factual determination; and

d.) improperly attempted to assert *in personam* and subject matter jurisdiction over former Class Counsel over this disputed factual issue.

9. The Court should dismiss and withdraw the Rule to Show Cause and deny the Plaintiffs' motion until a jury in another proceeding has made the necessary factual finding for it to proceed.



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July 17, 2012

CERTIFICATE OF SERVICE

I, James L. Bruner, attorney for William M. Bowen, do hereby certify that on July 17, 2012, I served a copy of the document(s) listed below on counsel of record by electronic mail and by depositing a copy of same in the U.S. Mail, first-class, postage prepaid and addressed as follows:

Pleadings served:

1. Return to Rule to Show Cause and Order for Accounting by William M. Bowen

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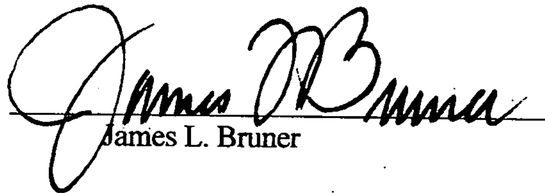
James L. Bruner

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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July 17, 2012

Columbia, South Carolina

Attorneys for Defendant
William Dixon Robertson III

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE CIRCUIT COURT
Timothy J. Treon and his wife, Jane Treon, and P. Jennings Scearce and Steven Christian individually, and on behalf of other similarly situated in the State of South Carolina, Plaintiffs, vs. Dryvit Systems, Inc., Defendant.	Case No. 2002-CP-07-1377 **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she served the foregoing William Dixon Robertson III's Response to Rule to Show Cause and Order for Accounting by causing a copy of same to be deposited in the United States Mail, proper postage prepaid, this 17th day of July 2012, addressed as follows:

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Columbia, South Carolina

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

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

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

I. No Subject Matter Jurisdiction
Dismissal Pursuant to Rule 12(b)(1)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Venue is Improper as Against Movants,

Rule 12(b)(3)

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

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

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

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

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

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

There is no cause of action recognized in this (or any other) State that allows one party to a piece of litigation that has been dismissed with prejudice to have someone who has never been

a party to that proceeding ordered to appear, without any Summons or Complaint, in a County without any basis for venue, to carry the burden of showing a Judge why he should not take their money and give it to the people who were the former Plaintiffs in that now dismissed lawsuit. While this Court seemingly looks to the case of Premium Investment Corp, 282 S. C. 464, 324 S.E. 2d. 72 (1984) as the basis for the assertion of some claim for money against these Movants, they submit that such case is factually, procedurally and otherwise legally distinguishable from this action and does not, therefore, provide any such support. Movants do submit, however, that the manner in which that case was pursued is insightful on the question of how a cause of action might be asserted if the circumstances warranted. Simply stated, the Premium Investment case involved a new and separate civil action, instituted by an allegedly injured party, in which the defendants were made parties to the action and were given all of the rights afforded by Due Process. That is, quite clearly, distinguished greatly from the current action, as described above.

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

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

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

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

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

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

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

VII. Other Grounds for Dismissal

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

VIII. Conclusion

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

Respectfully submitted,

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