STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

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

Plaintiffs,

V.

DRYVIT SYSTEMS, INC.,

Defendant.

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

RULE TO SHOW CAUSE
and
ORDER FOR ACCOUNTING

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JERRI ANN ROSENEAU
CLERK OF COURT
BEAUFORT COUNTY, S.C.

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

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

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

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

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

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

Background[2]

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

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

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

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

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

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[3] Exterior Insulation Finish Systems are commonly known as "synthetic stucco" or by their acronym EIFS. EIFS is a relatively new building product that looks very similar to traditional concrete-based stucco, but incorporates an insulation lawyer that traditional stucco does not have.
[4] Posey's purported nationwide settlement sought jurisdiction over EIFS homeowners in every state except for North Carolina due to a state-wide class action settlement Dryvit had entered into earlier.
[5] Frank Grimball, Robert Wylie, and Dixon Robertson - attended that Hearing in Tennessee. Although ostensibly appearing on behalf of two individual objectors, William and Alison DeLoache, Frank Grimball argued against the Posey Settlement on a variety of grounds and he explained that "the entire state of South Carolina at this point, Your Honor, has opted out [of the Posey Settlement]." Posey Hr'g Tr. dated October 1,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "Subject: SC Class. Hi to both of you. We are preparing to attend and agree to the motion to decertify the [Cardamone] class which will take place Monday in Beaufort, S.C. Some of my SC lawyers are concerned about not having any memorialization of the agreement Frank Grimball and I reached with the 2 of you in Tennessee about class counsel compensation, and I agree we should at least have an e-mail writing of it prior to Monday at 1 pm. Here is my understanding of it: Class counsel will earmark 600K of its national class fees for SC counsel and in addition Dryvit will contribute 225K which can be distributed by class counsel to the SC group. I would appreciate confirmation of this understanding." Dry0970.

After learning that Dryvit was attempting to decertify and dismiss the Cardamone action, Timothy and Frances Treon, and P. Jennings Scearce successfully moved to intervene in the action and became the named class representatives (hereinafter collectively and individually referred to as "Intervening Class Representatives"). Additionally, their attorneys, Richard R. Gleissner, Robert B. (Sam) Phillips, Gregory M.

[8] In correspondence dated February 5, 2003, Dryvit's counsel confirmed the individual settlement it had reached with class representatives John and Sally Cardamone and acknowledged that the amount "Dryvit has agreed to pay [the Cardamones] includes a bonus reflecting Mr. Cardamone's status as a named plaintiff in the South Carolina class action. This settlement, of course, ends his participation in that class action, which it is anticipated will be entirely dismissed following resolution of the limited number of cases previously listed."

Alford, Thomas J. Finn, Thomas E. Williams, and Donald E. Jonas successfully moved to intervene as class counsel (hereinafter collectively referred to as "Intervening Class Counsel"). Although most members of Original Class Counsel chose to voluntarily withdraw from this action at that time, attorneys George Mullen and Frank Grimball remained in the action.

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

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

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

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

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

Law/Analysis

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

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

[10] Mrs. Deloach has testified in her deposition that she and her husband had no attorney- client relationship with any of Original Class Counsel.

[11] The final Order in Posey, does not designate any of Original Class Counsel as "Class Counsel" in Posey.

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

The Court therefore finds it necessary to require each member of Original Class Counsel and the Original Class Representatives to appear before it and account for the funds and or benefits, if any, they received as a result of their representation of this Class. Original Class Representatives and Original Class Counsel invoked the jurisdiction of this Court to make themselves the fiduciaries of this Court and the Class under Rule 23 SCRCP and therefore this Court feels it appropriate to exercise its jurisdiction over them.

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

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

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

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

This Court's responsibility to unnamed class members and to the integrity of the judicial process requires that this Court exercise its authority and duty to inquire of the issues contained in this Rule to Show Cause and to account for all funds paid, or promised to be paid, in connection with this action. Rule 23 of the South Carolina Rules of Civil Procedure "specifically permits the trial court to maintain continual control over class action proceedings." Salmonsen v. CGD, Inc., 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). This allows the trial court, "at any time, [to] impose such terms as shall fairly and adequately protect the interest of the person on whose behalf the action is brought." Rule 23(d)(2), SCRCP. A trial court has a specific responsibility to account for the benefits derived by Class Representatives and Class Counsel in this action in accordance with Rule 23, SCRCP. See Premium Investment Corp. v. Green, 282 S.C. 464, 324 S.E.2d 72 (Ct.App. 1984) (recognizing the fiduciary duty owed by class representatives and their lawyers to unnamed class members and imposing a constructive trust on any benefits obtained as a

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

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

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

1) An accounting for the $825,000 referenced herein;
2) An Accounting of all fees received from the settlement of the individual cases of the Original Class Representatives;
3) An accounting of all benefits received by the Original Class Representatives;
4) To show why the court should not require that all fees and/or benefits, if any, be paid into the court to be held in a constructive trust for the class.

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

AND IT IS SO ORDERED.

J. Mark Hayes, II
Presiding Judge

This 1st day of June 2012