

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

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S.C. Supreme Court

Case No. 2007-CP-07-1396

Supreme Court Appellate Case No. 2013-000238

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs,..... Respondents,

v.

South Carolina State Plastering, LLC,..... Defendant,

and

South Carolina State Plastering, LLC,..... Defendant,

v.

Del Webb Communities, Inc. Pulte Homes, Inc.

and Kephart Architects, Inc., ... Third-Party Defendants,

Of whom Del Webb Communities, Inc., and

Pulte Homes, Inc. are Petitioners.

Supreme Court Appellate Case No. 2013-000233

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs,..... Respondents,

v.

South Carolina State Plastering, LLC,..... Petitioner,

and

South Carolina State Plastering, LLC,..... Petitioner,

v.

Del Webb Communities, Inc. Pulte Homes, Inc.

and Kephart Architects, Inc., ... Third-Party Defendants.

JOINT APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS
or in the alternative,
PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS

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The South Carolina Court of Appeals

Anthony and Barbara Grazia, individually and on behalf
of all other similarly situated Plaintiffs, Respondent,

v.

South Carolina State Plastering, LLC, Defendant.

South Carolina State Plastering, LLC, Defendant,

v.

Del Webb Communities, INC., Pulte Homes and Kephart
Architects, Inc., Third-Party Defendants,

Of Whom Del Webb Communities, Inc., and Pulte
Homes, Inc. are the Appellants.

Appellate Case No. 2012-212364

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McNAIR LAW FIRM, P.A.

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon Jr C.J.
H B W J.
Daniel G. Pieper J.

Columbia, South Carolina

FILED
RG 1-15-13

cc:

Robert L. Widener

A. Victor Rawl, Jr.

W. Jefferson Leath, Jr.

Michael S. Seekings

Phillip Ward Segui, Jr.

John T. Chakeris

The South Carolina Court of Appeals

Anthony and Barbara Grazia, individually and on behalf
of all other similarly situated Plaintiffs, Respondents,

v.

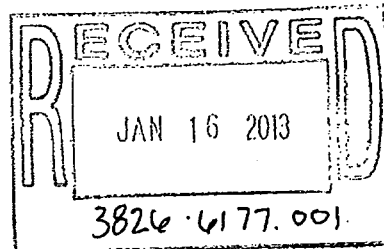
South Carolina State Plastering, LLC, Appellant.

South Carolina State Plastering, Appellant,

v.

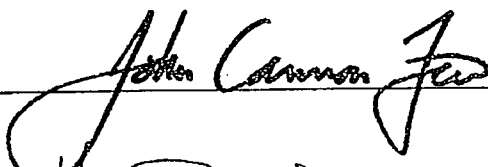
Del Webb Communities, INC., Pulte Homes and Kephart
Architects, Inc., Third-Party Defendants,

Appellate Case No. 2012-212212



ORDER

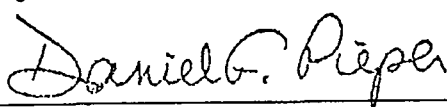
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



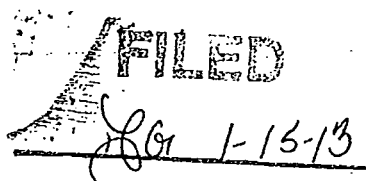
C.J.



J.



J.

A stamp with the word "FILED" in a large, outlined font. Below it, the date "1-15-13" is stamped.

Columbia, South Carolina

cc:

Everett Augustus Kendall, II

Christy Elizabeth Mahon

Phillip Ward Segui, Jr.

John T. Chakeris

W. Jefferson Leath, Jr.

Michael S. Seekings

The South Carolina Court of Appeals

Anthony and Barbara Grazia, individually and on behalf
of all other similarly situated Plaintiffs, Respondent,

v.

South Carolina State Plastering, LLC, Defendant.

South Carolina State Plastering, LLC, Defendant,

v.

Del Webb Communities, Inc., Pulte Homes and Kephart
Architects, Inc., Third-Party Defendants,

Of Whom Del Webb Communities, Inc., and Pulte
Homes, Inc. are the Appellants.

Appellate Case No. 2012-212364

ORDER

Appellant has filed a Notice of Appeal from an "Order Making Preliminary Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCF; Setting Parameters for Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing a Stay of Proceedings; and Setting Forth Procedures for Compliance with the Right to Cure Construction Dwelling Defect Act" and an order denying reconsideration and clarification. Respondents have filed a motion to dismiss contending the underlying orders are not immediately appealable and Appellant has filed a "Motion to Determine Appealability." After careful consideration, Respondents' motion to dismiss is granted because these orders are not immediately appealable. Because this appeal

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MCNAIR LAW FIRM, PA.

is dismissed, this Court need not act on Appellant's "Motion to Determine Appealability."


FOR THE COURT

Columbia, South Carolina

cc:

Robert L. Widener

A. Victor Rawl, Jr.

W. Jefferson Leath, Jr.

Michael S. Seekings

Phillip Ward Segui, Jr.

John T. Chakeris

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8-31-12

The South Carolina Court of Appeals

Anthony and Barbara Grazia, individually and on behalf
of all other similarly situated Plaintiffs, Respondents,

v.

South Carolina State Plastering, LLC, Appellant.

South Carolina State Plastering, Appellant,

v.

Del Webb Communities, Inc., Pulte Homes and Kephart
Architects, Inc., Third-Party Defendants,

Appellate Case No. 2012-212212

ORDER

Appellant has filed a Notice of Appeal from an "Order Making Preliminary Finding that Plaintiffs' Proposed Class Meets the Requirements of Rule 23(a), SCRCF; Setting Parameters for Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing a Stay of Proceedings; and Setting Forth Procedures for Compliance with the Right to Cure Construction Dwelling Defect Act" and an order denying reconsideration and clarification. Respondents have filed a motion to dismiss contending the underlying orders are not immediately appealable and Appellant has filed a "Motion to Determine Appealability." After careful consideration, Respondents' motion to dismiss is granted because these orders are not immediately appealable. Because this appeal is dismissed, this Court need not act on Appellant's "Motion to Determine Appealability."

Aspund Curleton AT
FOR THE COURT

Columbia, South Carolina

cc:

Everett Augustus Kendall, II

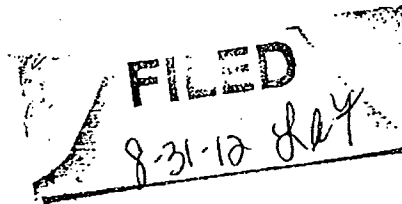
Christy Elizabeth Mahon

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W. Jefferson Leath, Jr.

Michael S. Seekings



STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NUMBER: 07-CP-07-1396

ANTHONY AND BARBARA GRAZIA,
individually and on behalf of all other
similarly situated Plaintiffs,

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC,

Defendants.

) ORDER MAKING PRELIMINARY
) FINDING THAT PLAINTIFFS'
) PROPOSED CLASS MEETS THE
) REQUIRMENTS OF RULE 23(a),
) SCRPC; SETTING PARAMETERS FOR
) PUTATIVE CLASS; DISMISSING
) PLAINTIFFS'
) UNFAIR TRADE PRACTICES CLAIM
) WITHOUT PREJUDICE; IMPOSING A
) STAY OF PROCEEDINGS; AND,
) SETTING FORTH PROCEDURES FOR
) COMPLIANCE WITH THE RIGHT TO
) CURE CONSTRUCTION DWELLING
DEFECT ACT

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

vs.

DEL WEBB COMMUNITIES, INC.,
PULTE HOMES, INC., and KEPHART
ARCHITECTS, INC.,

Third-Party Defendants.

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JEROME H. BUREAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter comes before the Court pursuant to Plaintiffs' Motion to Certify a Class in accordance with the provisions of Rule 23, SCRPC, and is on remand from the South Carolina Supreme Court after its majority decision that the class action provisions of Rule 23, SCRPC, are not incompatible with the requirements of the Right to Cure Construction Dwelling Defect Act (hereafter, Act) (S. C. Code Ann. 40-59-810, et. seq.). See Grazia v. S. C. State Plastering, LLC, et. al., 390 SC 562, 703 SE 2d 197 (2010). After a thorough review of the South Carolina

Rules of Civil Procedure, relevant case law, the specific appellate decision in this case, extensive memoranda of law and correspondence submitted by counsel, affidavits, and the various oral arguments presented by all parties at multiple hearings, the Court finds that Plaintiffs' proposed Class preliminarily meets the requirements for certification, hereby establishes the parameters of the putative Class, approves the proposed Class representatives and counsel, imposes a stay of proceedings in order to permit Plaintiffs and Defendant to comply with the Act, and sets forth the procedures and requirements for compliance in this putative class setting. Thereafter, the Court will make a final decision as to whether a class action vehicle is practicable under the specific facts and circumstances disclosed by the notices and responses required under the Act. See Rule 23(d)(1), SCRPC.

Just 2 The named Plaintiffs (Anthony and Barbara Grazia) and those they represent as proposed class members are all individuals or legal entities who own stucco-clad residences in the Sun City development of Bluffton, Beaufort County, South Carolina ("Sun City"). There are currently about 140 individual cases already pending in Beaufort County, and Plaintiffs allege there are an approximate additional 4,000 similar housing units that are not yet in litigation. The pending cases have been declared complex and assigned to this Court for disposition. To attempt to individually try the already pending cases and those yet unfiled would be overwhelming to this Court and all judicial resources available within the Fourteenth Judicial Circuit, and has the potential impact of denying meaningful access to the justice system for some of the parties.

The Plaintiffs' complaint focuses on damages allegedly flowing from defects in exterior wall stucco design, construction, manufacture, and application. Plaintiffs allege that the Defendants participated in the design and installed the stucco system in the Grazia residence and

many other Sun City residences as well, and the Third-Party Defendants, who have extensively participated in opposing this motion, were the designers and sellers of the residences.

As a threshold issue, Plaintiffs attempt to certify a Class that consists of all stucco-clad residences within the Sun City Development, but have named as the sole Defendant South Carolina State Plastering, LLC (SCSP), the entity that performed the stucco work on the vast majority of the homes at Sun City. South Carolina State Plastering in turn filed suit against third-party Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. as the entities engaged in the development, layout, design, and were allegedly ultimately responsible for construction of the Sun City Development, asserting that any work done by SCSP was at the direction of and in accordance with the specifications and instructions of Del Webb/Pulte. Kephart Architects, Inc., who designed some of the Sun City homes, was also brought in as a third-party Defendant. Of the 140 Sun City stucco cases already pending, counsel agree that less than ten (10) do not involve stucco applied in whole or in part by SCSP. Of the approximate 4000 cases not yet filed, counsel agree that almost all, if not every one, involve stucco applied in whole or in part by SCSP. Accordingly, because no other stucco applicators are a party to this action and have not been permitted to contest the allegations or afforded due process of notice and an opportunity to be heard on the issue of class certification, the putative class is limited those homes on which SCSP installed the stucco in whole or in part.

With regard to those homes, by competent evidence presented to this Court, including affidavits and testimony of an architect, engineer, and a general contractor, the Court finds that the Plaintiffs' case presents a single critical issue that is common in law and fact: the improper design, mix, and installation of stucco exterior wall systems by SCSP on the houses at Sun City Hilton Head built before July 31, 2007. These design, manufacture, and installation issues have

led to generally consistent claimed problems within these structures, and generally consistent damages flowing therefrom. These damages include, according to the complaint, cost of repairs, loss of use, depreciation, incidental and consequential losses, and sums previously paid for attempted repairs. A discussion of the specific certification requirements of Rule 23(a), SCRCF, follows.

The "Numerosity" Requirement of Rule 23(a)(1)

7-4 The numerosity requirement of 23(a)(1) is often referred to as the impracticality of joinder requirement. Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d, § 1762. No arbitrary measure of impracticability or numerosity has been established, and this issue is determined by the facts of each case. The objective of this requirement is to prevent members of a class from being unnecessarily deprived of their rights and a day in court by either the opposing party or by a few members of the proposed class. Ripley v. Denver U.S. National Bank, 260 F. Supp. 704, 712 (D. Colo. 1966). In this case, the Court finds that the numerosity requirement is met. The Plaintiffs have presented credible evidence, including testimony of Pulte representatives, that the number of houses clad with stucco in a similar manner as the Plaintiffs' house is over 4,000. There is no possibility that each case could be tried individually or joined as individual cases. Because the volume of cases presented here would certainly overwhelm the Beaufort County docket, and because joinder is impractical, this Court finds that the Rule 23 requirement of numerosity has been met.

Questions of Law and Fact Common to the Class

The Court finds that this case satisfies the commonality requirement because it is limited to claims related to the design, installation, and condition of the stucco cladding, and common issues of fact and law exist. To establish commonality, a party must show that "there are

questions of law or fact common to the class.” SCRCF, Rule 23(a)(2). See McGann v. Mungo, 287 S.C. 561, 567-568, 340 S.E. 2d 254, 157-158 (Ct. App. 1986). In practical terms, this means the party must articulate the existence of “significant common, legal, or factual issues” that bind the proposed class together. Gardner v. S.C. Dep’t of Revenue, 353 S.C. 1, 577 S.E.2d 190 (2003). The Court must examine whether, in its judgment, the issues are similar such that class resolution will provide a more efficient method of resolving the litigation.

After a thorough review of the allegations, defenses, and facts distilled thus far in the cases, this Court finds that all of the owners in the class are similarly affected by the alleged acts of the Defendants, and each owner may face significant costs to repair their houses. Common legal and factual questions that exist in each case include, but are not limited to, whether (1) the original design of the stucco system was proper and (2) the installation of the system was proper.

The Court finds that Plaintiffs have met their burden of proving commonality.

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5- Specifically, pursuant to South Carolina law, Plaintiffs have established the following three elements of commonality:

- 1) That there is a common determinative issue of fact or law that overshadows all other issues; namely, the structures in question have problems with (a) head flashing above doors and windows, (b) stucco control joints, and/or (c) moisture encapsulation by failing to leave a gap between the stucco exterior and the structure slab.
- 2) That the Court will not have to investigate each class member's individual claim for purposes of establishing or failing to establish liability; and,
- 3) That the damages determination, should Plaintiffs prevail on liability, will be comprised of a core set of similar inquiries for each structure.

The “Typicality” Requirements of Rule 23(a)(3)

South Carolina requires that a plaintiff prove that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Rule 23(a)(3), SCRCF.

These requirements "ensure that only [those] who can advance similar factual and legal arguments are grouped together as a class." Mace v. Van Ru Credit Corp., 109 F.3d 338, 341 (7th Cir. 1997). See also, General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 2370 n. 13, 72 L.Ed.2d 740 (1982)(commonality and typicality "serve as guideposts" to determine whether "a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence"); Sprague v. Gen. Motors Corp., 133 F.3d 388, 399 (6th Cir. 1998)(commonality and typicality not satisfied when "taken as a whole the class claims were based on widely divergent facts").

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The typicality requirements focus on the characteristics of the class representative. Typicality entails an inquiry into whether the named plaintiff's individual circumstances and the legal theory upon which the claims are based are typical with respect to the claims of other class members. The typicality requirement focuses on the consideration of whether the representative's interests are truly aligned and consistent with those of the class members. Smith v. The B&O Railroad Company, 473 F. Supp. 572 (D. Md. 1979). The Court finds that Plaintiffs satisfy these requirements.

In this case, plaintiffs assert that the design and installation of the stucco is improper on over 4000 Sun City Homes. Evidence has been reviewed by this Court in the form of expert testimony and affidavit. This Court finds that evidence establishes typicality.

The proposed class representatives' claims are typical because each class member owns a residence with a similar allegedly defective stucco system allegedly designed, installed, and/or sold by the Defendants/third-party Defendants. Rule 23(a)(3) requires that "the claims or defenses of the representative parties" be "typical of the claims or defenses of the class."

Decisions construing Rule 23(a)(3) have given it a liberal construction, holding that a claim is typical if it arises from the same events, practices, or course of conduct that gives rise to the claims of other class members and if the claims are based on the same legal theories. See, e.g., Senter v. General Motors Corp., 532 F.2d 511 (6th. Cir.), *cert. denied* 429 U.S. 870 (1976); 1 H. Newberg, *Newberg on Class Actions* §3:13 (2002) (cases collected). The typicality requirement "may be satisfied even though varying fact patterns support the claims or defenses of individual class members, or there is a disparity in the damages claimed by the representative parties and the other members of the class." 7A Wright and Miller, *Federal Practice & Procedure* §1764 (1986). Here, the Court finds that the claims of Anthony and Barbara Grazia are typical of the claims of the other homeowners.

Adequacy of Class Representatives and Counsel

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Rule 23(a) also requires that "the representative parties will fairly and adequately protect the interests of the class." SCRCF, Rule 23(a)(4). Adequacy of representation consists of two components: (1) there must be no disabling conflicts of interest between the class representative and the class and (2) the class representative must be represented by counsel competent and experienced in the kind of litigation to be undertaken. See Runion v. U.S. Shelter, 98 F.R.D. 313, 317 (D.S.C. 1983), *cited with approval in Waller v. Seabrook Island Property Owners Ass'n.*, 300 S.C. 465, 388 S.E. 2d 799 (1990). In this case, the Court finds that the proposed class representatives and the class members' interests are identically aligned. They seek to have their homes repaired and hold liable those responsible for the damages. This Court notes that the Grazia complaint was filed in 2007 and that the Grazias have pursued this claim in a representative capacity for four (4) years, including a trip to the Supreme Court and back, as have their counsel. Plaintiffs' counsel are qualified, experienced, and able to conduct class

litigation. Attorney W. Jefferson Leath, Jr. has approximately thirty (30) years of experience in construction litigation and is familiar with issues surrounding class litigation, as is Attorney Michael S. Seekings with more than twenty (20) years' experience, and Attorneys John T. Chakeris and Phillip W. Segui, Jr., are similarly experienced.

The Amount in Controversy Meets the Statutory Requirement

Defendants argue that some houses in the putative class have no damage at all; thus, they further argue that Plaintiffs do not meet the one hundred dollar (\$100.00) per claim threshold amount for a class to be certified. This argument is disputed by the Plaintiffs, who counter that even if damage is not currently visible on a particular structure, the defective stucco system will eventually cause damage. Plaintiffs allege that the only appropriate repair is to de-clad and then re-clad the houses with an appropriate stucco system, at a cost of approximately \$75,000.00 per structure. Clearly, after reviewing the pleadings and the evidence of record, the Court finds that plaintiffs' allegations of the amount in controversy well exceed Rule 23's threshold requirement.

Responses of the Defendants in Opposition to Class Certification

The Defendants have raised numerous legal and factual arguments in opposition to class certification, contesting all requirements of Rule 23. First, Defendants argue Plaintiffs' claims under the SC Unfair Trade Practices Act are by law not amenable to class action prosecution. This position is correct, and as a part of this preliminary Order, these claims will be dismissed without prejudice by the Court. See Grazia v. S. Carolina State Plastering, LLC, at id. The dismissal is without prejudice at this juncture; however, in the event a Class is certified with finality in this case, the dismissal will be with prejudice.

On the issue of dismissing the Unfair Trade Practices Claim (UTPA), counsel for Del Webb/Pulte argues that the Court does not have the authority to *sua sponte* dismiss this claim

without a motion from Plaintiffs or any other party to do so; rather, the Court's only option is to deny certification of the class. The Court does not accept this argument. In moving for class certification, Plaintiffs have implicitly requested the dismissal of the UTPA claim, and in open Court on the record acknowledged that South Carolina law does not permit the UTPA claim to be prosecuted in a representative capacity, and acquiesced in the dismissal. Rule 23(d), SCRPC, permits the Court to impose such terms as are necessary to protect the interests of the parties. This dismissal protects the interests of the third-party Defendant, who now complains of it. Thus, third-party Defendant's objection is overruled.

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The Defendants further argue that a class action will be of no benefit to the parties because each claim will still have to be individually investigated and determined, including individual structure destructive testing, and the damages for each home separately calculated. Moreover, Defendants argue that similarity of claims, in and of itself, does not meet the commonality requirement of Rule 23, and the alleged specific defects at the Grazia home are not probative as to the alleged problems at other claimants' residences.

To demonstrate this argument, Defendants raised factual points in opposition to class certification. They argue that some of the homes in question may have alleged defects as to inadequate or thin application of stucco, while others have a problem with the mix of ingredients used to create the stucco. Some houses have alleged problems with head flashing, some with sealant joints, others with control joints, some have cracking stucco while others do not, and some houses have alleged problems with weep configurations while others do not. The houses in question do not all use the same type stucco system or stucco product, and the stucco systems may be manufactured by different companies. Moreover, because the completion date of these structures spans a period of almost ten years, construction standards may differ. Some houses

may have had multiple owners who may have altered the stucco. Defendants also argue that certain members of the putative class are subject to certain affirmative defenses, while others are not, and that the class action procedure cannot be used to alter substantive law and deprive Defendants of these defenses with respect to any individual claim.

The Court is cognizant of Defendant's and third-party Defendants' arguments, and recognizes that factual and legal differences may exist within the putative class. For these reasons, this Order makes only a preliminary finding that the requirements of Rule 23 have been met by Plaintiffs. The Court intends to employ the Right to Cure process as outlined below to further analyze and perhaps organize the various claims that exist in these cases. The Court opines that there may be certain sub-groups formed within the class action to facilitate the determination of liability and damages issues, if such procedure is found to be fair and efficient. See McGann v. Mungo, 287 S.C. at 570-71, 340 S.E.2d at 159 ("In any case, the problem of determining initial membership in the class affords no basis for dismissal of the action since the circuit court can either require the plaintiffs to replead, redefine the alleged class itself, or designate subclasses."). Moreover, should a Class be finally certified, after the passage of an appropriate period for discovery as to the applicability of affirmative defenses, the Court will require the Defendants to provide a listing of claimants for whom Defendants allege a specific affirmative defense is applicable, and the Court may thereafter form additional sub-groups within the Class to accommodate these defenses. The specifics of these procedures, if necessary, will be deferred until further development of the evidence through the discovery process. The Court specifically rejects Defendant's and third-party Defendants' contention, however, that the factual and legal components within the cases automatically defeat a class action approach to resolution

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of this litigation, or the typicality, commonality, or adequacy of the named Plaintiff's representation of the class.

After hearing arguments of counsel and reviewing the pleadings and exhibits submitted, it appears to the Court that common issues exist for all homes to which SCSP applied the exterior stucco in whole or in part prior to July 31, 2007, as specifically defined below. While the Court recognizes Defendants' argument that not all of the pending stucco cases are exactly the same, it is the firm belief of this Court that common, core issues are present in all the cases and that a class approach is not only the best, but the only method available to enhance judicial economy, promote efficient disposition of these cases, and reduce litigation costs.

State case law directs that this Court take an expansive rather than narrow view of class action motions. Littlefield v. South Carolina Forestry Comm'n, 337 S.C. 348, 354-55, 523 S.E.2d 781, 784 (1999) ("Rule 23, SCRPC, endorses a more expansive view of class action availability than its federal counterpart"). This Court finds that this case presents a core set of facts contemplated by Rule 23 when considering certification. Moreover, the Supreme Court had the clear opportunity to deny class status in this very case but affirmatively chose not to do so, instead emphasizing in its decision the vitality of the class action doctrine to preserve the resources of the Court and the parties. See Grazia v. S. Carolina State Plastering, LLC, *Id.*, rehearing denied (Jan. 20, 2011).

Accordingly, for purposes of attempted compliance with the Right to Cure Construction Dwelling Defect Act, this Court finds that Plaintiffs have met the requirements of Rule 23(a), and are entitled to a preliminary determination that Plaintiffs may proceed at this juncture using a class approach. The class is preliminarily recognized as follows: All individuals, corporations, unincorporated associations, or other entities that currently own stucco-clad homes in Sun City

Hilton Head to which SCSP applied the exterior stucco in whole or in part prior to July 31, 2007, which allegedly are damaged due to (a) the lack of head flashing above doors and windows, (b) the failure to install stucco control joints, and/or (c) the presence of moisture encapsulation by the failure to leave a gap between the stucco exterior and the structure slab. Further, Anthony and Barbara Grazia are approved as representatives of the putative class, and attorneys W. Jefferson Leath, Jr., Michael S. Seekings, John T. Chakeris, and Phillip W. Segui, Jr., are found to be competent and capable class counsel.

Requirement of Notice to Putative Class Members

12
The Court has requested the parties to reach an agreement on the contents of an opt-out class notice to all potential members. Counsel has been unable to do so. Accordingly, each party is requested to present to the Court a proposed opt-out Notice of Class Action and Exclusion Request Form for distribution to all potential class members within thirty (30) days of the date of this Order, consistent with the remaining provisions of this Order. This Notice must contain the standard information concerning the obligations, rights, and ramifications of acceptance or rejection of class membership, and include a date certain for closure of the opt-out period. Additionally, this Notice should inform the potential members that class certification is preliminary at this juncture pending the results of the Right to Cure process; that once the opt-out period has ended, a Right to Cure document must be individually completed for each claimant; a brief description of the Right to Cure process (a more detailed description will come with the Right to Cure document itself); that based upon the Right to Cure responses, the Court will make a final determination of class certification; and, that the potential class members will be notified of this final decision and the legal ramifications thereof.

Once the parties have submitted a proposed Notice to Potential Class Members and Exclusion form, the Court will either choose one party's form or combine portions of the submitted forms to reach its decision as to the final format of the document. It is likely that an additional hearing may be conducted on this matter prior to a final decision, and in such hearing the Court will resolve related issues such as the timetable for initiating the notice process, the necessity and authorization of permission to enter a property for inspection, and the result of failure of cooperation by a particular claimant.

Compliance with the Right to Cure Act and Future Imposition of Stay

The following procedures are imposed, pursuant to Rule 23(d)(2), SCRPC, to fairly and adequately protect the divergent interests of the multiple parties before the Court. Within seven (7) days following the closure of the opt-out period, Plaintiffs shall be required to provide to this Court at the Hartsville office, Defendants, third-party Defendants, and filed with the Clerk of Court a complete list of the proposed class, identifying the properties by name of owner(s) and street address. This listing shall be organized in two separate ways – one shall be in alphabetical order by name of the owner with street address and contact information included (mailing address if different from street address and home telephone number, or cellular number if no home number exists), and a second shall be a listing by street address, set forth street by street in sequential address number, with name of owner(s) included. Once this listing is filed and distributed as outlined above, it may only be amended (except for a change in contact information) by motion of a party and written permission of the Court, which shall not be freely given. At the time this listing is filed with the Clerk, pursuant to S. C. Code Ann 40-59-830, a Stay of proceedings shall be imposed until the requirements of the Act are met and procedures set out thereunder are completed. This Stay shall be automatic without need of issuance of a

further Order from this Court. This Stay shall remain in effect until the conclusion of the claims procedure for all properties as outlined below, and shall be ended only upon issuance of an Order Lifting Stay from this Court after proper motion of any party.

To provide structure for compliance in such a large number of cases, Plaintiffs shall be given a period of one hundred and eighty (180) days from the imposition of the Stay to provide Defendants with the notice of claim required by Section 40-59-840 for all properties within the proposed class. Rather than provide all notices at once at the end of this entire period, working from either the alphabetical list or the sequential street list at the choice of Plaintiffs' counsel, Plaintiffs must provide one fourth of the total notices due on the final day of each forty-five day period within the given one hundred eighty days. In setting these deadlines, the Court realizes that this is an ambitious schedule; however, given the current age of this case and the number of potential claims, the need for timely disposition of this litigation demands that both parties acquire adequate staff to meet the timetables set forth herein.

Jan 14
Because there is no specific exclusion in either case law or the language of the Act, the notice to the contractor required under the Act must be filed in a representative capacity by proposed class counsel, and must be signed by counsel and dated as to the date of service to contractor. For purposes of record keeping and administration, Contractor SCSP shall receive service of the notices in a representative capacity through counsel. The date of service on each individual notice shall trigger the response dates as set forth herein. Because of the magnitude of the number of claims, the amount of work required in the initial investigation of the claims by contractor, and the fact that Plaintiffs have chosen to proceed by class action, the Court will grant a period of sixty (60) days to contractor to provide the individual claim response required by Section 40-59-850, and failure to respond within sixty (60) days shall be deemed a denial of the

claim. These claim responses shall be signed and dated by counsel, and shall be served upon class counsel. If contractor does respond with an offer of settlement, claimant shall be given thirty (30) days after the date of service to respond to contractor's offer as required by Section 40-59-850(b).

The required content for each notice of claim is set forth in Section 40-59-840. Proposed class counsel is hereby advised that, for purposes of analyzing and organizing class certification issues, specificity of the exact nature of the stucco defect and defect results with regard to each individual property shall be required. A uniform notice listing all possible defects and all possible damages within the class will not suffice.

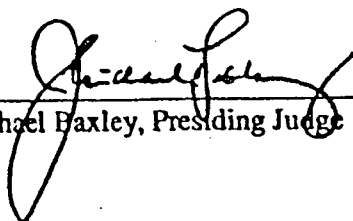
Qub
15
The Court is aware that the original purpose of the Act is to provide an opportunity for a claim to settled between parties without litigation occurring. To this end, the Court neither requires counsel to attend home inspections that occur as a result of Section 40-59-850(a) of the Act, nor is counsel specifically excluded. However, an inspection may not be cancelled or postponed because one or more of the attorneys for any party cannot be present. The contact information is provided on the alphabetical list of potential class members so that the parties may engage in the inspection process directly between themselves without need of counsel, if such is determined to be practicable by all concerned.

Conclusion

Compliance with all of the procedures and requirements contained in this Order will prove beneficial for everyone involved in this dispute. At this juncture in this litigation, the use of the class action vehicle will operate to conserve valuable judicial resources as well as concentrate and clarify the common issues of law and fact that predominate this dispute. At the

same time, the rights and interests of all parties will be fully protected by adhering to the guidelines outlined by the Court.

IT IS SO ORDERED.



J. Michael Baxley, Presiding Judge

Hartsville, South Carolina

December 8, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated
Plaintiffs, ... Respondents,

v.

South Carolina State Plastering, LLC, ... Appellant,

v.

Del Webb Communities, Inc., Pulte Homes,
Inc., and Kephart Architects, Inc. . . Third-Party Defendants.

Of Whom Del Webb Communities, Inc., and
Pulte Homes, Inc. are Appellants.

RESPONDENTS' MOTION TO DISMISS
APPELLANT DEL WEBB/PULTE'S
APPEAL AND MOTION FOR RULE 269 INQUIRY

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RECEIVED

JUN 22 2012

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Attorneys for the Respondents

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF
APPEALS:

This Motion is brought by the Plaintiffs/Respondents in this Class Action seeking dismissal of an Appeal taken by the Appellant Del Webb Communities, Inc., an Arizona Corporation ("Del Webb"), of two interlocutory Orders issued by Judge Baxley in the Circuit Court. (Exhibits 1 and 2). In support of this Motion, Plaintiffs/Respondents would show as follows.¹

INTRODUCTION

Del Webb has noticed an appeal from two separate interlocutory Orders entered by the circuit court in the conduct of this class action. Neither of the Orders is immediately appealable. To avoid any further disruption and delay of the adjudication of this matter in the Circuit Court, Del Webb's appeal should be immediately dismissed and pursuant to the provisions of SCRAP 269, this Court should inquire as to the propriety of Counsel filing a Notice of Appeal.

BACKGROUND

The Plaintiffs/Respondents are homeowners in Sun City Hilton Head ("Sun City"), a large-scale, planned retirement

¹ This Motion is virtually identical in form and substance to the Motion filed by Respondents in Lancaster v. Georgia Pacific Corporation, et al. (Exhibit 3). In response to that Motion, this Court dismissed Del Webb's Appeal. (Exhibit 4).

community in Bluffton, developed by Del Webb, with Del Webb also serving as general contractor for the construction of all of the class homes, some 4300 in total. The Respondents brought the present action on behalf of themselves and their similarly situated Sun City neighbors to recover damages as a result of the deficient design and construction of the stucco exterior on class members' homes.

After three hearings, the Honorable J. Michael Baxley entered an Order granting the Respondents' motion for class certification. (Order Making Preliminary Finding That Plaintiffs' Proposed Class Meets The Requirements of Rule 23(a), SCRCF; Setting Parameters For Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing A Stay Of Proceedings; and, Setting Forth Procedures For Compliance With The Right To Cure Construction Dwelling Defect Act, Exhibit 1). Thereafter, Del Webb filed motions seeking reconsideration and/or clarification of the class certification Order.

Following another hearing held on April 30, 2012, Judge Baxley entered an Order denying Del Webb's motion for reconsideration and/or clarification of the class certification Order. (Exhibit 2).

On or about June 7, 2012, Del Webb noticed an appeal of the Orders issued by Judge Baxley. (Exhibit 5).

ARGUMENT

Neither of the Interlocutory Orders Identified in Del Webb's Notice of Appeal is Immediately Appealable.

Both Orders issued by Judge Baxley are interlocutory, a fact that is observed by the Court in its May 1, 2012, Order. (Exhibit 2).

Rule 201(a), SCACR, addresses judgments, orders and decisions subject to appeal, and, in pertinent part, provides that "[a]ppel may be taken, as provided by law, from any final judgment, appealable order or decision." "As a general rule, only final judgments are appealable." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005). "To promote judicial efficiency and orderly adjudication of disputes on appeal, this rule seeks to prevent multiple appeals of non-final matters." Jean Hoefer Toal et al., Appellate Practice in South Carolina 83 (2002).

As is the case here, "any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Wilson, 367 S.C. at 12, 625 S.E.2d at 208; Mid-State Distribs, Inc. v. Century Imps., Inc., 310 S.C. 330,

335, 426 S.E.2d 777, 780 (1993) ("South Carolina case law has established what constitutes an interlocutory appeal. If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory."); see also Toal, supra at 86 ("'Final judgment' is a term of art denoting the disposition of all issues in the action."). Here, Del Webb has appealed six separate Orders (each of which will be more particularly identified and analyzed below), none of which are final judgments; they are all interlocutory (and not immediately appealable).

"Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within [S.C. Code Ann.] § 14-3-330." Wilson, 367 S.C. at 13, 625 S.E.2d at 208. Neither Order falls within the statute. In pertinent part, § 14-3-330 provides as follows:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions;

provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action; . . .

Accordingly, "[i]ntermediate orders involving the merits may be immediately appealed pursuant to § 14-3-330(1)." Wilson, 367 S.C. at 13, 625 S.E.2d at 208. "An order which involves the merits is one that 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense.'" Id. (citing Mid-State Distribs., 310 S.C. at 334, 426 S.E.2d at 780). Also, "[i]nterlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2)." Id. "Orders affecting a substantial right 'discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.'" (citing Mid-State Distribs., 301 S.C. at 335, 426 S.E.2d at 780 n. 4).

As to subsection (2) of § 14-3-330, "[g]enerally, this subsection has only been used when the trial order affected

the 'mode of trial' because if those orders are not immediately appealed, no appellate review is available to correct any error." Toal, supra at 87. "[T]he 'mode of trial' exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury.'" Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (citing Salmonsens v. CGD, Inc., 377 S.C. 442, 461, 661 S.E.2d 81, 91 (2008) (Pleicones, J., dissenting)).

As is more particularly set forth below, neither of the Orders Del Webb purports to appeal are final judgments. Neither involves the merits. Neither discontinues this action, prevents a later appeal, grants or refuses a new trial, or strikes out a defense pled by Del Webb. Neither abridges Del Webb's constitutional right to a jury trial. Neither is immediately appealable. Del Webb's appeal should be immediately dismissed, so as to avoid any further disruption or delay of the adjudication of this matter in the Circuit Court.

Order Granting Class Certification, dated December 19, 2011
(Exhibit 1)

This is a procedural Order granting class certification and setting the procedural structure of the case moving forward. Generally, Orders under Rule 23 are

interlocutory and not immediately appealable. See Salmonsens, 377 S.C. 442, 661 S.E.2d 81 (refusing to entertain interlocutory appeal of class certification despite express argument against precedent to do so, and also despite Court simultaneously addressing the merits of another issue in the case on appeal); Eldridge, 308 S.C. at 127, 417 S.E.2d at 534 (1992); see also Ferguson, 349 S.C. at 565, 564 S.E.2d at 98; Schein, 274 S.C. at 331, 263 S.E.2d at 384; Knowles, 274 S.C. at 59, 261 S.E.2d at 49.

Within that Order are several case management directives from Judge Baxley. The first is an Order staying proceedings pending compliance with the S.C. Right To Cure Statute (S.C. Code Ann. § 40-59-810, et. seq.) and setting certain conditions for the notice and timing of compliance with the Right To Cure Act by the Plaintiffs/Respondents. While Plaintiffs can imagine no basis for an Appeal by Del Webb, as it was on their Motion that the framework of compliance with the Statute was set, this Order is certainly not appealable because it is not a final Order, and is consistent with the Right To Cure Act and the Supreme Courts recent decision in Grazia v. South Carolina State Plastering, LLC, et al, 390 S.C. 562, 703 S.E.2d 197 (2010).

Also contained within the Class Certification Order, is an Order striking Plaintiffs' Unfair Trade Practices claims. Again, this is a matter of procedure mandated by the legislature (unfair trade claims cannot be brought in a representative capacity) and Plaintiffs have no complaint with the rules. It is no more than the grant of a Motion to Amend. Moreover, it is without prejudice and plainly not appealable.

Order Denying Del Webb Communities, Inc.'s Motion for
Reconsideration and/or Clarification, dated May 7, 2012
(Exhibit 2)

This Order merely denies reconsideration and/or clarification of the circuit court's prior procedural Order granting class certification. Once again, generally, Orders under Rule 23 are interlocutory and not immediately appealable. See Salmonsens, 377 S.C. 442, 661 S.E.2d 81; Eldridge, 308 S.C. at 127, 417 S.E.2d at 534 (1992); see also Ferguson, 349 S.C. at 565, 564 S.E.2d at 98; Schein, 274 S.C. at 331, 263 S.E.2d at 384; Knowles, 274 S.C. at 59, 261 S.E.2d at 49. Del Webb, after spending countless months trying to convince the Circuit Court to change its mind, now seeks this Court to impose a change that the rules do not allow.

INQUIRY PURSUANT TO SCRAP 269

As is shown in Exhibits 3 and 4, Pulte has recently attempted to do exactly what it is attempting to do here, appeal an Order that is plainly and on its face not appealable. On May 1st, Judge Baxley made it clear that his Orders were interlocutory and on June 1st, this Court told Pulte that class certification Orders are interlocutory. Nonetheless, with the Lancaster Order in hand, on June 7th, Pulte filed its Notice of Appeal in this case. This notice is nothing more than a tactic of delay where the strategy of counsel has been, and continues to be, to deprive the Plaintiffs/Respondents of their right to be heard on the merits. Delay is not a legitimate course of procedure when it is in plain violation of court rules and Orders. It is not advocacy, it is obstructionism. Plaintiffs/Respondents respectfully move this Court to inquire as to the facts and circumstances surrounding the filing of this improper Appeal and grant such relief as the Court might deem proper under Rule 269 so as to discourage like conduct in the future.²

² Counsel for Plaintiffs has consulted with Counsel prior to the filing of this motion for a Rule 269 Inquiry. (Exhibit 6).

CONCLUSION

For the foregoing reasons, the Respondents ask that the Court immediately dismiss Del Webb's appeal and conduct an inquiry into the propriety of Pulte's filing of its Appeal.

Respectfully Submitted,



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Attorneys for the Respondents

Dated: June 19, 2012

Charleston, South Carolina

EX. 1

Exhibit 1 to Respondent's Motion to Dismiss Del Webb / Pulte's appeal was a copy of the trial court's "Preliminary Class" Order. To avoid duplication in this Joint Appendix (JA), that order is not reproduced here. It appears at JA 009-024.

EX. 2

FORM 4

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

Case No. 2007-CP-07-1396

ANTHONY and BARBARA GRAZIA,)
individually and on behalf of all other)
similarly situated plaintiffs,)

Plaintiffs,)

v.)

SOUTH CAROLINA STATE)
PLASTERING, LLC,)

Defendant,)

and)

SOUTH CAROLINA STATE)
PLASTERING, LLC,)

Third-Party Plaintiff,)

v.)

DEL WEBB COMMUNITIES, INC.,)
PULTE HOMES, INC. and)
KEPHART ARCHITECTS, INC.,)

Third-Party Defendants.)

ORDER DISMISSING DEFENDANTS'
MOTIONS TO RECONSIDER AND
DENYING DEFENDANTS' MOTIONS
FOR CLARIFICATION
OF ORDER PRELIMINARILY
CERTIFYING CLASS

2012 MAY -7 PM 3:49
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

gwb

This civil litigation involves allegations of defective construction relating to stucco application on approximately 4,000 homes located at the Sun City Development in Beaufort County, South Carolina. The case has been declared complex and assigned to this Court for disposition. On December 8, 2011, this Court issued an Order making a preliminary finding that Plaintiffs' proposed class meets the requirements of Rule 23(a), SCRCF, and this Order was filed with the Clerk of Court on December 15, 2011. Subsequently, on January 3, 2012, Defendant South Carolina State Plastering, LLC and Third-Party Defendants Del

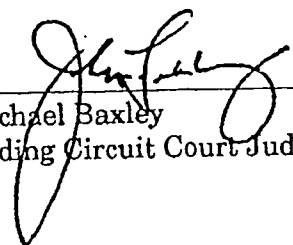
Webb Communities, Inc. and Pulte Homes, Inc. filed Motions to Reconsider and/or Motions for Clarification, pursuant to Rule 59(e), the matter that is presently before the Court. The Court heard arguments on these motions on April 30, 2012, and after hearing these arguments and reviewing the memoranda submitted by the parties, the Court dismisses the Motion to Reconsider and denies the Motion for Clarification.

The Court's Order dated December 8, 2011 was interlocutory in nature, and thus Defendants' Motions to Reconsider were improvidently filed. There is no provision in Rule 59(e), SCRCP, allowing a party to challenge an interlocutory order. Indeed, Rule 59 motions are permitted only after final, appealable adjudications on the merits. Accordingly, **the Court hereby dismisses Defendants' Motions to Reconsider as improper.**

During the April 30 hearing, Defendants were also permitted to address the various portions of the Court's Order for which they sought clarification. After carefully considering on the record each of the concerns raised by Defendants, the Court determined that the Order was clear and complete as originally issued and thus no further clarification was necessary. Therefore, **the Court hereby denies Defendants' motions for clarification.**

Accordingly, the parties have thirty (30) days from the date this Order denying clarification is served upon them to submit a proposed opt-out notice to putative class members as outlined in the initial Order.

IT IS SO ORDERED.



J. Michael Baxley
Presiding Circuit Court Judge

May 1, 2012
Hartsville, SC

EX. 3

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Beaufort County
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2007-CP-07-3166

Jim Lancaster, Nancy Lancaster, Art
Holland, Jeannette Holland, Wendell
Turner, Phyllis Turner, Jack Bennett, Joan
Bennett, on behalf of themselves and others
similarly situated,

Respondents,

v.

Georgia-Pacific Corporation and/or
Georgia-Pacific, LLC, Grayco Home
Center, Inc., Del Webb Communities, Inc.,
an Arizona Corporation, Razor Component
Systems, Inc., a South Carolina Corporation,
Razor Enterprises, Inc., a Texas Corporation
and DJ Construction Co., LLC,

Defendants,

Of whom Del Webb Communities, Inc., an
Arizona Corporation, is

Appellant.

**RESPONDENTS' MOTION
TO DISMISS APPELLANT'S APPEAL
AND SUPPORTING MEMORANDUM**

Case No. 2007-CP-07-3166

YOUNG CLEMENT RIVERS, LLP

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Attorneys for the Respondents

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA
COURT OF APPEALS

COME NOW the Respondents above named, by and through their undersigned counsel, and move this Honorable Court as follows to dismiss the appeal taken by the Appellant, Del Webb Communities, Inc., an Arizona Corporation ("Del Webb").¹

INTRODUCTION

Del Webb has noticed an appeal from six separate interlocutory orders entered by the circuit court in the conduct of this class action. None of the orders is immediately appealable. To avoid any possibility of undue disruption or delay of the adjudication of this matter in the circuit court, Del Webb's appeal should be immediately dismissed.

BACKGROUND

The Respondents are homeowners in Sun City Hilton Head ("Sun City"), a large-scale, planned retirement community in Bluffton, developed by Del Webb, with Del Webb also serving as general contractor for the construction of all of the putative class homes, some 800 in total. (See Third

Amended Complaint and Del Webb Communities' Response to Plaintiffs' Requests to Admit, copies of which are attached hereto as Exhibits 1 and 2, respectively, which are incorporated herein by reference.) The Respondents brought the present action on behalf of themselves and their similarly situated Sun City neighbors to recover damages they allege on account of an inherently defective and unfit building product (an exterior trim-board product known as PrimeTrim^{®2}) and its deficient installation by Del Webb and its subcontractors.

After a two-day hearing, the Honorable Roger M. Young, Sr.³ entered an order granting the Respondents' motion for class certification. (A copy of this order is attached hereto as Exhibit 4, which is incorporated by reference herein.) Thereafter, Del Webb filed motions seeking reconsideration and/or clarification of the class certification order, a stay of this action pending compliance with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §§

¹ The Respondents would alert the Court that, in an effort to avoid any possibility of undue disruption or delay of the adjudication of this matter in the circuit court, the Respondents are contemporaneously herewith filing in the Supreme Court a motion asking that Court to certify this matter for immediate and expedited review (and dismissal). A copy of the Respondents' motion is being filed with this Court along with the instant motion to dismiss.

² PrimeTrim[®] is a registered trademark of Defendants Georgia-Pacific Corporation and/or Georgia-Pacific LLC.

40-59-810 to -860 (the "Right to Cure Act"), and to conduct discovery as to the individual class members.

Following another hearing held February 23, 2012, Judge Young entered orders denying Del Webb's motion for reconsideration and/or clarification of the class certification order, denying Del Webb's motion to stay this action pending compliance with the Right to Cure Act, and denying Del Webb's motion to conduct discovery as to the individual class members. (Copies of each of these orders are attached hereto as Exhibits 5, 6, and 7, respectively, all of which are incorporated herein by reference.) Judge Young also entered an order approving notice of the pendency of the action to the putative class members as well as a preliminary case management and scheduling order. (Copies of both of these orders are attached hereto as Exhibits 8 and 9, respectively, both of which are incorporated herein by reference.)

On or about April 2, 2012, Del Webb noticed an appeal of the orders above named. (A copy of Del Webb's Notice of Appeal is attached hereto as Exhibit 10, which is incorporated herein by reference.)

³ By order entered May 28, 2008, this case was designated complex and assigned to Judge Young, expressly giving him authority to "hear and handle all pre-trial motions,

ARGUMENT

- I. Because none of the interlocutory orders identified in Del Webb's notice of appeal is immediately appealable, Del Webb's appeal should be dismissed.

Rule 201(a), SCACR, addresses judgments, orders and decisions subject to appeal, and, in pertinent part, provides that "[a]ppeal may be taken, as provided by law, from any final judgment, appealable order or decision." "As a general rule, only final judgments are appealable." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005). "To promote judicial efficiency and orderly adjudication of disputes on appeal, this rule seeks to prevent multiple appeals of non-final matters." Jean Hoefer Toal et al., Appellate Practice in South Carolina 83 (2002).

"Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Wilson, 367 S.C. at 12, 625 S.E.2d at 208; Mid-State Distribs, Inc. v. Century Imps., Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) ("South Carolina case law has established what constitutes an interlocutory appeal. If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory."); *see also* Toal, supra at 86 ("'Final judgment' is a term of art denoting the

scheduling matters, and other matters pertaining to this case." (A copy of this order is

disposition of all issues in the action."'). Here, Del Webb has appealed six separate orders (each of which will be more particularly identified and analyzed below), none of which are final judgments; they are all interlocutory (and not immediately appealable).

"Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within [S.C. Code Ann.] § 14-3-330." Wilson, 367 S.C. at 13, 625 S.E.2d at 208.

In pertinent part, § 14-3-330 provides as follows:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any

attached hereto as Exhibit 3, which is incorporated herein by reference.)

action; . . .

Accordingly, “[i]ntermediate orders involving the merits may be immediately appealed pursuant to § 14-3-330(1).” Wilson, 367 S.C. at 13, 625 S.E.2d at 208. “An order which involves the merits is one that ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense.’” Id. (citing Mid-State Distribs., 310 S.C. at 334, 426 S.E.2d at 780). Also, “[i]nterlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2).” Id. “Orders affecting a substantial right ‘discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.’” (citing Mid-State Distribs., 301 S.C. at 335, 426 S.E.2d at 780 n. 4).

With more particular respect to subsection (2) of § 14-3-330, “[g]enerally, this subsection has only been used when the trial order affected the ‘mode of trial’ because if those orders are not immediately appealed, no appellate review is available to correct any error.” Toal, supra at 87. “[T]he ‘mode of trial’ exception to the general rule that only final orders are appealable is confined to orders which abridge a party’s constitutional right to trial by jury.” Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (citing Salmonsens v. CGD, Inc., 377 S.C. 442, 461, 661 S.E.2d 81, 91 (2008) (Pleicones, J., dissenting)).

As is more particularly set forth below, none of the orders Del Webb purports to appeal are final judgments. None involves the merits. None discontinues this action, prevents a later appeal, grants or refuses a new trial, or strikes out an action or defense. None abridges Del Webb's constitutional right to a jury trial. None is immediately appealable. And Del Webb's appeal should be immediately dismissed, so as to avoid any possibility of undue disruption or delay of the adjudication of this matter in the circuit court.

- **Order Denying Del Webb Communities, Inc.'s Motion to Stay Action Pending Compliance with SC Code § 40-59-810, et seq., dated March 29, 2012 (i.e., Exhibit 6)**

This order is not immediately appealable because it is not a final order, and the denial of a motion for a stay is not otherwise immediately appealable. See Carolina Water Service, Inc. v. Lexington County Joint Mun. Water and Sewer Com'n, 373 S.C. 96, 644 S.E.2d 681 (2007) (holding that an order lifting a stay is not immediately appealable); Edwards v. SunCom, 369 S.C. 91, 94-5, 631 S.E.2d 529, 530-31 (2006) ("The order here does not discontinue the proceeding. It merely temporarily stays the matter pending a ruling by the FCC. Accordingly, we find an order granting a stay is not immediately appealable.").

Moreover, the stay denied by this order relates to compliance with the

Right to Cure Act in the context of a class action. The relationship between the Right to Cure Act and class actions under Rule 23, SCRCF, was recently addressed by our Supreme Court in Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010). In Grazia, the Supreme Court harmonized the stay and notice provisions within the Right to Cure Act, found the Right to Cure Act to be compatible with Rule 23, and reversed the circuit court's decision to strike the class action allegations from the plaintiffs' complaint. In so doing, the Court rejected the notion that the Right to Cure Act did not allow for representative compliance, and explained that, in an action containing class allegations, after the circuit court has determined that the Rule 23(a) prerequisites to a class action are met, the circuit court may then find that representative notice under the Right to Cure Act is appropriate. Id. at 575-76, 703 S.E.2d at 204. The Court also explained that "rights under the Right to Cure Act notice provisions are not new substantive rights . . .," expressly noting that, under the Right to Cure Act, "the claimant is not required to accept any offer by the contractor/subcontractor to remedy the alleged defect, and he or she is not required to accept an offer of settlement of the claim." Id. at 573, 703 S.E.2d at 202. Under the Grazia Court's holding, the rights afforded under the Right to Cure Act are not substantive and are akin to discovery rights.

And discovery orders are not immediately appealable. Hamm v. South Carolina Public Service Com'n, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) ("Discovery orders, however, are interlocutory and are not immediately appealable.").

Further still, this order, by its express terms reflects a lack of finality with respect to the substance of its ruling, providing that, "[t]he Court further notes that, in accordance with its authority to maintain continual control over class action proceedings and the Supreme Court's decision in Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2010), it will address issues pertaining to S.C. Code Ann. §§ 40-59-810 to -860 in this case in due course." This is consistent with the broad and continuing case management authority granted the circuit court under Rule 23(d), and also with the specific managerial role conferred upon Judge Young by the Order Establishing Complex Case Designation and Appointment of Judge Roger M. Young as Case Manager. (See Exhibit 3.)

- Preliminary Case Management and Scheduling Order, dated April 2, 2012 (i.e., Exhibit 9)

This order is, by its express terms, a "preliminary" order pertaining to procedural issues of case management and scheduling. While it does address compliance with the Right to Cure Act and the timing thereof, as explained above, the Right to Cure Act does not create substantive rights in

Del Webb. Grazia, 390 S.C. at 573, 703 S.E.2d at 202.

- Order Approving Notice of Class Action, dated April 2, 2012 (i.e., Exhibit 8)

This is a procedural order approving notice of the pendency of this action to the putative class members. Generally, orders under Rule 23 are interlocutory and not immediately appealable. See Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) ("Orders under Rule 23, SCRPC are interlocutory and thus, immediately appealable only in certain circumstances."); see also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002) ("Usually, an order denying class certification is interlocutory and not immediately appealable."); Schein v. Lamar, 274 S.C. 329, 331, 263 S.E.2d 383, 384 (1980) (finding issue of class certification sought to be raised on appeal was interlocutory and appeal regarding that issue was dismissed); Knowles v. Standard Sav. & Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979) (dismissing class certification order as interlocutory on the grounds that "[c]lass certification, essentially procedural in nature, does not involve substantial or essential legal rights which require attention prior to final judgment").

- Order Denying Del Webb Communities, Inc.'s Motion to Conduct Discovery as to Individual Class Members, dated March 29, 2012 (i.e., Exhibit 7)

This is a discovery order. Generally, discovery orders are not directly appealable. Hamm, 312 S.C. at 241, 439 S.E.2d at 853; Patterson v. Specter Broadcasting Corp., 287 S. C. 249, 335 S. E. 2d 803 (1985); Jacobs v. Harman, 282 S. C. 17, 316 S. E. 2d 146 (1984); Pendergrass v. Martin, 275 S. C. 413, 272 S. E. 2d 172 (1980); Lowndes Products, Inc. v. Brower, 262 S. C. 431, 205 S. E. 2d 184 (1974); Kemmerlin v. Bloom, 251 S. C. 49, 159 S. E. 2d 910 (1968); Wallace v. Interamerican Trust Co., 246 S. C. 563, 144 S. E. 2d 813 (1965). It is irrelevant whether such an order is directed to a party or a nonparty⁴ or whether it denies or compels discovery. Patterson, 287 S. C. 249, 335 S. E. 2d 803 (order compelling discovery); Brower, 262 S. C. 431, 205 S. E. 2d 184 (order refusing to compel discovery).

- Order Granting Class Certification, dated October 5, 2011 (i.e., Exhibit 4)

This is a procedural order granting class certification. Again, generally, orders under Rule 23 are interlocutory and not immediately appealable. See Salmonsens, 377 S.C. 442, 661 S.E.2d 81 (refusing to entertain interlocutory appeal of class certification despite express argument against precedent to do so, and also despite Court simultaneously addressing

the merits of another issue in the case on appeal); Eldridge, 308 S.C. at 127, 417 S.E.2d at 534 (1992); *see also* Ferguson, 349 S.C. at 565, 564 S.E.2d at 98; Schein, 274 S.C. at 331, 263 S.E.2d at 384; Knowles, 274 S.C. at 59, 261 S.E.2d at 49.

- Order Denying Del Webb Communities, Inc.'s Motion for Reconsideration and/or Clarification, dated March 29, 2012 (i.e., Exhibit 5)

This order merely denied reconsideration and/or clarification of the circuit court's prior procedural order granting class certification. Once again, generally, orders under Rule 23 are interlocutory and not immediately appealable. *See* Salmonsens, 377 S.C. 442, 661 S.E.2d 81; Eldridge, 308 S.C. at 127, 417 S.E.2d at 534 (1992); *see also* Ferguson, 349 S.C. at 565, 564 S.E.2d at 98; Schein, 274 S.C. at 331, 263 S.E.2d at 384; Knowles, 274 S.C. at 59, 261 S.E.2d at 49.

CONCLUSION

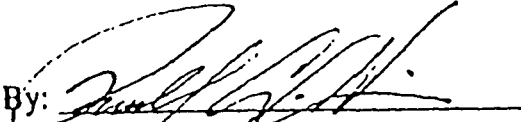
For the foregoing reasons, the Respondents ask that the Court immediately dismiss Del Webb's appeal.

<SIGNED ON THE FOLLOWING PAGE>

⁴ Ex parte Whetstone, 289 S. C. 580, 347 S. E. 2d 881 (1986).

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

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Dated: 4/19/12

EX. 4

The South Carolina Court of Appeals

Jim Lancaster, Nancy Lancaster, Art Holland, Jeannetter Holland, Wendell Turner, Phyllis Turner, Jack Turner, Jack Bennett, Joan Bennett, on behalf of themselves and other similarly situated, Respondents,

v.

Georgia-Pacific Corporation and/or Georgia Pacific LLC, Grayco Home Center Inc., Del Webb Communities, Inc., and Arizona Corporation, Razor component Systems, Inc., a South Carolina Corporation, Razor Enterprises, Inc., a Texas Corporation and DJ Construction Co., LLC, Defendants,

Of Whom, Del Webb Communities, Inc. an Arizona Corporation is, Appellant.

Appellate Case No. 2012-210927

ORDER

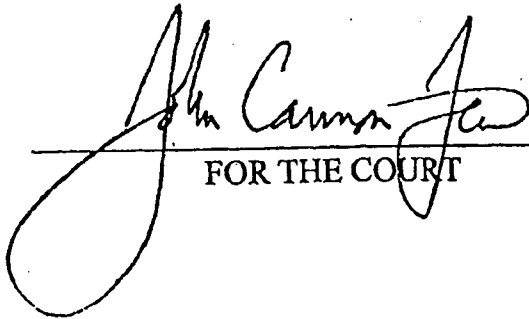
This appeal shall be consolidated with 2012-211920 and with the Notices of Appeal filed May 31, 2012, relating to "Order Regarding Interlocutory Appeals" and the order denying reconsideration of that order.

Appellant in 2012-210927 has appealed six orders, including the order denying a motion to stay the action pending compliance with section 40-59-810 of the South Carolina Code, the preliminary case management and scheduling order, the order approving notice of class action, the order denying a motion to conduct discovery as to individual class members, the order granting class certification, and the order denying a motion to reconsider the order granting class certification.

Appellant in 2012-211920 has appealed six orders, including the order denying a motion to stay the action pending compliance with section 40-59-810 of the South Carolina Code, the preliminary case management and scheduling order, the order approving a notice of class action, the order granting class certification, the order denying a motion to strike affidavits filed in support of the motion for class certification, and the order denying a motion to reconsider the orders granting class certification and denying the motion to strike.

Respondents, who are the same in both appeals, have filed a motion to dismiss, contending the underlying orders on appeal are not immediately appealable. After careful consideration, Respondents' motion to dismiss is granted. This consolidated appeal is dismissed because none of the underlying orders are immediately appealable. Additionally, the appeals from the "Order Regarding Interlocutory Appeals" and the order denying reconsideration are dismissed as moot.

Because the underlying orders have all been dismissed, this Court need not act on Appellant's petition for supersedeas.


FOR THE COURT

Columbia, South Carolina

cc:

Arthur Thomas Meeder
Edward D. Buckley, Jr.
Robert L. Widener
Joseph Edwin DaPore
A. Victor Rawl, Jr.
Stephen Lynwood Brown
Russell Grainger Hines
William L. Howard, Sr.

FILED

Carter 6/1/12

EX. 5

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs,..... Respondents,

v.

South Carolina State Plastering, LLC,..... Defendant,

and

South Carolina State Plastering, LLC,..... Defendant,

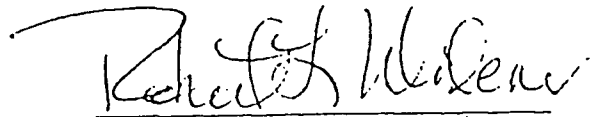
v.

Del Webb Communities, Inc. Pulte Homes, Inc.
and Kephart Architects, Inc.,..... Third-Party Defendants,

Of whom Del Webb Communities, Inc., and
Pulte Homes, Inc. are..... Appellants.

NOTICE OF APPEAL

Del Webb Communities, Inc., and Pulte Homes, Inc., appeal the order of the Honorable J. Michael Baxley, dated December 8, 2011 and filed December 19, 2011. Appellants made a timely motion to reconsider this order, and Appellants also appeal the order Honorable J. Michael Baxley, dated May 1, 2012 and filed May 7, 2012, which denied the motion to reconsider. Appellants received written notice of the entry of May 1, 2012 order on May 9, 2012.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs,..... Respondents,

v.

South Carolina State Plastering, LLC,..... Defendant,

and

South Carolina State Plastering, LLC,..... Defendant,

v.

Del Webb Communities, Inc. Pulte Homes, Inc.
and Kephart Architects, Inc., ... Third-Party Defendants,

Of whom Del Webb Communities, Inc., and
Pulte Homes, Inc. are Appellants.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the *Notice of Appeal* by depositing a copy in the United States Mail, postage prepaid, on June 8, 2012, addressed to all attorneys of record, as follows:

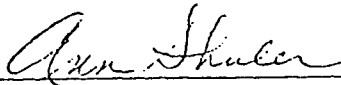
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Ann Shuler

EX. 6



LEATH, BOUCH & SEEKINGS, LLP

COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

June 15, 2012

VIA E-MAIL ONLY

A. Victor Rawl, Jr., Esq.
Robert L. Widener, Esq.
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211

RE: Anthony and Barbara Grazia, et al v. South Carolina State Plastering, LLC
Case No.: 07-CP-07-1396
LBS No.: 1351.0001

Dear Vic and Robert:

To the extent it is required under the South Carolina Rules of Civil Procedure, Appellate Procedure and specifically SCRAP 269, please accept this letter as a communication between counsel prior to the filing of a motion. We are in receipt of your Notice of Appeal in the above-referenced case dated June 7, 2012. The Orders from which you take your appeal are interlocutory and therefore confer no right upon you or your client to seek review in the Court of Appeals. Accordingly, we respectfully request that you voluntarily dismiss your appeal as improvidently filed.

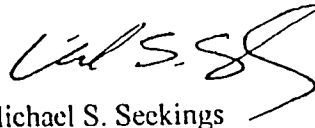
While the law of South Carolina is plain on this issue and we are certain that you are well aware of its restriction on such appeals, we would direct your attention to the June 1, 2012 order of Chief Judge Few in the Lancaster case (attached hereto) which is on point and holds that interlocutory orders, identical to the orders appealed by you in this case, are not immediately appealable. Of course, you know that because your client is a party to the Lancaster case and it was your Notices of Appeal that were summarily dismissed. Your attempt to do what has recently been specifically rejected by the Court is problematic. We are certain that upon review and reflection, you will reach the same conclusion and dismiss your appeal.

Please be advised that if you decline, we will file a motion pursuant to Rule 269 and seek all relief contemplated therein. We await your prompt and favorable response.

A. Victor Rawl, Jr., Esq.
Robert L. Widener, Esq.
June 15, 2012
Page 2

Yours truly,

LEATH, BOUCH & SEEKINGS, LLP



Michael S. Seckings

MSS/sas

cc: John T. Chakeris, Esq.
Phillip W. Segui, Jr., Esq.
Everett A. Kendall, II, Esq.
David S. Cobb, Esq.

The South Carolina Court of Appeals

Jim Lancaster, Nancy Lancaster, Art Holland, Jeannetter Holland, Wendell Turner, Phyllis Turner, Jack Turner, Jack Bennett, Joan Bennett, on behalf of themselves and other similarly situated, Respondents,

v.

Georgia-Pacific Corporation and/or Georgia Pacific LLC, Grayco Home Center Inc., Del Webb Communities, Inc., and Arizona Corporation, Razor component Systems, Inc., a South Carolina Corporation, Razor Enterprises, Inc., a Texas Corporation and DJ Construction Co., LLC, Defendants,

Of Whom, Del Webb Communities, Inc. an Arizona Corporation is, Appellant.

Appellate Case No. 2012-210927

ORDER

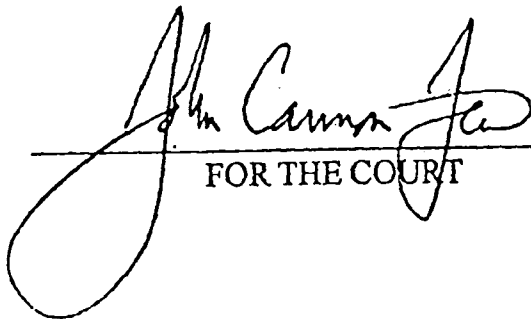
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Because the underlying orders have all been dismissed, this Court need not act on Appellant's petition for supersedeas.


FOR THE COURT

Columbia, South Carolina

cc:

Arthur Thomas Meeder
Edward D. Buckley, Jr.
Robert L. Widener
Joseph Edwin DaPore
A. Victor Rawl, Jr.
Stephen Lynwood Brown
Russell Grainger Hines
William L. Howard, Sr.

FILED

Karter 6/1/12

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

JUL 23 2012

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

SC Court of Appeals

Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs,..... Respondents,

v.

South Carolina State Plastering, LLC,.....Appellant,

and

South Carolina State Plastering, LLC,.....Appellant,

v.

Del Webb Communities, Inc. Pulte Homes, Inc.
and Kephart Architects, Inc., ...Third-Party Defendants,

Of whom Del Webb Communities, Inc., and
Pulte Homes, Inc. are Appellants.

RETURN TO MOTION TO DISMISS APPEAL

This putative class action involves 4,000 homes built with stucco siding in Sun City near Hilton Head, South Carolina. Appellants Del Webb and Pulte Homes (Del Webb) developed and sold the homes – Appellant South Carolina State Plastering (SCSP) was the stucco subcontractor. It is undisputed that the 4,000 homes comprise myriad combinations of different types of stucco and proprietary stucco systems produced by different stucco manufacturers that were applied under

different installation instructions and different building codes. Against this backdrop of inherent differences between the homes, the plaintiffs sought certification of the following class:

All present owners of houses located in Sun City of Bluffton, South Carolina, which properties have had stucco exteriors applied *or partly applied* by [SCSP] in Beaufort County, South Carolina, *who will incur damages in excess of \$100* for loss of use of the premises and the cost of repair of these houses, depreciation, *and for* sums paid in the past for repairs to stucco exterior of the houses. This class is *limited to matters dealing with* the stucco exteriors of the houses.

(Cmplnt. ¶ 1, Tab B) (emphasis added). This class definition had several immediate problems: (1) determining whether any particular house had stucco applied fully or partly by SCSP, and which part if not all, requires a house-by-house inspection, which is the antithesis of a class action; (2) defining the class by the type of damage incurred requires a house-by-house inspection and testing to determine whether the house is in the class, which is the antithesis of a class action; and (3) by limiting the class to stucco exterior matters, the class representatives and class counsel have waived numerous potential claims held by class member for non-stucco claims. In discovery, the plaintiffs disavowed and thereby waived any claim for past repairs related to any stucco problems for themselves and all class members.

Two years of class discovery conclusively established several undisputed and controlling facts based on the testimony of the *plaintiffs' own experts*: (1) stucco defects, if any, will differ from house to house, and each house must be inspected to determine whether there is any stucco installation defect at that house; (2) destructive testing to each house will be required to determine whether the stucco is damaged and whether there is consequential damage behind the stucco; (3) additional destructive testing will be required to determine whether any "found" damage is related to any stucco installation defect; and (4) inspection and testing of one house cannot prove anything about any other house. (See for example testimony at Tab C). In short, the *plaintiffs' own experts* established that there can be no representative trial of the claims asserted by the plaintiffs, which is

the essence of a class action. Rather, each house will have to be inspected and tested, which is the antithesis of a class action.

The plaintiffs moved to certify their class. They obviously failed to prove the requirements for certification of their class, because the trial court did not certify their class. Rather than deny class certification for the plaintiffs' failure of proof, the trial court stepped outside its proper role of neutral decision maker and became a *de facto* advocate for certification of a Sun City class.

First, the trial court *sua sponte* dismissed the plaintiffs' unfair trade practice claim, because a statute precludes class actions on such claims. (Class Order at 8, Tab A).¹ The plaintiffs and class counsel have acquiesced in this dismissal, because it furthers their personal interests in having the class certified. Thus, the plaintiffs and class counsel, with the *sua sponte* assistance of the trial court, have waived any and all unfair trade practice claims held by any member of the class.

Second, again acting *sua sponte*, the trial court changed the definition of the class to the following:

All individuals, corporations, unincorporated associations, or other entities that currently own stucco-clad homes in Sun City Hilton Head to which SCSP applied the exterior stucco in whole or part prior to July 31, 2007, which allegedly are damaged due to (a) the lack of head flashing above doors and windows, (b) the failure to install stucco control joints, and/or (c) the presence of moisture encapsulation by the failure to leave a gap between the stucco exterior and the structure slab.

(Class Order at 12, Tab A) (emphasis added). The plaintiffs obviously did not prove the requirements for certifying this newly defined class, because the trial court did not certify this class.²

¹ See S.C. Code Ann. § 39-5-140(a) (1976) (claims under SCUTPA cannot be brought in a representative capacity).

² Like the plaintiffs' proposed class, the trial court's new and *sua sponte* class definition also has several immediate problems. First, as with the class definition asserted by the named plaintiffs, the trial court's class definition requires a house-by-house inspection to determine whether any particular house had stucco applied fully or partly by SCSP, and which part if not all. Second, and again as with the class pursued by the named plaintiffs, the trial court's new class defines the class in terms of damages incurred and thus requires a house-by-house inspection and testing. Third, the trial court's new class definition hinges on that damage being caused by one of three potential construction defects, and this again requires a house-by-house inspection to determine whether the house suffers from any of these defects and, if so, whether any of those defects caused damage to the house. All of these house-by-house inquiries, which are essential to

Rather than deny certification for the plaintiffs' failure of proof, the trial court *sua sponte* created a new procedure unknown to the law and "preliminarily" certified the newly defined class.

Third, again acting *sua sponte*, the trial court invoked the Right to Cure Act procedures in an attempt to save the new class from the plaintiffs' failure of proof. The trial court imposed a stay to allow compliance with the Act and set forth the process for complying with the Act "in this putative class setting." (Class Order at 2, 13-15, Tab A). The trial court ruled that, after the compliance with the Act, the Court would decide "whether a class action vehicle is practicable under the specific facts and circumstances disclosed by the notices and responses required under the Act." (Class Order at 2, Tab A).³ Thus, after redefining the class, the trial court invoked the Act for a purpose for which it was never intended by the General Assembly – attempting to provide the evidence on whether there could be or should be a class action.⁴ (For a brief discussion of the Right To Cure Act, and its stated purpose of encouraging pre-trial settlement through a statutorily required pre-action alternative dispute resolution procedure, see the Appendix at the end of this Return).

The trial court undertook the foregoing extraordinary and *sua sponte* actions, because it misread the Supreme Court's opinion in *Grazia v. South Carolina State Plastering, LLC*, 703 S.E.2d 197 (S.C. 2010) as a directive to certify the class: "[T]he Supreme Court *had the clear opportunity to deny class status in this very case* but affirmatively chose not to do so, instead emphasizing in its decision the vitality of the class action doctrine to preserve the resources of the Court and the parties." (Class Order at 11, Tab A). The Supreme Court, however, stated that the

determining whether any particular house is in the trial court's new class, are the antithesis of a class action. The necessity of these house-by-house inquiries is conclusively established by the earlier-noted and undisputed testimony of the named plaintiffs' own experts. Finally, by defining the class in terms of specific defects, the trial court has eliminated and waived all other potential claims held by the class members.

³ See also Class Order at page 12 (Tab A), stating that: "based upon the Right to Cure responses, the Court will make a final determination of class certification"

⁴ The trial court also envisioned that the Right to Cure Notices would reveal the necessity for creating subclasses, but it is axiomatic that each subclass requires a class representative. The Grazias are the only named plaintiffs in this case, and they cannot be the representative for more than one subclass.

issue of whether any class should be certified was not “properly before the Court” and the issue before the Court was “not whether *these* claims could be properly certified.” *Id.* at 203 n.5 (emphasis in original). Thus, the trial court based its decision and its *sua sponte* actions on a reading of *Grazia* that is exactly the opposite of what the Supreme Court said in *Grazia*. Moreover, the trial court impermissibly converted the general purpose of class actions (judicial economy) into a reason for certifying a particular class. This was error, because a putative class action that does not satisfy the requirements of Rule 23, SCRCP, cannot be certified to preserve judicial resources.⁵

To determine whether its newly defined class even existed, the trial court ordered the following process for complying with the Act: (1) the Class Notice would advise the putative class members of the “preliminary” class and, “once the opt-out period has ended, a Right to Cure document must be individually completed for each claimant.” (Class Order at 12, Tab A). In so ruling, the trial court created an impermissible opt-in class, because any class member desiring to stay in the class after the opt-out period must submit a Right to Cure notice through class counsel specifying the “exact nature of the stucco defect and defect results with regard to each individual property.” (Class Order at 15, Tab A). By definition, since the determination of whether a class exists is to be based on the Right to Cure Notices, one cannot be in the class unless they have submitted a Right Cure Notice in compliance with the trial court’s order, *i.e.*, after the end of the opt-out period, the putative class members must opt into the class by giving notice under the Act.

ARGUMENTS

- A. **The Class Order is immediately appealable, because it affects a mode of trial to which the Appellants are entitled as a matter of right.**

Orders affecting the mode of trial are immediately appealable and must be appealed immediately or the right to appeal is lost. *E.g.*, *Salmonsens v. CGD, Inc.*, 661 S.E.2d 81, 87 (S.C.

⁵ Appellants do not suggest that the trial court’s order is the product of any improper motives. Rather, the trial court undertook all of its extraordinary and *sua sponte* actions based on its erroneous reading of the *Grazia* opinion.

2008). The Supreme Court has held that an “opt-in” class does not exist under South Carolina law and that an order creating an opt-in class is immediately appealable because it affects the mode of trial. *Id.* at 87-91. Here, as shown above, the trial court created an “opt-in” class and, therefore, the Class Order is immediately appealable. Moreover, the trial court’s creation of a “preliminary class certification” procedure has no basis in Rule 23, SCRPC or South Carolina law. Thus, this case “presents a novel question of law which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar.” *Salmonsens*, 661 S.E.2d at 87 (allowing immediate appeal to address novel question of opt-in classes under South Carolina law).

Manifestly, every litigant in every case is entitled to a mode of trial wherein the trial court is a neutral decision maker that decides the issues *presented by the parties* based on the arguments and evidence *presented by the parties*. Here, as shown above, the trial court has stepped outside its proper role of neutral decision maker and become a *de facto* advocate for certification of the class, mistakenly believing such is required by the Supreme Court’s opinion in *Grazia*. To further its advocacy for class certification, the trial court *sua sponte* created a process of “preliminary class certification,” which has no basis in Rule 23, SCRPC, or in South Carolina law. All of this deprives the Appellants of the required mode of trial. Thus, the Class Order is immediately appealable.

In *Grazia*, the Supreme Court mandated a mode of trial wherein the circuit court was to first determine whether the plaintiffs had proven the requirements for class certification, and if they did so, then the court could consider the possibility of representative notice under the Right to Cure Act:

Upon a motion for class certification, it will be *incumbent upon the circuit court* to determine *whether or not* the action meets each of the five prerequisites proponents [plaintiffs here] of class certification are required to prove. *If and when the prerequisites are met*, the court *may then* find that representative notice under the Right to Cure Act is appropriate.

703 S.E.2d at 204 (emphasis added). Here, the trial court has inverted the procedures mandated by the Supreme Court in a *sua sponte* attempt to use the Right to Cure Act to determine whether a class can be or should be certified, *i.e.*, to rescue the class from the plaintiffs' failure to prove the prerequisites for class certification. Since the plaintiffs failed to prove those prerequisites, the court should never have reached any question under the Right to Cure Act. The trial court's attempt to use the Right to Cure Act as a vehicle for determining whether class certification is possible deprives the Appellants of the mode of trial established by the Supreme Court in *Grazia* and, therefore, the Class Order is immediately appealable.

Each of the foregoing defects in the Class Order affects the mode of trial and thereby renders the Order immediately appealable. At the very least, the combination of these defects deprives the Appellants of a mode of trial and thereby renders the Class Order immediately appealable.

B. The Class Order is immediately appealable because it affects the merits of the class action.

An interlocutory order that "affects the merits" is immediately appealable under S.C. Code Ann. § 14-3-330(1). Here, rather than rule upon the issues presented to it, the trial court *sua sponte* changed the merits question by redefining the class. Thus, the Class Order affects the merits and is immediately appealable.

C. The Class Order is immediately appealable because it affects the substantial rights of the Appellants.

An interlocutory order that affects a "substantial right" is immediately appealable under S.C. Code Ann. § 14-3-330(2). Every litigant has a substantial and due process right to a judicial process wherein the trial court is a neutral decision maker and decides the issues *presented by the parties* based on the arguments and evidence *presented by the parties*. Here, the trial court has stepped

outside the proper role of neutral decision maker and become a *de facto* advocate for class certification, thereby denying Appellants a substantial right. In *sua sponte* changing the definition of the class to save it from the plaintiffs' failure of proof, the trial court effectively struck the class definition and the Appellants' defenses thereto. Thus, the Class Order is immediately appealable under § 14-3-330(2)(c) as an order that affects a substantial right and "strikes out an answer or any part thereof *or any pleading in any action.*" (Emphasis added).

D. Assuming the Class Order is not immediately appealable for the foregoing reasons, this Court should deny the motion to dismiss if it identifies any ground for an immediate appeal of the Class Order.

The plaintiffs' motion challenges the appellate jurisdiction of this Court. Appellate jurisdiction is this Court's only subject matter jurisdiction. Questions of subject matter jurisdiction may be raised at any time and should be raised by the appellate court on its own motion. See *Travelscape, L.L.C. v. S.C. Dep't of Revenue*, 705 S.E.2d 28, 38 n. 10 (S.C. 2011) (appellate court may *sua sponte* address an issue involving subject matter jurisdiction). Thus, assuming this Court finds there is any basis for an immediate appealable, even if that basis is not argued above, it should reach this basis on its own motion and deny the plaintiffs' motion to dismiss.

E. Assuming the Class Order is not immediately appealable for the foregoing reasons, this Court should exercise pendent appellate jurisdiction over the Class Order in conjunction with the appeal from the order denying injunction.

An interlocutory order denying an injunction is immediately appealable under § 14-3-330(4). The appellate courts have discretion to exercise pendant appellate jurisdiction and review an unappealable order in connection with an appeal from an order that is immediately appealable. *E.g., Edge v. State Farm Mut. Auto. Ins. Co.*, 623 S.E.2d 387, 390 (S.C. 2005) (court will entertain appeal of unappealable order when doing so will promote judicial economy and avoid need for a future appeal after final judgment).

Here, Appellants have appealed the denial of an injunction prohibiting class counsel from contacting putative class members until after the end of the opt-out period. (Injunction Order at Tab D).⁶ Considering the appeal of the Class Order in connection with the appeal of the injunction order will promote judicial economy and avoid the need for a future appeal after final judgment. *Edge*, 623 S.E.2d at 390. Moreover, this case “presents a novel question of law which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar.” *Salmonsens*, 661 S.E.2d at 87.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Return of South Carolina State Plastering, which are incorporated herein by reference, it is respectfully submitted that this Court should deny the motion to dismiss appeal.

Respectfully Submitted,



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Columbia, SC
July 23, 2012

⁶ The basis for the requested injunction is the inherent conflict of interest between class counsel (who has a personal interest in having the class certified with as many members as possible) and the putative class members (who are entitled to know that remaining in the class will result in a waiver of numerous potential claims). This same basic issue relates to the class certification question of whether the named plaintiffs or class counsel are adequate representatives due to their willingness to waive claims of putative class members in order to achieve class certification. This identity of issues in the two orders also makes it appropriate to consider an immediate appeal of the Class Order in connection with the appeal of the order denying injunction.

APPENDIX

Summary of Right to Cure Act

The South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (the Right to Cure Act) is set forth at S.C. Code Ann. §§ 40-59-810 to -860 (Supp. 2011). The Act includes an express statement of the General Assembly's public policy purposes in enacting the Act: (1) there is a need for an alternative dispute resolution method to promote settlement of construction disputes "*without litigation*"; and (2) the Act is designed to promote this public policy by requiring the would-be plaintiff to file a "notice of claim" with the would-be defendant and provide an opportunity to "resolve the claim *without litigation*." Act No. 82, 2003 S.C. Acts 943 (emphasis added). The Act achieves its purpose of avoiding litigation with a mandatory five-step process that must be completed before a homeowner (such as Plaintiffs here and the class members) may sue a contractor:

1. At least "ninety days before filing" a lawsuit, the homeowner "must" serve the contractor with a "written notice of claim" that "must contain the following" information:
 - (a) statement that the homeowner asserts a construction defect;
 - (b) a description of the claim with sufficient detail to determine the general nature of the construction defect; and
 - (c) a description of any known results of the defect.

S.C. Code Ann. § 40-59-840 (emphasis added).
2. Within 15 days after receiving the notice, the contractor may request clarification if the notice does not describe the construction defect sufficiently. *Id.*
3. After receiving a proper notice, the contractor may request and the homeowner "shall give" the contractor access to the home to inspect the construction defect.

S.C. Code Ann. § 40-59-850(A).

4. The contractor has 30 days to make a written offer to remedy or settle the claimed construction defect, or the claim is deemed denied. *Id.*
5. If the contractor makes a written offer, the homeowner must respond in writing within 10 days after receiving the offer. § 40-59-850(B).

“If the parties” do not settle under the foregoing process, then the homeowner “may proceed with a civil action.” § 40-59-850(C) (emphasis added). The Act further provides that if a homeowner files a lawsuit before complying with the notice and settlement procedures mandated by the Act, then the action “shall” be stayed upon contractor’s motion “until the claimant [homeowner] has complied with the requirements of [the Act].” § 40-59-830 (emphasis added).

TAB A

Tab A to Del Webb / Pulte's Return to Motion to Dismiss Del Webb / Pulte's appeal was a copy of the trial court's "Preliminary Class" Order. To avoid duplication in this Joint Appendix (JA), that order is not reproduced here. It appears at JA 009-024.

TAB B

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) C/A NO. 07-CP-07-

ANTHONY AND BARBARA GRAZIA,
individually and on behalf of all other
similarly situated Plaintiffs,

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC.

Defendant.

COMPLAINT
(Class Action)

(Construction Defects)
(Jury Trial Demanded)

BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

2007 MAY 30 PM 2:01

The Plaintiffs, Anthony and Barbara Grazia, through their undersigned counsel on their own behalf, and on behalf of all others similarly situated, complain of the Defendant and allege and show as follows:

1. This action is filed pursuant to Rule 23, South Carolina Rules of Civil Procedure, on behalf of the named Plaintiffs, and those similarly situated as members of a class defined as follows:

All present owners of houses located in Sun City of Bluffton, South Carolina, which properties have had stucco exteriors applied or partly applied by the Defendant in Beaufort County, South Carolina, who will incur damages in excess of \$100 for loss of use of the premises and the cost of repair of these houses, depreciation, and for sums paid in the past for repairs to stucco exterior of the houses. This class is limited to matters dealing with the stucco exteriors of the houses.

2. As set forth in further detail herein below, this action arises from the defective stucco exterior work performed on single family residences owned by class member Plaintiffs which residences were generally marketed by Del Webb Communities, Inc. and Pulte Homes, Inc. and upon which the Defendant South Carolina State Plastering, LLC, acted as a stucco subcontractor. This action involves the erection of stucco systems on the exterior of residential

dwellings which defective construction has proximately caused damages incurred by the representative and individual class members. This action is properly brought as a class action under Rule 23, S.C.R.C.P. for the following reasons:

3. Numerosity. [Rule 23 (a)(1) S.C.R.C.P.] The representative Plaintiffs, and a group of which they are a member, consisting of approximately five hundred and fifty (550) homes, comprise approximately thirteen percent (13%) of a total class of approximately Four Thousand One Hundred (4,100) residences. The owners of these residences are all citizens of the State of South Carolina, and all of property is located in Beaufort County, South Carolina, as is the residence of the Defendant, and all acts of the Defendant causing damage took place in Beaufort County, South Carolina.

4. Commonality. [Rule 23 (a)(2), S.C.R.C.P.] The class members have suffered or will suffer a common injury in that all have been damaged or will be damaged in a similar fashion by the action of the Defendant. There are questions of law or fact common the class which predominate over any questions affecting individual members, which include but are not limited to:

- (a) Whether the Defendant South Carolina State Plastering, LLC, failed to adequately construct, supervise, and inspect the exterior stucco construction on the residences, so as to not employ good construction practices;
- (b) Whether stucco subcontractor, South Carolina State Plastering, LLC, failed to adequately install stucco, stucco systems and water management elements of the stucco systems such as weep systems, control joints, sealant joints, head flashing;
- (c) Whether the stucco subcontractor, South Carolina State Plastering, LLC, breached the Implied Warranty of Good and Workmanlike Service in its construction efforts;

5. Typicality [Rule 23(a)(3), S.C.R.C.P.] The claims asserted by the named Plaintiffs are typical of the claims that the members of the class in that the claims are essentially

identical for the entire class and arise from the same course of wrongful conduct alleged against the Defendant.

6. Adequacy [Rule 23(a)(4) S.C.R.C.P.] Adequacy of representation is satisfied in that the named representatives have no interests that are antagonistic to the absent class members, and counsel representing the class is qualified, experienced, and capable of litigating the case competently.

NATURE OF THE CASE

7. Sun City Bluffton, South Carolina, is a large residential subdivision development located in Beaufort County, South Carolina, and was, and is, being developed by Del Webb Communities, Inc. and Pulte Homes, Inc.

8. That as an essential and integral part of the development, Del Webb/Pulte designed, constructed and marketed approximately Four Thousand One Hundred (4,100) single family residences with stucco exteriors.

9. That Defendant South Carolina State Plastering, LLC, operated as the subcontractor for the stucco systems on these houses, upon information and belief, and executed various subcontracts for the stucco systems on the houses.

10. That South Carolina State Plastering, LLC, is a resident of Beaufort County as are all of the Plaintiffs of the Class, listing an address of 38 Oyster Shell Lane, Hilton Head Island, South Carolina 29926, with the South Carolina Secretary of State's office.

11. That the Defendant installed complete stucco systems, and further had the duty to install weep systems, control joints, sealant joints and head flashing, in conjunction with its work on installing the stucco systems on the homes prior to sale to the class members.

12. That after noticing problems with the stucco systems on their homes, Plaintiffs requested that forensic investigations be conducted, and forensic investigations were therefore conducted, as well as destructive testing and inspections on many of the class member's residences at Sun City.

13. As a result of the investigations and reports, Plaintiffs have learned that their houses have deficient stucco exterior systems which will require the exteriors to be reconstructed as a result of the improper installation work performed by the Defendant.

14. That Plaintiffs have learned and allege that the Defendant's improper stucco installation involves, at the least, improper installation of wall termination weeps, improper installation of control joints, improper installation of sealant joints, improper installation of head flashing, all of which has resulted or will result in cracking and in water infiltration such that reconstruction of the exterior stucco systems is necessitated.

15. The damages caused to the Plaintiffs and class are the direct and proximate result of one or more activities of the Defendant as follows:

**FOR A FIRST CAUSE OF ACTION
(Negligence)**

16. Plaintiffs repeats and realleges its allegations set forth in Paragraphs 1 through 15 above as if set forth herein verbatim.

17. At all times material hereto, the Defendant, through their agents, servants and employees, undertook and was under a duty to the Plaintiffs to construct the building and/or provide the materials and services in accordance with the building codes applicable in Beaufort County and the State of South Carolina, properly approved plans and specifications, their subcontractual duties, and sufficient, adequate and accepted construction and workmanlike practices and with due care.

18. The Defendant was negligent, grossly negligent, careless, reckless, willful, and wanton in constructing, supervising, inspecting and supplying defective materials, and in failing to comply with the requirements of the building codes, failing to construct the residences in accordance with properly approved construction plans and specifications, manufacturer specifications, and in failing to employ good supervisory and construction practices, and as a direct and proximate result of which the residences have been constructed and ultimately sold to the Plaintiffs herein in the class with all the defects and deficiencies as now exist therein.

19. The Plaintiffs class has sustained damages as a direct and proximate cause of the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness of the Defendant in one or more of the following particulars, to wit:

- a. In installing an improper exterior system on the building,
- b. In improperly installing the exterior finish system on the building,
- c. In failing and omitting to meet industry standards in stucco installation and sealant application;
- d. In failing to apply an exterior stucco finish system so as to result in cracks, sealant failure, a lack of window opening wraps, and gaps in the weather barrier;
- e. In failing and omitting to properly install wall termination weep flashing;
- f. In failing and omitting to properly install control joints;
- g. In failing and omitting to properly install proper head flashing;
- h. In failing to properly supervise work forces and to properly inspect the work;
- i. In failing to construct the residences according to plans and specifications and applicable building codes;
- j. In failing and omitting to use due care on the stucco exterior systems on the residences;

and punitive to be determined by the Court, exceeding One Hundred Dollars (\$100.00) per class member, for the cost of this action and for such other and further relief as the Court may deem just and proper.

**FOR A THIRD CAUSE OF ACTION
(Unfair Trade Practices)**

26. Plaintiffs repeats and realleges its allegations made in Paragraphs 1 through 25 above as if set forth herein verbatim.

27. Plaintiffs and the Defendant are "persons" within the meaning of S.C. Code § 39-5-10(a).

28. The Defendant, by developing, marketing and constructing the subject Residences, were engaged in commerce within the meaning of S.C. Code § 39-5-10(b).

29. The Defendant's actions, described hereinabove, constitute unfair and deceptive practices within the meaning of S.C. Code § 39-5-20(a).

30. The Defendant's acts are capable of repetition, and, upon information and belief, have been repeated.

31. The Defendant's conduct affects the public interest of South Carolina.

32. The Defendant, knew, or reasonably should have known, that their conduct violated the Unfair Trade Practices Act.

33. As a direct foreseeable and proximate result of the Defendant's unfair and deceptive practices, Plaintiffs have suffered an ascertainable loss of money and property.

34. Plaintiffs are entitled to recover their actual damages, which amount should be trebled, together with interest and attorney's fees.

Accordingly, therefore, the Plaintiffs and the Class respectfully pray that this Court certify this action as a Class Action under Rule 23, S.C.R.C.P.; that they demand a jury trial with

respect to all issues triable; and pray that this Court enter judgment against the Defendant on behalf of the Class for such damages as may be found by the trier of fact.

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Dated: May 30, 2007

TAB C

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

ANTHONY AND BARBARA GRAZIA,
individually and on behalf of
all other similarly situated plaintiffs,

Plaintiffs,

vs.

CASE NO. 07-CP-07-1396

SOUTH CAROLINA STATE PLASTERING, LLC,

Defendant.

and

SOUTH CAROLINA STATE PLASTERING, LLC,

Third-Party Plaintiff,

vs.

DEL WEBB COMMUNITIES, INC., PULTE HOMES, INC.,
and KEPHART ARCHITECTS, INC.,

Third-Party Defendants.

DEPONENT: ROBERT GALLAGHER- VOLUME I

DATE: APRIL 20, 2011

TIME: 10:00 AM

LOCATION: MCNAIR LAW FIRM
Charleston, South Carolina

REPORTED BY: J. LYNN CLARK, CSR(Iowa) RPR-CP
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I N D E X

EXAMINATION

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1 stucco, you don't know whether all those things
2 were done correctly or incorrectly with regard to
3 the house at 24 Sunbow or not, correct?

4 A. Right.

5 Q. And you would not be able to answer those
6 questions until you did destructive testing on 24
7 Sunbow, correct?

8 A. Correct.

9 Q. Let's assume that there is a crack in the
10 stucco at 24 Sunbow. Can you tell me what the
11 cause of that crack is?

12 A. No.

13 Q. What would you have to know in order to tell
14 me the cause of the crack in the stucco system at
15 24 Sunbow?

16 A. I need to do some investigation work.

17 Q. With regard to that house at 24 Sunbow, do
18 you know if there's any water damage or other
19 consequential damage to the OSB or framing behind
20 the stucco?

21 A. Can't answer.

22 Q. And what would you have to do in order to
23 tell me whether or not there is any OSB damage or
24 framing damage that was caused by some type of
25 improper stucco system or application?

1 A. Can't answer.

2 Q. You couldn't do that until you did
3 destructive testing, correct?

4 A. Correct.

5 Q. Is there anything you can tell me about the
6 house at 24 Sunbow without doing some type of
7 inspection?

8 MR. CHAKERIS: Objection.

9 A. No, but I think you must have visited it.

10 Q. Have you seen any house at Sun City Hilton
11 Head that does not have control joints?

12 A. Are you meaning absolutely no control joints
13 anywhere in the system at all?

14 Q. Right. What I'm asking you, isn't it true
15 that every house that you've seen at Sun City
16 Hilton Head has control joints somewhere on the
17 house?

18 A. There are some, yes.

19 Q. Is it your opinion that control joints are
20 required on every stucco clad house in Sun City
21 Hilton Head?

22 A. Yes.

23 Q. With regard to 24 Sunbow again, do you know
24 if any of the stucco on that house has been
25 repaired?

1 Q. You're not testifying that SCSP was required
2 to follow that detail in installing a three-coat
3 system, are you?

4 A. No.

5 Q. It's your understanding that at Sun City
6 Hilton Head there are different types of wall
7 terminations, correct?

8 A. Yes.

9 Q. Some of the walls terminate with a stucco
10 with a point like you're seeing in Exhibit 1 or
11 Exhibit Number -- sorry.

12 A. 36.

13 Q. -- 36 to Sisnroy's deposition, correct?

14 A. Correct.

15 Q. And some of them terminate in a casing bead,
16 correct?

17 A. Yes.

18 Q. And those two systems should be -- there are
19 different types of ways of terminating the stucco,
20 correct?

21 A. Yes.

22 Q. With the weep screed such as in Exhibit 1
23 and 36 of Sisnroy's deposition, the WRB should come
24 out over the top of the top portion of the weep
25 screed, correct?

1 that there were four different accessories that
2 were utilized to terminate the wall at Sun City
3 Hilton Head during the time that South Carolina
4 State Plastering was installing stucco out there.

5 A. Three or four.

6 Q. Three or four. Okay. And one of them was
7 what you would consider a casing bead or J weep.

8 A. Yes.

9 Q. And you can't tell me which house has which
10 accessory without looking at that house, correct?

11 A. Correct.

12 Q. Was there any damage behind the stucco that
13 you observed at the Grazia house?

14 A. In the 10 test cut locations that I observed
15 at Grazia, I did not see any damage underneath the
16 stucco system.

17 Q. And when you say no damage behind the stucco
18 system, I just want to make sure we have the same
19 terminology. You mean you didn't see any water
20 damage to the OSB or framing members.

21 A. Correct. I did see some corrosion on some
22 of the metal components, but I did not see any OSB
23 or framing-type damage.

24 Q. And at the -- at any of the other places
25 that you did test cuts, did you observe any damage

1 behind the stucco?

2 A. Yes.

3 Q. So as we sit here today, with regard to the
4 house where you've done destructive testing, you've
5 seen some houses like Grazia where you found no
6 damage, correct?

7 A. In the 10 test cut locations we did not
8 observe damage.

9 Q. Okay. And then you've seen houses, other
10 houses where you've done test cuts, that you did
11 observe damage.

12 A. Yes. In fact, at Oros, there was -- at Oros
13 there was sheathing damage and some framing damage
14 due to past water infiltration. The other thing
15 that we've learned at Oros was the building wrap
16 was not wrapped into the rough openings. It
17 terminated at the edge of the window, and then they
18 relied on a tape between the window flange and the
19 building wrap. And obviously, because of that
20 detail, there was no layering of how they wrapped
21 the window. They just basically ran tape around
22 the four sides.

23 Q. Who installed the windows at the Oros house
24 originally?

25 A. I don't know, but the result was, because we

1 No one knows about some of these conditions until
2 you pull the system.

3 Q. You can't know whether there's damage behind
4 any stucco system at any house at Sun City Hilton
5 Head until you actually cut into the stucco at that
6 house, correct?

7 MR. CHAKERIS: Objection.

8 A. Correct.

9 Q. And with regard to the Grazia house, if you
10 remove the stucco and there is no damage, then
11 that's \$5,000 that the Grazias would not have to
12 spend that the Oros did have to spend, correct?

13 A. Correct.

14 Q. You wrote a letter to Jeff Leath on January
15 19, 2010, and you're welcome to pull it out if you
16 have a copy of it. Is that accurate?

17 A. Yes, I recall that letter.

18 (Exhibit No. 2 was marked for
19 identification.)

20 Q. Is Exhibit Number 2 a copy of a letter that
21 you wrote to Jeff Leath on January 19, 2010?

22 A. It is.

23 Q. Is everything that you wrote in that letter
24 true to the best of your knowledge?

25 A. It is.

1 A. If they're in random areas, in isolated
2 areas, you know, on different elevations, that
3 doesn't concern me so much to say, we need to start
4 tearing off the stucco to look at it, but when you
5 have multiple cracks and known problems in a given
6 set of buildings or structures like at Sun City --

7 Q. Let me stop you for a second. If there are
8 only a handful of cracks and they're hairline
9 cracks, that doesn't concern you and you would not
10 recommend repairs.

11 A. No, I didn't say a handful. I said possibly
12 four.

13 Q. Four. Okay. If there are four cracks and
14 they're hairline, then you would not recommend
15 repairs. You would not say, let's go do
16 destructive testing on this house and determine the
17 cause of this cracking?

18 A. Not necessarily. It wouldn't concern me as
19 much as one that's cracked all over the place.

20 Q. Well, now, if I asked you for any given
21 crack, whether there were a lot of cracks or not a
22 lot of cracks, what is the cause of that crack, how
23 would you determine that?

24 A. The best way is to do destructive testing.

25 Q. So to know definitively the cause of any

1 crack on any house at Sun City Hilton Head, you
2 would have to do destructive testing at that crack
3 to be able to tell me the cause of that crack.

4 A. Yes.

5 Q. Is it your opinion that the lack of control
6 joints off the corners of windows and doors at the
7 Grazia house has caused any damage to the Grazia
8 house?

9 A. Yes. The system, the stucco system is under
10 stress. It's contributing to cracks, and those
11 cracks are damage.

12 Q. So you found cracks that -- you did
13 destructive testing to a crack at the Grazia house
14 to determine that it was related to control joints.

15 A. The lack of.

16 Q. Well, control joints in -- not on the
17 corners of windows and doors. There are control
18 joints on the Grazia house, right?

19 A. There are some.

20 Q. Right. You just don't agree with where
21 they're located, correct?

22 A. Correct.

23 Q. You think instead of being located in the
24 field of the wall they should be located off the
25 corners of the windows and doors.

1 A. They were all covered up by the patch
2 material we put over them.

3 Q. So you don't know.

4 A. No.

5 Q. Did you know at the time that those cracks
6 were covered over, were they greater than an eighth
7 of an inch?

8 A. I didn't personally look at it.

9 Q. Is it your understanding that the South
10 Carolina Residential Construction Standards state
11 that a contractor is not responsible to fix any
12 cracks that are smaller than an eighth of an inch
13 in stucco?

14 MR. LEATH: Objection.

15 A. I wasn't aware of that.

16 Q. And you're a contractor. You might want to
17 look that up. I think it's attached to one of
18 Sisnroy's depositions.

19 A. I think it all hinges on what's causing the
20 crack.

21 Q. With regard to the cracks on the houses that
22 you've done destructive testing on, you've seen
23 several different primary causes for those cracks
24 depending on which house it is, correct?

25 A. Correct.

1 Q. Some of the primary causes for those cracks
2 have been either thin stucco?

3 A. Yes.

4 Q. Low -- or bad mix of stucco giving a low PSI
5 or a low strength to the stucco?

6 A. According to Larry Elkins, yes.

7 Q. And according to Mr. Sisnroy too, right?

8 A. Yes.

9 Q. And you've seen cracks that you thought were
10 caused by the inappropriate lapping of the lath,
11 correct?

12 A. Yes.

13 Q. And I can't remember. What were some of the
14 other reasons that you determined that caused
15 cracks when you did destructive testing on any
16 given crack?

17 A. The lack of proper control joints, lack of
18 through-wall flashing, and water management system,
19 and the conditions at the base of the wall.

20 Q. When you talk about the improper water
21 management system, are you referring to something
22 other than the weep screed at the base of the wall?

23 A. The -- well, I will use Oros as an example
24 because I saw it firsthand there. The building
25 wrap did not turn into the rough openings.

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

ANTHONY AND BARBARA GRAZIA,
individually and on behalf of
all other similarly situated plaintiffs,
Plaintiffs,

vs. CASE NO. 07-CP-07-1396

SOUTH CAROLINA STATE PLASTERING, LLC,
Defendant.

and

SOUTH CAROLINA STATE PLASTERING, LLC
Third-Party Plaintiff,

vs.

DEL WEBB COMMUNITIES, INC., PULTE HOMES, INC.,
and KEPHART ARCHITECTS, INC.,
Third-Party Defendants.

DEPONENT: ROBERT GALLAGHER- VOLUME II

DATE: APRIL 21, 2011

TIME: 10:00 AM

LOCATION: MCNAIR LAW FIRM
CHARLESTON, SOUTH CAROLINA

REPORTED BY: J. LYNN CLARK, CSR(Iowa) RPR-CP
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1 that question.

2 Q. And also how thick the stucco is.

3 A. That would be another component, yes.

4 Q. So even if a house at Sun City Hilton Head
5 has control joints off the windows and doors, has
6 through-wall flashing above the windows and doors
7 and has a weep screed with the WRB outboard of the
8 top leg, you would still not okay that house until
9 you did destructive testing on that house to make
10 sure that the lath was not reverse lapped, the
11 sequencing of the accessories was correct, there
12 was no stucco mix issue, and the thickness of the
13 stucco was consistent and the proper thickness,
14 correct?

15 MR. CHAKERIS: Objection.

16 A. Yes, and I mentioned that because we're
17 seeing that as a consistent problem at the homes
18 that we're visiting and inspecting.

19 Q. And you can't know any of those last four
20 issues, the lapping of the lath, the sequencing of
21 the accessories, the stucco mix or the thickness of
22 the stucco, for any house until you do destructive
23 testing on that house, correct?

24 A. Correct.

25 Q. Just because you look at one house that has

1 an area of thin stucco doesn't mean that another
2 house in Sun City Hilton Head also has an area of
3 thin stucco, correct?

4 A. That's what the testing is intended to
5 determine.

6 Q. Right. You have to test the house to find
7 out whether it actually has thin stucco or not,
8 correct?

9 A. Yes.

10 Q. So the issues that you have with the houses
11 at Sun City Hilton Head are not just the three
12 issues that you put in your letter. It's not just
13 the control joint issue, the head flashing issue,
14 and the wall termination issue. You have several
15 other issues that we just discussed, correct?

16 MR. CHAKERIS: Objection.

17 A. Well, those three are the primary problems.

18 Q. Okay.

19 A. All the other factors that we've been
20 discussing are -- basically I consider them
21 contributing factors to the total system being
22 dysfunctional.

23 Q. And you testified yesterday that those four
24 issues have caused damage to the houses that you've
25 observed in Sun City Hilton Head.

1 them to know one way or another whether or not
2 through-wall head flashing should be installed at
3 the head of every window and door or whether
4 control joints should be off the corner of every
5 window and door.

6 MR. SEGUI: Objection.

7 Q. Correct?

8 A. Correct.

9 Q. I'd like to go over what information you
10 would need to know in order to give an opinion
11 about the stucco on any house in Sun City Hilton
12 Head. Okay?

13 A. Okay.

14 Q. The first question you'd need an answer to
15 is does the house have stucco on it, right?

16 A. Certainly.

17 Q. And then you would need to know whether or
18 not the stucco was installed by South Carolina
19 State Plastering.

20 MR. SEGUI: Objection.

21 Q. That's who's being sued in this case.

22 A. Right. I understand that. Yes.

23 Q. So you'd then need to know whether the
24 stucco was installed on the house by South Carolina
25 State Plastering, correct?

1 MR. SEGUI: Objection.

2 A. Well, regardless of who installed it, if
3 there's stucco there -- I'm sorry. What was the
4 original question, please?

5 Q. What information you need to know in this
6 case in order to give an opinion about stucco on
7 any house that would be covered by this case. The
8 only person being sued in this case is South
9 Carolina State Plastering, the installer.

10 A. Okay.

11 Q. Okay. So the first thing you'd need to know
12 was is any of that stucco on that house installed
13 by South Carolina State Plastering?

14 A. Yes.

15 Q. And then on any given house you need to know
16 what stucco was installed by South Carolina State
17 Plastering, right?

18 MR. SEGUI: Objection.

19 A. Yes.

20 Q. Because if any stucco was installed by some
21 other contractor, that would be another
22 contractor's issue and not South Carolina State
23 Plastering's, right?

24 MR. SEGUI: Objection.

25 A. We discussed that yesterday.

1 Q. I'm just trying to summarize some stuff.

2 A. Yes.

3 Q. So your answer was yes?

4 A. It was.

5 Q. For example, the Grazias' next-door
6 neighbor, the Oros house, all the stucco on that
7 house was installed by your company, correct?

8 A. It was.

9 Q. And so it would not be fair to charge South
10 Carolina State Plastering to completely strip and
11 re-clad the Oros house because South Carolina State
12 Plastering didn't install any of the stucco on the
13 Oros house at this point, correct?

14 MR. SEGUI: Objection.

15 A. Didn't they originally?

16 Q. I'm talking about the stucco that is present
17 on the Oros house right now, right?

18 A. And I'm talking about the stucco that was on
19 there originally that I removed.

20 Q. Okay. So do you think that South Carolina
21 State Plastering is responsible for the stucco
22 system that is presently on the Oros house?

23 A. Not the present system.

24 Q. Who is responsible for the present system
25 that is presently on the Oros house?

1 A. My company.

2 Q. Why is that?

3 A. Because we installed it.

4 Q. So it's very important to know, in looking
5 at any house at Sun City Hilton Head, who actually
6 installed the stucco on any given elevation,
7 correct?

8 A. Well, I believe the attorneys need that
9 information more than I do.

10 Q. But for you to give an opinion as to South
11 Carolina State Plastering, that they did something
12 right or did something wrong, you'd need to know
13 whether or not they actually installed the stucco
14 on the house, correct?

15 MR. SEGUI: Objection.

16 A. Yes, that's fair to say.

17 Q. Then for any originally installed stucco on
18 the home that was installed by South Carolina State
19 Plastering, you would then need to know what
20 installation methods were used, correct?

21 MR. SEGUI: Objection.

22 A. That would be helpful in the analysis.

23 Q. And you would need to know what type of
24 stucco system was used, correct?

25 A. That would be helpful.

1 present condition of the stucco on the given house,
2 correct?

3 MR. SEGUI: Objection.

4 A. Yes.

5 Q. And then you would need to determine if
6 there was any deficiency when comparing the
7 building code, the manufacturer's specification and
8 the industry standards in the application of the
9 stucco.

10 A. Yes.

11 Q. And if you find any deficiency, you would
12 then have to determine whether or not that
13 deficiency caused any damage to the stucco or to
14 the substrate behind the stucco, correct?

15 MR. SEGUI: Objection.

16 A. Yes.

17 Q. And then if you determined that the
18 deficiency caused some damage, you would then have
19 to determine what the proper scope of repair would
20 be to fix that location.

21 A. Correct.

22 Q. And then if there was damage to the stucco,
23 you'd have to determine whether or not that damage
24 to the stucco allowed any water through the system
25 that damaged any of the OSB or the wood, correct?

1 hairline cracks are expected in any stucco system,
2 correct?

3 MR. SEGUI: Objection.

4 A. They can occur, yes.

5 Q. And just because there are hairline cracks
6 in the system doesn't mean you would condemn the
7 entire stucco system, correct?

8 A. Again, I would like to do an evaluation and
9 try to determine why those cracks are occurring.

10 Q. And I don't mind if you explain your answer,
11 but I'd like you to answer my question first and
12 then explain it. So you agree that just because
13 there are hairline cracks in any stucco system that
14 you would not condemn that stucco system just
15 because of the hairline cracks, correct?

16 MR. SEGUI: Objection.

17 A. I can't say that I would or that I wouldn't.

18 Q. You would first need to determine the cause
19 of those cracks before you would know whether to
20 condemn the stucco system or not, correct?

21 MR. SEGUI: Objection.

22 A. Correct.

23 Q. Just because you look at any house and see
24 that there are hairline cracks in the stucco, you
25 would not say that that entire house needed to be

1 reclad until you determined the cause of that
2 crack, correct?

3 MR. SEGUI: Objection.

4 A. I need to do further evaluation, correct.

5 Q. You would need to determine the cause of
6 that crack, correct?

7 MR. SEGUI: Objection.

8 A. Correct.

9 Q. In fact, there are actually hairline cracks
10 on the house that you reclad that's next door to
11 the Grazia house, the Oros house, correct?

12 MR. SEGUI: Objection.

13 A. I haven't been back to look at the home.

14 Q. So you have not inspected the Oros house
15 since you installed the stucco?

16 A. No.

17 Q. Does it surprise you that there are hairline
18 cracks in that stucco system?

19 MR. SEGUI: Objection.

20 A. Who says there's hairline cracks in the
21 system?

22 Q. I'll show you some pictures if you'd like.
23 Does it surprise you that there are hairline cracks
24 in that stucco system?

25 MR. SEGUI: Objection.

1 Q. In this case you have done destructive
2 testing on somewhere between 11 and 13 houses at
3 Sun City Hilton Head, correct?

4 A. Yes.

5 Q. And in addition you've looked at the
6 neighbors of those houses which include maybe
7 another 30 houses, correct?

8 A. Yes.

9 Q. And based on the destructive testing and the
10 other inspections that you've done on the
11 neighbors' houses, you can't say that there is
12 anything else wrong with any other house at Sun
13 City Hilton Head that you have not inspected,
14 correct?

15 MR. SEGUI: Objection.

16 A. I can say that of the 12 to 13 and then the
17 surrounding homes that we visually looked at, I saw
18 the same consistent types of problems, but I have
19 not looked at every home in Sun City.

20 Q. So based on the inspection, whether or not
21 it was visual or destructive, that you've done on
22 the 40-something houses at Sun City Hilton Head,
23 you can't tell me whether there's anything wrong
24 with the stucco system at any other house at Sun
25 City Hilton Head that you have not inspected,

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

DEPOSITION OF PETER SHERRATT
VOLUME 2 5-6-11

ANTHONY AND BARBARA GRAZIA,
individually and on behalf of
all other similarly situated plaintiffs,

Plaintiffs,

vs.

CASE NO. 07-CP-07-1396

SOUTH CAROLINA STATE PLASTERING, LLC,

Defendant.

and

SOUTH CAROLINA STATE PLASTERING, LLC,

Third-Party Plaintiff,

vs.

DEL WEBB COMMUNITIES, INC., PULTE HOMES, INC.,
and KEPHART ARCHITECTS, INC.,

Third-Party Defendants.

DEPONENT: PETER SHERRATT

DATE: MAY 6, 2011

TIME: 10:00 AM

LOCATION: MCNAIR LAW FIRM
BLUFFTON, SOUTH CAROLINA

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1 A. With the exception of what the plastering
2 company said, if there's no control joints, that is
3 a problem. And if there's no through-wall head
4 flashing at the exposed windows, that is a problem.

5 Q. Let me ask you about that.

6 MR. SEGUI: Were you finished with your
7 answer, Mr. Sherratt?

8 THE WITNESS: Yes.

9 Q. On the Grazia house, you found several other
10 issues such as delamination, thin stucco areas, the
11 lath that is not lapped properly, and I think
12 something else, in addition to your complaints that
13 there were no control joints over the corners of
14 windows and doors and penetrations, correct?

15 A. Yes.

16 Q. Now, are you dropping those other opinions
17 with regard to the thinness of the stucco or the
18 delamination or the mix and those types of issues,
19 or are those problems that you found also important
20 with regard to the Grazia house?

21 A. They're also important.

22 Q. Because if a trier of fact determines that
23 control joints aren't necessary off the corners of
24 windows and doors, your through-wall flashing is
25 not required over the heads of the doors, you've

1 still got problems with the stucco that have been
2 caused by other issues, correct?

3 A. Yes.

4 Q. In order to determine whether there is a bad
5 mix or delamination of stucco on any house, you
6 would have to do destructive testing of that house,
7 correct?

8 A. Not necessarily. I mean there are -- there
9 are some houses out there where the stucco has
10 actually bulged off the wall. You don't need to do
11 destructive testing. It's already off the wall and
12 you can see behind it. So there are some
13 exceptions to the general statement you're making.

14 Q. And I want to be fair. So if I change the
15 statement to, isn't it true that you have to do
16 destructive testing to determine whether or not
17 there is a bad stucco mix or delamination, except
18 for cases where the stucco is either bulging or
19 falling off the wall, would that be generally a
20 true statement?

21 A. Yes, it would.

22 Q. You didn't find any damage to the sheathing
23 or the framing members at the Grazia house,
24 correct? That's all right. Strike that question.
25 You've already answered it.

1 Did you find any damage to any sheathing or
2 framing members at any house that you did
3 destructive testing to?

4 A. Yes.

5 Q. So is it fair to say that you found damage
6 to sheathing or framing on some houses, but on
7 others you did not find damage to framing or
8 sheathing, correct?

9 A. That would be correct.

10 Q. And you can't know whether or not there is
11 any damage to any frame or sheathing until you do
12 destructive testing to a house at Sun City Hilton
13 Head, correct?

14 MR. SEGUI: Objection.

15 A. Correct.

16 MR. SEGUI: I misunderstood. I
17 withdraw my objection. I misunderstood Mr. Rawl's
18 question.

19 A. The same exception applied where it's
20 already fallen off the wall. That's the way I took
21 your question.

22 Q. Right. You have to see the sheathing to
23 know whether it is damaged or not, correct?

24 A. Yes, sir.

25 Q. And another way to put that is, just because

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
: FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT) CASE NO. 06-CP-07-454

JOSEPH S. OROS, and MARY A.)
OROS, on behalf of themselves)
and others similarly situated,)

Plaintiffs,

-vs-

DEL WEBB COMMUNITIES, INC., and)
PULTE HOMES, INC.,)

Defendants.)

) DEPOSITION OF:

) THOMAS J. CARLSON,
) CSI

Given before G. Michael Alexander, Notary
Public and Registered Professional Reporter, at the law
offices of Clawson & Staubes, LLC, 126 Seven Farms Drive,
Suite 200, Charleston, South Carolina, on Wednesday,
August 22, 2007, commencing at 10:00 o'clock, a.m.

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Also Present: Darrell W. Carter, Esquire

1 A Correct. It's not one coat, so it's an
2 oxymoron. It's a dry waterfall. Why would you call the
3 name of your product one coat system when it's not?

4 Q It's your understanding that that is what
5 Master Wall considers a proprietary system.

6 A It definitely is a proprietary system.

7 Q And what is your understanding of the meaning
8 of a proprietary system?

9 A It's a system manufactured by either a
10 manufacturer or somebody that the manufacturer contracts
11 with to manufacture products. There is a proprietary
12 specification put together. Typically those proprietary
13 specifications were from industry standards. That was my
14 biggest concern, did it or didn't it? Not my concern, my
15 biggest question in my mind. The manufacturer has to
16 submit its products to testing labs, has to perform for
17 the model code agency.

18 Q Do you have any understanding that the
19 proprietary systems may have a different content of
20 materials in the stucco itself?

21 A I don't think any two stucco systems are alike,
22 ever.

23 Q With regard to the content of the actual powder
24 stucco itself.

25 A The powder? The plaster?

1 house across the street. No formal inspections other
2 than those two dates, I don't think.

3 Q Do you have any type of normal protocol that
4 you do, when asked to render an opinion, as to whether
5 stucco has been properly applied to a building or not?

6 A Do I have a standard protocol like you grilled
7 Mr. Sisnroy about? No.

8 Q So you don't do the same thing every time.

9 A Never. It would be a good role. Never predict
10 what counsel is going to do. Each house has to be
11 evaluated individually. You need to -- You can't take a
12 set of blinders to the house and say "This is what I'm
13 gonna do."

14 Q Why would you have a standard protocol --

15 A Why would there be a certain protocol?

16 Q Wouldn't there be certain items on each house
17 you would need to look at to make sure that the system is
18 applied properly?

19 A Sure.

20 Q Do you look at the same thing in residential
21 houses every time regardless?

22 A Look at the same thing on stucco cladding
23 systems, whether it's on a four story building or
24 single-family house. They're all the same issues. You
25 look for deviations from industry standards. Mr. Rawl,

1 do you mean by you did the groundwork for forming your
2 opinions? Is the second part of that that you haven't
3 formed the opinions yet?

4 MR. SEGUI: Objection.

5 THE WITNESS: Well, the groundwork for
6 most of my forensic reports are inspections and
7 destructive testing. I typically don't condemn
8 a cladding system without doing an invasive
9 cut, and I've criticized other people when they
10 have done that.

11 Q Why is the invasive cut necessary?

12 A So you can see what's really there. All you
13 can see is the surface.

14 Q You can see the result but not the cause if
15 there's a crack in the stucco?

16 MR. SEGUI: Objection.

17 THE WITNESS: No. No. I answered your
18 question. Ask it again, and I'll try and give
19 you a different answer, or another one that you
20 can understand.

21 Q Thank you, sir. Can you tell me why you
22 believe it's important to do invasive cuts before
23 condemning a cladding system.

24 A So that you can see what the cladding system is
25 composed of. How thick it is. How the components are

1 A See, I was getting those mixed up.

2 Q Yes, sir.

3 A Do you know the owner's name?

4 Q I do not.

5 A I was at 26 Seabow on the 16th of March.

6 (The deposition went off the record for a brief
7 period.)

8 THE WITNESS: I don't have any record of
9 any inspection there.

10 Q Can you tell me what's wrong with the stucco on
11 that house.

12 A Of course not. I haven't looked at it.

13 Q Can you tell me if there's anything wrong with
14 the stucco on that house.

15 A Not at this point in time.

16 Q In order to give an opinion about 26 Sunbow,
17 what would you need to do? First of all, you would need
18 to look at it.

19 A I need to think about that.

20 Q Can you give an opinion regarding any house if
21 you have not looked at it?

22 MR. SEGUI: Objection.

23 THE WITNESS: I may be able to.

24 Q Really?

25 A Really. If it's within the limits of Sun City.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	Case No. 07-CP-07-1396
	)	
Anthony and Barbara Grazia,	)	
Individually and on behalf of)		
all other similarly situated)		
Plaintiffs,	)	
Plaintiffs,	)	Deposition of
-vs-	)	ROBERT SISNROY
South Carolina State	)	October 31, 2008
Plastering, LLC.,	)	
Defendant.	)	
and	)	
South Carolina State	)	
Plastering, LLC,	)	
Third-Party Plaintiff,	)	
-vs-	)	
Dell Webb Communities, Inc.,	)	
Pulte Homes, Inc., and	)	
Kephart Architects,	)	
Defendants.	)	
	)	

Deposition on oral examination of

ROBERT SISNROY, reported by Jeannette M. King,

Court Reporter and Notary Public in and for the

State of South Carolina; said deposition taken

pursuant to Notice of Deposition and in

accordance with the South Carolina Rules of Civil

Procedure at the law offices of Turner, Padgett,

Graham & Laney, 40 Calhoun Street, Charleston,

South Carolina, commencing on Friday, October,

31, 2008, at the hour of 8:30 a.m.

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1 properly wrapped, if water gets through the
2 stucco in whatever manner, the purpose of the
3 secondary moisture is for the water to exit out,
4 correct?

5 A That secondary moisture barrier would
6 direct the water out, yes.

7 Q Okay. And it's to protect the framing
8 members and the sheathing behind it, correct?

9 A That's correct.

10 MS. MAHON: I think I'm about done.

11 (A short break transpired.)

12 EXAMINATION

13 BY MR. RAWL:

14 Q Mr. Sisnroy, my name is Vick Rawl.
15 It's nice to see you again. As you know, I
16 represent Dell Webb and Pulte.

17 Just two weeks ago, you were a witness
18 in the Oros trial, correct?

19 A Yes.

20 Q And in that case, you testified that
21 the only proximate cause of any of the damage to
22 the Oros house that you were aware of was the
23 stucco mix issue, correct?

24 MR. CHAKERIS: Objection.

25 THE WITNESS: That was identified as a

1 specific cause, yes.

2 BY MR. RAWL:

3 Q What you are saying is, the only
4 specific proximate cause that you testified to
5 regarding any of the damage or the cracks at the
6 Oros house was the stucco mix, correct?

7 A Correct.

8 Q And as we sit here today, you still
9 don't have testimony in regard to the specific
10 proximate cause for any damage or any cracks on
11 any other house within Sun City, Hilton Head,
12 correct?

13 A Correct.

14 Q And the basis of your testimony
15 regarding proximate cause at the Oros house was
16 some petrographic analysis that was conducted by
17 a group that was hired by the defendantS' expert,
18 Mr. Elkins, correct?

19 A That's correct.

20 Q And did you rely on the petrographic
21 analysis in forming your opinion that the stucco
22 mix was the proximate cause of cracks or damage
23 at the Oros house?

24 A Yes.

25 Q Have you relied on those tests in

1 forming opinions with regard to any other house
2 at Sun City, Hilton Head?

3 A No.

4 Q And just to be clear, the Oros house is
5 a house within Sun City, Hilton Head, correct?

6 A That's correct.

7 Q And do you remember the address of that
8 house?

9 A 218 Stratford Village Way.

10 Q Okay. And the Oros house is literally
11 right next door to the Grazia house, correct?

12 A Yes, it is.

13 Q In the Oros case, it was your opinion
14 that Dell Webb was responsible for the damage to
15 that house, correct?

16 A Yes.

17 Q But it is now your opinion that Dell
18 Webb is not responsible for any of the damage
19 with regard to the Grazia house, correct?

20 MR. CHAKERIS: Objection.

21 THE WITNESS: Say that again.

22 BY MR. RAWL:

23 Q Is it your opinion that Dell Webb
24 Communities, Inc. is responsible for any of the
25 damage that you have seen including the cracks in

1 from another residence, correct?

2 A Yes.

3 Q And then there was one last sample that
4 was taken. It was labeled as No. 3, which was
5 the Oros house, correct?

6 A Yes.

7 Q And as you sit here today, you don't
8 know which house No. 1 was or which house No. 2
9 was, correct?

10 A That's correct.

11 Q You agree that the mix of stucco can
12 vary on one house, correct?

13 A Yes.

14 Q And you agree that the mix of stucco
15 can vary from house to house, correct?

16 A Yes. I testified to that already, yes.

17 Q And you agree that just because the mix
18 of stucco may be bad on one house in Sun City,
19 Hilton Head, it does not indicate that the mix is
20 necessarily bad on any other house that hasn't
21 been tested, correct?

22 A Correct.

23 Q Approximately, how long were you at the
24 Grazia house during your
25 inspection/investigation?

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

JOSEPH S. OROS and MARY A. OROS
on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

CASE NO. 2006-CP-07-454

DEL WEBB COMMUNITIES, INC. and
PULTE HOMES, INC.,

Defendants.

DEPOSITION OF: ROBERT SISNROY, P.E.
VOLUME III

DATE: September 27, 2007

TIME: 10:28 a.m.

LOCATION: CLAWSON & STAUBES
126 Seven Farms Drive
Charleston, SC

TAKEN BY: Counsel for Defendants

REPORTED BY: Karen V. Andersen,
Registered Professional Reporter

Computer-Aided Transcription By:

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23 (INDEX AT REAR OF TRANSCRIPT)

1 other house in Sun City Hilton Head; correct?

2 MR. SEGUI: Objection.

3 THE WITNESS: Correct.

4 BY MR. RAWL:

5 Q. Isn't it true that just by looking at the
6 Oros' house, you can't tell me or tell where sealant
7 joints are located on any other house in Sun City
8 Hilton Head?

9 MR. SEGUI: Objection.

10 THE WITNESS: Correct. Yes.

11 BY MR. RAWL:

12 Q. And you can't tell by looking just at the
13 Oros' house whether any other weep screed in Sun City
14 Hilton Head is coated with stucco product; correct?

15 MR. SEGUI: Objection.

16 THE WITNESS: Correct.

17 BY MR. RAWL:

18 Q. And you can't tell just by looking at the
19 Oros' house that any other house in Sun City Hilton
20 Head has cracks in the stucco; correct?

21 MR. SEGUI: Objection.

22 THE WITNESS: Correct.

23 BY MR. RAWL:

24 Q. And you can't tell just by looking at the
25 Oros' house that there is any damage between the stucco

1 or wood on any other house in Sun City Hilton Head;
2 correct?

3 MR. SEGUI: Objection.

4 THE WITNESS: Correct.

5 BY MR. RAWL:

6 Q. And you can't tell by looking at the Oros'
7 house what types of windows are installed at any other
8 house in Sun City Hilton Head; correct?

9 A. Correct.

10 MR. SEGUI: Objection.

11 BY MR. RAWL:

12 Q. And to make this simple, just by looking at
13 the Oros' house, you can't tell me anything else about
14 any other house in Sun City Hilton Head; correct?

15 MR. SEGUI: Objection.

16 THE WITNESS: Correct.

17 BY MR. RAWL:

18 Q. With regard to control joints, isn't it true
19 that it is your opinion that control joints should be
20 located off the top and bottom of every window and
21 door; correct?

22 A. Correct.

23 Q. And on the Oros' house, if the control
24 joints are located off the top and bottom of every
25 window and door, would there be a need for any

1 material problem?

2 A. No, that would not be my opinion. My
3 opinion would be it is a failure of the lath, but it is
4 a failure because the lath was exposed to chronic water
5 intrusion conditions that it was not designed to
6 resist.

7 Q. Is it fair to say that where you found
8 corroded lath, there has to be a source of water
9 somewhere?

10 A. Yes.

11 Q. In order to determine the reason for the
12 lath or the reason why the lath had corroded, you would
13 have to determine the source of that water?

14 A. Yes.

15 Q. Is it fair to say that with regard to
16 different houses at Sun City Hilton Head that you have
17 observed with cracks in the stucco, that you would
18 expect there would be different proximate causes for
19 the stucco cracks from house to house?

20 MR. SEGUI: Objection.

21 BY MR. RAWL:

22 Q. In other words, not every house is going to
23 crack for exactly the same reason?

24 A. This is true.

25 Q. Is it fair to say that you observed houses

1 at Sun City Hilton Head where there is no evidence of
2 any damage to either the stucco or to the wood behind
3 the stucco?

4 A. With regard to our intrusive observations, I
5 don't think there was an instance where there wasn't
6 evidence of damage behind the stucco.

7 Q. How many houses did you do intrusive
8 observations on?

9 A. Nine.

10 Q. With regard to houses other than those nine
11 that you've observed, is it fair to say that you have
12 seen houses that you have no evidence of any damage
13 that has occurred to these houses?

14 MR. SEGUI: Objection.

15 THE WITNESS: There was no evidence of, with
16 which I observed, no evidence of physical damage, such
17 as cracking.

18 BY MR. RAWL:

19 Q. So the answer to my question is yes?

20 A. Yes.

21 MR. SEGUI: Objection.

22 BY MR. RAWL:

23 Q. And the primary damage you are looking for
24 is cracks; correct?

25 A. Yes.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

JOSEPH S. OROS and MARY A. OROS
on behalf of themselves and others
similarly situated,

Plaintiffs,

vs.

CASE NO. 2006-CP-07-454

DEL WEBB COMMUNITIES, INC. and
PULTE HOMES, INC.,

Defendants.

VOLUME IV

DEPOSITION OF: ROBERT SISNROY, P.E.

DATE: September 28, 2007

TIME: 10:15 a.m.

LOCATION: CLAWSON & STAUBES
126 Seven Farms Drive
Charleston, SC

TAKEN BY: Counsel for Defendants

REPORTED BY: Karen V. Andersen,
Registered Professional Reporter

Computer-Aided Transcription By:

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19 (INDEX AT REAR OF TRANSCRIPT)

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1 then look to the South Carolina Residential
2 Construction Standards?

3 A. It provides guidance to contractors, yes.

4 Q. Did you see houses in your survey, of the
5 200-some-odd houses you did, that had cracks that were
6 bigger than those allowed by the South Carolina
7 Residential Construction Standards?

8 A. Yes.

9 Q. And did you document which houses you saw
10 cracks that were bigger than the Residential
11 Construction Standard documents?

12 A. No.

13 Q. And you would agree that many of the houses
14 along which you checked yes on your survey, such as the
15 form on Exhibit 39, where you checked yes to observe
16 cracking in stucco, would have cracks that were smaller
17 than that 1/8th inch standard allowed by the South
18 Carolina Residential Construction Standards; correct?

19 A. Yes.

20 Q. I believe that you had testified in one of
21 the prior days of deposition that the building codes,
22 you would consider the building codes to be violated if
23 water intrudes behind the stucco system; is that
24 accurate?

25 A. Yes.

1 where it is removed or in the section itself of the
2 material that's laying out..

3 Q. Yes, sir, I understand completely. What I'm
4 asking is, there may have been other drill holes where
5 the moisture probe was inserted around the house that
6 wasn't cut into, correct? For example, I remember
7 being out there seeing the locations that were being
8 cut and there were drill holes either above or in the
9 location that was cut?

10 A. Yes.

11 Q. And there were other areas on houses that
12 had the drill holes in it that were not cut. Do you
13 understand what I'm saying?

14 A. Yes.

15 Q. How would I find out what the moisture
16 reading that you received was from those drill holes?

17 MR. CHAKERIS: Objection.

18 THE WITNESS: I don't know. That would have
19 been documented if that occurred, it was just a test
20 hole.

21 BY MR. RAWL:

22 Q. In general, with regard to the additional
23 eight houses you cut into, would you agree that the
24 cracks occurred on those houses for different reasons?
25 It wasn't the same reason every time?

1 A. Yes.

2 Q. Can you do any type of correlation with
3 regard to the percentage on the Oros' house if, for
4 example, approximately 10 percent of your readings
5 showed what you consider an unacceptable moisture
6 reading, would you agree that the other 90 percent of
7 the house then is dry?

8 MR. CHAKERIS: Objection.

9 THE WITNESS: Well, I would agree that the
10 other 90 percent of the locations tested indicated an
11 acceptable moisture level, but there may have been
12 deterioration.

13 BY MR. RAWL:

14 Q. You can have situations where you have a
15 high moisture level and no deterioration, can't you?

16 A. It happens very seldom.

17 Q. Is the answer to my question yes?

18 MR. CHAKERIS: Objection.

19 THE WITNESS: Yes.

20 BY MR. RAWL:

21 Q. In your notes next to some of the moisture
22 readings on the Oros' house, you have either solid
23 medium or solid or some combination thereof?

24 A. Yes.

25 Q. What do those mean to you?

TAB D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	Case No. 2007-CP-07-1396
	)	
ANTHONY and BARBARA GRAZIA,	)	
individually and on behalf of all other	)	
similarly situated plaintiffs,	)	
	)	
Plaintiffs,	)	ORDER VACATING TEMPORARY
v.	)	INJUNCTION, DISMISSING AS MOOT
	)	DEFENDANTS' MOTION TO AMEND
	)	INJUNCTION, AND DENYING
SOUTH CAROLINA STATE	)	MOTION TO RENEW INJUNCTION
PLASTERING, LLC,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
SOUTH CAROLINA STATE	)	
PLASTERING, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
DEL WEBB COMMUNITIES, INC.,	)	
PULTE HOMES, INC. and	)	
KEPHART ARCHITECTS, INC.,	)	
	)	
Third-Party Defendants.	)	

2012 MAY 16 PM 1:21
 JEFF AM ROSENEAU
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

This class action concerns allegations of defective stucco on approximately 4000 residences within the Sun City development in Hilton Head, South Carolina. The case has been declared complex and assigned to this Court for disposition. On January 13, 2012, Defendant South Carolina State Plastering ("SCSP") filed a Motion for Temporary Injunction, and on January 18, 2012, Third-Party Defendants Del Webb Communities, Inc. and Pulte Homes, Inc. likewise filed a Motion for Injunctive Relief. Both of these motions sought to enjoin Plaintiffs' counsel from communicating with stucco homeowners in Sun City Hilton Head prior to the

expiration of any opt-out period for inclusion in the class. According to Defendants, the motions were filed because Plaintiffs' counsel intended to conduct a "community meeting" with reference to this pending lawsuit, and published notice of such meeting in the local newspaper. Before a hearing could be scheduled on the motions, Plaintiffs' counsel submitted a proposed Order to the Court granting the injunction, presented as a consent Order, and the Court signed Plaintiffs' counsel's proposed order.

After the Court signed and issued the Order, Defendant SCSP and Third-Party Defendants Del Webb and Pulte moved to alter the Order. The Court conducted a hearing on this motion, during which Defendants asserted that the timeframe they had requested for the injunction to remain in place in their motions was different from the one actually outlined in the signed Order presented by Plaintiff's counsel. At that point, the Court learned that Defendants had not in fact consented to the proposed Order submitted by Plaintiffs' counsel.

After considering this issue with the knowledge that there was no true consent among the parties, the Court has determined that the Order was improvidently granted; moreover, after close review, the requested injunction was unilateral in nature and failed to require a bond in the event of Plaintiffs' counsels' failure to abide thereby, which is reversible error. *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009); Rule 65, SCRPC. Therefore, the Court hereby vacates the Order Granting Temporary Injunction entered on March 15, 2012. As a result, the Court further now dismisses as moot Defendants' motion to alter or amend that injunction.

After learning that the Court intended to vacate the previous injunction, Defendants have now moved to renew the injunction. A telephone conference was conducted on the record on May 9, 2012 to hear arguments on the issue of whether an injunction should issue. In considering this renewed motion, the Court is aware that class actions serve an important function in our system of civil justice, but they also present opportunities for abuse as well as problems for courts and counsel in the management of cases. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99, 101 S.Ct. 2193, 2200 (1981). Therefore, because of the potential for abuse, courts have been given the discretion to "impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended." Rule 23, SCRPC; *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992). To ensure that these interests are protected, courts may find it necessary to issue orders, like the previous one in this case, that limit communication between the parties and potential members of the class.

But a court's power to issue an order curtailing communication is not unlimited. In fact, one such limitation flows from the framework and general policies contained in Rule 23 itself. As the South Carolina Supreme Court has stated, the specific grant of power to a court under Rule 23(d), SCRPC, are directed towards notifying the parties of the pending litigation. *Id.* Therefore, while it may be necessary for a court to issue an order limiting communications in certain circumstances, such an order "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in [Rule 23]." *Id.*, citing *Gulf Oil Co.* at 101, 101 S.Ct. at 2200.

Another, and perhaps more important, limitation on a court's authority to enter an order prohibiting communication under Rule 23 emerges from the constitutional rights enshrined in the First Amendment. The impact of Defendants' motion is broad sweeping and effectively constitutes a prior restraint on speech. It enjoins the named Plaintiffs and Plaintiffs' counsel from "communicating with prospective class members regarding" the pending litigation, "publishing any statement" regarding the litigation, and "taking any action intended to advise or inform residents of Sun City Hilton Head of their legal rights." A prior restraint, of course, is subject to a heavy presumption against its constitutionality; in order for the restraint to be valid, it must prevent "direct, immediate, and irreparable damage" and be the least restrictive means of doing so. *New York Times Co. v. U.S.*, 403 U.S. 713, 732-33, 91 S.Ct. 2140, 2150-51 (1971). While the Court is well aware of the constitutional implications of Defendants' motion, this decision is not made upon constitutional grounds.

With regard to the motion for temporary injunction, the Court makes the following specific findings in weighing the need for limitation of communications between Plaintiffs' counsel and putative class members versus a potential interference with the rights of the parties:

1. The Court's ability to control the flow of information within a class action is superimposed upon the foundational democratic principles of the need for a free flow of information within society generally and specifically within the justice system;
2. The motions as filed are unilateral in nature, applying only to Plaintiffs' counsel, raising an immediate question as to the propriety of

disparate treatment of the parties. While Defendants now offer to amend the motion so as to apply to all parties, this does not cure the Court's concerns;

3. This case involves a retirement community where the citizenry is similarly situated as to the construction of their residences by Defendants, and where putative class members have the necessary time, fiscal capability, and level of sophistication to fully participate in this case;

4. This case further involves the most substantial investment that most individuals make in a lifetime, their home, and thus is of core interest. Due to the large number of people involved who live in close proximity to one another, one can anticipate that rumor and misunderstanding will abound. The inability to discuss the issues in this litigation with counsel on either side of the case will result in the potential for confusion and frustration, particularly when individuals are attempting to determine whether or not to opt out of the proposed class;

5. This situation would undermine the confidence of potential litigants in the justice system as the ban on information would be imposed by Court order, as opposed to an agreement between counsel, and the Court finds no reason to impose such a ban;

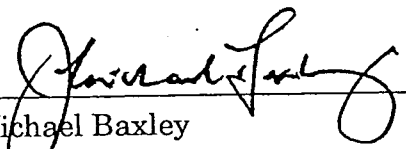
6. The free flow of information, particularly in light of the requirements and directives of the Right to Cure Dwelling Defect Act, S.C. Code Ann. 40-59-810, et. seq., may lead to the settlement of many of these claims without the necessity of joining the class; and,

7. The Defendants have shown no "abuse" by Plaintiffs' counsel in their communications with putative class members, and the mere conjecture that such may occur is insufficient for this Court to impose a ban. *Gulf Oil Co.* at 104, 101 S.Ct. at 2202.

After review and consideration of this issue, the Court does not find that direct, immediate, and irreparable harm will result if Plaintiffs' counsel is allowed to communicate with the residents of Sun City Hilton Head. To the contrary, the Court finds that the interests of justice are better served if all counsel are permitted to discuss this case with prospective and potential members of the class, as the free

flow of information from either side of the case will serve to better inform potential class members as to their rights and the potential to resolve individual claims without the need for litigation prior to the enrollment of the class. For this reason, the Court now declines to issue an injunction, and denies Defendants' motion.

IT IS SO ORDERED.



J. Michael Baxley
Presiding Judge

Hartsville, South Carolina
May 11, 2012

RECEIVED

MAY 21 2012

McNair Law Firm, PA

CERTIFICATE OF SERVICE

As a ~~Docket~~ Clerk of Court for Common Pleas in Beaufort County, I certify that on 5-18-12, I served a copy of this Order Vacating Temporary Injunction, Dismissing as Moot Defendants' Motion to Amend Injunction, and Denying Motion to Renew Injunction, in this action, dated May 11, 2012, on Michael S. Seekings, Esquire, Everett A. Kendall, II, Esquire, A. Victor Rawl, Jr., Esquire, David S. Cobb, Esquire, by depositing in the U.S. Mail, pre-paid for first class delivery, at the following addresses:

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Post Office Box 59
Charleston, SC 29402

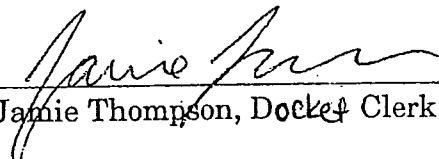
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Post Office Box 12129
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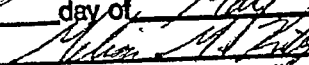
David S. Cobb, Esquire
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JEROME A. ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

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Jamie Thompson, Docket Clerk

May 18, 2012

SWORN to before me this 18 day of May, 2012

Notary Public for South Carolina
My Commission Expires: 5-28-14

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McNair Law Firm, P.A.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396
Case Tracking No.: 2012-212364

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated
Plaintiffs, ... Respondents,

v.

South Carolina State Plastering, LLC, ... Defendant,

and

South Carolina State Plastering, LLC, ... Defendant,

v.

Del Webb Communities, Inc., Pulte Homes,
Inc., and Kephart Architects, Inc. . . Third-Party Defendants.

Of Whom Del Webb Communities, Inc., and
Pulte Homes, Inc. are Appellants.

**RESPONDENTS' REPLY TO APPELLANT DEL WEBB/PULTE'S
RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL**

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TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF
APPEALS:

INTRODUCTION

Appellants in their Return advance no arguments which could cause this Court to overturn years of jurisprudence stating that Class Certification Orders are interlocutory and not appealable. They wholly fail to distinguish this Court's Order in the companion Class case of *Lancaster v. Del Webb, et al* which stated clearly the non-appealability of a virtually identical Certification Order involving Del Webb/Pulte and which was served on Pulte's counsel prior to its initiating the instant Appeal.

A. The Class Certification Order does not affect a mode of trial so as to be appealable nor does it deprive Appellants of substantial rights.

Appellants can cite no precedent which states that an interlocutory Class Certification Order is appealable pursuant to one or both of their above theories. The *Salmonsens* decision (377 S.C. 442, 661 S.E.2d 81 (2008)) cited was appealable only because it was defective in the manner of certification of the Class itself-creating an impermissible "opt-in" Class. Such is manifestly not the situation here, indeed the next step in this process is service on all putative class members of a Notice and

Exclusion form - to permit opt-OUTS not opt-IN's. The notion advanced by SCSP that compliance with the subsequent Right to Cure Statute creates an "opt-in" Class is unsupported by any case law, logic, or indeed, anything other than an opinion of defense counsel.

The concept of "Mode of Trial" is usually addressed to jury or non-jury trials. This has not yet been addressed but there is nothing in this record to indicate that the Class Certification Order deprives any party of a jury trial.

Del Webb/Pulte cites no precedent for its proposition that the Certification Order is appealable as affecting "Substantial Rights." Indeed, this section of its Return seems to consist of an attack on the Trial Court - wholly unwarranted.

B. SCSP's Complaints concerning the management of the Right to Cure notice and response are directed to an interlocutory case management mechanism - not an appealable final Order.

As it has consistently done below, SCSP complains about the case management procedure for providing it the opportunity to offer a settlement to the Plaintiffs. Of course, SCSP has had six years and nothing has prevented it from offering a resolution to this class - the result has been zero. Now, it just does not like the proposed

mechanism by which the Court proposes that Plaintiffs can notify SCSP, SCSP can inspect and offer to settle. This hardly rises to the level of an appellate issue even if there were any problems with this proposed mechanism - which there is not, as a facial reading of the Order will demonstrate.

C. There is no Authority supporting Del Webb/Pulte's theory that an Appellate Court can combine a first-filed defective Appeal with a later filed separate Appeal in order to bootstrap jurisdiction over the defective Appeal.

Del Webb/Pulte and SCSP have filed subsequent Appeals (Del Webb/Pulte Case Tracking No.: 2012-212364, filed July 9, 2012; and SCSP Case Tracking No.: 2012-212212, filed July 12, 2012) of the Trial Court's vacating of an injunction preventing Respondents' counsel from communicating with putative class members. Understanding that it is on shaky ground in attempting the Appeal of the Certification Order, Del Webb/Pulte seeks to create a theory of "Pendent Jurisdiction" asking this Appeals Court to consolidate the separate appeals for purposes of saving this first defective Appeal. No precedent cited supports this jurisdictional stretch. In the matters cited, legitimate Appeals were filed which had as an ancillary matter, a non-appealable issue, which the Appeals court considered. The Appeals Court noted that in such

circumstances, the ordinarily non-appealable ancillary issue can also be considered for reasons of judicial economy. No decision has stated what Del Webb/Pulte urges on this Court - to take a wholly non-appealable Appeal, then somehow combine it with a subsequently filed separate Appeal of a different Order so as to create jurisdiction over the first defective Appeal.

CONCLUSION

As noted in Respondents' initial filings, the present Appeal is an intentional delay tactic, and should be dismissed. Coming as it does on the heels of an Order from this Court directly on point in the Lancaster matter, this Court should additionally conduct an inquiry pursuant to Rule 269, SCRAP.

Respectfully Submitted,

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Attorneys for the Respondents

Dated: July 30, 2012

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated
Plaintiffs, ... Respondents,

v.

South Carolina State Plastering, LLC, ... Appellant,

v.

Del Webb Communities, Inc., Pulte Homes,
Inc., and Kephart Architects, Inc. . . Third-Party Defendants.

Of Whom Del Webb Communities, Inc., and
Pulte Homes, Inc. are Appellants.

RESPONDENTS' MOTION TO DISMISS
APPELLANT SOUTH CAROLINA STATE PLASTERING, LLC'S
APPEAL

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TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

This Motion is brought by the Plaintiffs/Respondents in this Class Action seeking dismissal of an Appeal taken by the Appellant South Carolina State Plastering, LLC ("SCSP"), of two interlocutory Orders issued by Judge Baxley in the Circuit Court. (Exhibits 1 and 2). In support of this Motion, Plaintiffs/Respondents would show as follows.

INTRODUCTION

SCSP has noticed an appeal from two separate interlocutory Orders entered by the Circuit Court in the conduct of this class action. Neither of the Orders is immediately appealable. To avoid any further disruption and delay of the adjudication of this matter in the Circuit Court, SCSP's appeal should be immediately dismissed and pursuant to the provisions of SCRAP 269, this Court should inquire as to the propriety of Counsel filing a Notice of Appeal.

BACKGROUND

The Plaintiffs/Respondents are homeowners in Sun City Hilton Head ("Sun City"), a large-scale, planned retirement community in Bluffton, developed by Del Webb, with SCSP serving as the stucco applicator for the construction of

all of the class homes, some 4300 in total. The Respondents brought the present action on behalf of themselves and their similarly situated Sun City neighbors to recover damages as a result of the deficient design and construction of the stucco exterior on class members' homes.

After three hearings, the Honorable J. Michael Baxley entered an Order granting the Respondents' motion for class certification. (Order Making Preliminary Finding That Plaintiffs' Proposed Class Meets The Requirements of Rule 23(a), SCRCF; Setting Parameters For Putative Class; Dismissing Plaintiffs' Unfair Trade Practices Claim Without Prejudice; Imposing A Stay Of Proceedings; and, Setting Forth Procedures For Compliance With The Right To Cure Construction Dwelling Defect Act, Exhibit 1). Thereafter, SCSP filed motions seeking reconsideration and/or clarification of the class certification Order.

Following another hearing held on April 30, 2012, Judge Baxley entered an Order denying SCSP's motion for reconsideration and/or clarification of the class certification Order. (Exhibit 2).

On or about June 8, 2012, SCSP noticed an appeal of the Orders issued by Judge Baxley. (Exhibit 3).

ARGUMENT

Neither of the Interlocutory Orders Identified in SCSP's Notice of Appeal is Immediately Appealable.

Both Orders issued by Judge Baxley are interlocutory, a fact that is observed by the Court in its May 1, 2012, Order. (Exhibit 2).

Rule 201(a), SCACR, addresses judgments, orders and decisions subject to appeal, and, in pertinent part, provides that "[a]ppeal may be taken, as provided by law, from any final judgment, appealable order or decision." "As a general rule, only final judgments are appealable." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005). "To promote judicial efficiency and orderly adjudication of disputes on appeal, this rule seeks to prevent multiple appeals of non-final matters." Jean Hoefer Toal et al., Appellate Practice in South Carolina 83 (2002).

As is the case here, "any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Wilson, 367 S.C. at 12, 625 S.E.2d at 208; Mid-State Distribs, Inc. v. Century Imps., Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) ("South Carolina case law has established what constitutes an interlocutory appeal.

If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory."); see also Toal, supra at 86 ("'Final judgment' is a term of art denoting the disposition of all issues in the action."). Here, SCSP has appealed two separate Orders (each of which will be more particularly identified and analyzed below), none of which are final judgments; they are both interlocutory (and not immediately appealable).

"Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within [S.C. Code Ann.] § 14-3-330." Wilson, 367 S.C. at 13, 625 S.E.2d at 208. Neither Order falls within the statute. In pertinent part, § 14-3-330 provides as follows:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order

or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action; . . .

Accordingly, "[i]ntermediate orders involving the merits may be immediately appealed pursuant to § 14-3-330(1)." Wilson, 367 S.C. at 13, 625 S.E.2d at 208. "An order which involves the merits is one that 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense.'" Id. (citing Mid-State Distribs., 310 S.C. at 334, 426 S.E.2d at 780). Also, "[i]nterlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2)." Id. "Orders affecting a substantial right 'discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.'" (citing Mid-State Distribs., 301 S.C. at 335, 426 S.E.2d at 780 n. 4).

As to subsection (2) of § 14-3-330, "[g]enerally, this subsection has only been used when the trial order affected the 'mode of trial' because if those orders are not immediately appealed, no appellate review is available to

correct any error." Toal, supra at 87. "[T]he 'mode of trial' exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury.'" Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (citing Salmonsens v. CGD, Inc., 377 S.C. 442, 461, 661 S.E.2d 81, 91 (2008) (Pleicones, J., dissenting)).

As is more particularly set forth below, neither of the Orders SCSP purports to appeal are final judgments. Neither involves the merits. Neither discontinues this action, prevents a later appeal, grants or refuses a new trial, or strikes out a defense pled by SCSP. Neither abridges SCSP's constitutional right to a jury trial. Neither is immediately appealable. SCSP's appeal should be immediately dismissed, so as to avoid any further disruption or delay of the adjudication of this matter in the Circuit Court.

Order Granting Class Certification, dated December 19, 2011
(Exhibit 1)

This is a procedural Order granting class certification and setting the procedural structure of the case moving forward. Generally, Orders under Rule 23 are interlocutory and not immediately appealable. See Salmonsens, 377 S.C. 442, 661 S.E.2d 81 (refusing to

entertain interlocutory appeal of class certification despite express argument against precedent to do so, and also despite Court simultaneously addressing the merits of another issue in the case on appeal); Eldridge, 308 S.C. at 127, 417 S.E.2d at 534 (1992); see also Ferguson, 349 S.C. at 565, 564 S.E.2d at 98; Schein, 274 S.C. at 331, 263 S.E.2d at 384; Knowles, 274 S.C. at 59, 261 S.E.2d at 49.

Within that Order are several case management directives from Judge Baxley. The first is an Order staying proceedings pending compliance with the S.C. Right To Cure Statute (S.C. Code Ann. § 40-59-810, et. seq.) and setting certain conditions for the notice and timing of compliance with the Right To Cure Act by the Plaintiffs/Respondents. While Plaintiffs can imagine no basis for an Appeal by SCSP, as it was on their Motion that the framework of compliance with the Statute was set, this Order is certainly not appealable because it is not a final Order, and is consistent with the Right To Cure Act and the Supreme Courts recent decision in Grazia v. South Carolina State Plastering, LLC, et al, 390 S.C. 562, 703 S.E.2d 197 (2010).

Also contained within the Class Certification Order, is an Order striking Plaintiffs' Unfair Trade Practices claims. Again, this is a matter of procedure mandated by

the legislature (unfair trade claims cannot be brought in a representative capacity) and Plaintiffs have no complaint with the ruling. It is no more than the grant of a Motion to Amend. Moreover, it is without prejudice and plainly not appealable.

Order Denying SCSP's Motion for Reconsideration and/or Clarification, dated May 7, 2012 (Exhibit 2)

This Order merely denies reconsideration and/or clarification of the Circuit Court's prior procedural Order granting class certification. Once again, generally, Orders under Rule 23 are interlocutory and not immediately appealable. See Salmonsens, 377 S.C. 442, 661 S.E.2d 81; Eldridge, 308 S.C. at 127, 417 S.E.2d at 534 (1992); see also Ferguson, 349 S.C. at 565, 564 S.E.2d at 98; Schein, 274 S.C. at 331, 263 S.E.2d at 384; Knowles, 274 S.C. at 59, 261 S.E.2d at 49. SCSP, after spending countless months trying to convince the Circuit Court to change its mind, now seeks this Court to impose a change that the rules do not allow.

CONCLUSION

For the foregoing reasons, the Respondents ask that the Court immediately dismiss SCSP's appeal.

Respectfully Submitted,



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Attorneys for the Respondents

Dated: June 20, 2012

Charleston, South Carolina

EX. 1

Exhibit 1 to Respondent's Motion to Dismiss State Plastering's appeal was a copy of the trial court's "Preliminary Class" Order. To avoid duplication in this Joint Appendix (JA), that order is not reproduced here. It appears at JA 009-024.

EX. 2

FORM 4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	Case No. 2007-CP-07-1396
	)	
ANTHONY and BARBARA GRAZIA,	)	
individually and on behalf of all other	)	
similarly situated plaintiffs,	)	
	)	ORDER DISMISSING DEFENDANTS'
Plaintiffs,	)	MOTIONS TO RECONSIDER AND
	)	DENYING DEFENDANTS' MOTIONS
v.	)	FOR CLARIFICATION
	)	OF ORDER PRELIMINARILY
SOUTH CAROLINA STATE	)	CERTIFYING CLASS
PLASTERING, LLC,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
SOUTH CAROLINA STATE	)	
PLASTERING, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
DEL WEBB COMMUNITIES, INC.,	)	
PULTE HOMES, INC. and	)	
KEPHART ARCHITECTS, INC.,	)	
	)	
Third-Party Defendants.	)	

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

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This civil litigation involves allegations of defective construction relating to stucco application on approximately 4,000 homes located at the Sun City Development in Beaufort County, South Carolina. The case has been declared complex and assigned to this Court for disposition. On December 8, 2011, this Court issued an Order making a preliminary finding that Plaintiffs' proposed class meets the requirements of Rule 23(a), SCRCP, and this Order was filed with the Clerk of Court on December 15, 2011. Subsequently, on January 3, 2012, Defendant South Carolina State Plastering, LLC and Third-Party Defendants Del

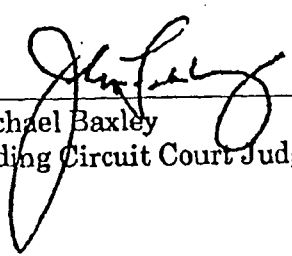
Webb Communities, Inc. and Pulte Homes, Inc. filed Motions to Reconsider and/or Motions for Clarification, pursuant to Rule 59(e), the matter that is presently before the Court. The Court heard arguments on these motions on April 30, 2012, and after hearing these arguments and reviewing the memoranda submitted by the parties, the Court dismisses the Motion to Reconsider and denies the Motion for Clarification.

The Court's Order dated December 8, 2011 was interlocutory in nature, and thus Defendants' Motions to Reconsider were improvidently filed. There is no provision in Rule 59(e), SCRPC, allowing a party to challenge an interlocutory order. Indeed, Rule 59 motions are permitted only after final, appealable adjudications on the merits. Accordingly, the Court hereby dismisses Defendants' Motions to Reconsider as improper.

During the April 30 hearing, Defendants were also permitted to address the various portions of the Court's Order for which they sought clarification. After carefully considering on the record each of the concerns raised by Defendants, the Court determined that the Order was clear and complete as originally issued and thus no further clarification was necessary. Therefore, the Court hereby denies Defendants' motions for clarification.

Accordingly, the parties have thirty (30) days from the date this Order denying clarification is served upon them to submit a proposed opt-out notice to putative class members as outlined in the initial Order.

IT IS SO ORDERED.



J. Michael Baxley
Presiding Circuit Court Judge

May 1, 2012
Hartsville, SC

EX. 3

Exhibit 3 to Respondent's Motion to Dismiss State Plastering's appeal was a copy of the State Plastering's Notice of Appeal – the trial court's "Preliminary Class" Order and order denying reconsideration were attached to the Notice of Appeal and included in Exhibit 3. To avoid duplication in this Joint Appendix (JA), those orders are not reproduced here. The "Preliminary Class" order appears at JA 009-024. The order denying reconsideration appears at JA 177-178.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and on behalf of all other similarly situated
Plaintiffs, ...Respondents,

v.

South Carolina State Plastering, LLC, ...Appellant.

South Carolina State Plastering, LLC, ...Appellant,

v.

Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects,
Inc., ...Third-Party Defendants.

RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL

The circuit court's orders dated December 19, 2011¹ and May 7, 2012² are
immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2) because together they
deprive the Appellant, South Carolina State Plastering, LLC (hereinafter "SCSP") of a

¹ This order was issued in response to Plaintiffs' Motion to Certify the Class. Hereinafter, referred to as
"Class Order."

substantial right for which it will have no recourse after final judgment. Specifically, the orders deprive SCSP of the ability to meaningfully exercise its rights under the South Carolina Notice and Opportunity to Cure Residential Defect statute, S.C. Code Ann. §§ 40-59-810 *et seq.*, by impermissibly modifying the statutory requirements and creating attorney-client relationships that undermine the legislative intent. In addition, the orders create a *de facto* “opt-in” class, which immediately violates the due process rights of the absent class members and threatens to abrogate SCSP’s due process right to a final judgment with *res judicata* protections.

SCSP recognizes the large body of case law holding that orders granting or denying class certification are not generally appealable. While there are exceptions to that rule, this court need not address those issues in response to Appellant’s Motion to Dismiss. Rather, the court should recognize that if an interlocutory order is immediately appealable for any reason, all other issues which are intertwined can also be considered in the interest of judicial economy.³

Although the Class Order arises from a Motion to Certify a Class, it actually contains multiple orders, as can be readily seen from the title given to it by the trial court: “ORDER MAKING PRELIMINARY FINDING THAT PLAINTIFFS’ PROPOSED CLASS MEETS THE REQUIREMENTS OF RULE 23(a), SCRCF; SETTING PARAMETERS FOR PUTATIVE CLASS; DISMISSING PLAINTIFFS’ UNFAIR TRADE PRACTICES CLAIM WITHOUT PREJUDICE; AND, SETTING FORTH

² This Order denies SCSP’s Motion to Reconsider and/or for Clarification. Because the trial court declined to make any change to the Class Order, references to “the Order” hereinafter are to the Class Order.

³ See *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 636, 670 S.E.2d 680, 688 n.14 (Cl. App. 2008)

PROCEDURES FOR COMPLIANCE WITH THE RIGHT TO CURE

CONSTRUCTION DWELLING DEFECT ACT.” Thus, while portions of the Class Order may be preliminary or interlocutory, portions immediately dispose of issues affecting the due process and statutory rights of SCSP. Because the aspects of the orders directly addressing the Right to Cure Act are immediately appealable, the orders should be considered in their entirety at this time.

The impact of taking this appeal now on judicial economy is substantial. Reviewing this Order now, in its entirety, may avoid years if not decades of further litigation before the Plaintiffs’ claims, and the claims of others who have filed individual suits, are resolved. The Class Order raises several significant issues of law that SCSP believes will eventually be reviewed and probably reversed by this court or the Supreme Court. These issues include the propriety of the court-created class definition, the manner in which the trial court has defined and made findings of “typicality” and “commonality,” the approval of the class representatives and counsel as adequate under the circumstances of claim splitting and claims waiver, and so forth. At some point, these issues (and likely many more) will be before this Court. Between now and then, if this entire order is not immediately reviewed, three very expensive and time consuming phases will take place: 1) the Right to Cure process; 2) individual discovery on all claims and defenses; and 3) individual trials on all non-class claims.⁴ All of this is being forced

⁴ The trial court has explicitly acknowledged that there are significant issues that are not common or typical to the class that arise from the same transaction or occurrence as the class claims. For example, SCSP has asserted the Statute of Limitations defense as to the Grazias and all other class members. SCSP is entitled to engage in discovery on this and all other individual issues. If the discovery on each house takes no more than one day, working 200 days per year will require more than 20 years to complete discovery. To avoid improper claim splitting, every class member must present his individual claims as part of this trial. There is no jury or judge who could preside over a trial of that length.

on the mistaken premise of the trial court that certification of this class has been directed by the Supreme Court in *Grazia*.

Plaintiffs seek to frame the December 19, 2011 order as a “procedural Order granting class certification and setting the procedural structure of the case moving forward.” Motion at 8. It does neither. In its Order, the trial court does not actually certify a class, but rather has made preliminary findings that the class defined by the court may meet the Rule 23(a) requirements. The court then creates an opt-in procedure involving a court-defined process in lieu of the statutorily enacted Right to Cure Act.

A. The Orders Deny South Carolina State Plastering Statutory and Due Process Rights by Re-writing the Right To Cure Act.

In its Order, the court sets forth a procedure in an effort to conform the typical class certification and notification process to the requirements of the Right to Cure Act (hereinafter sometimes referred to as RTC”). In doing so, the trial court explicitly and implicitly requires the following:

1. Within seven days of the close of the “opt-out” period, class counsel is to file and serve a list of the class members.
2. On the day the list is filed and served, an automatic stay is imposed that will remain in effect until a motion is made and further court order is issued. This motion is to be made only after the “Right to Cure period” has concluded.
3. On the forty-fifth day after the list is filed and served, class counsel must serve notices pursuant to the Right to Cure Act for one-fourth of the properties in the class. Notices for an additional one-fourth of the class must be served every forty-five days thereafter. The effect of this

sequence is to require service of all RTC notices 180 days after the stay is imposed.

4. Each time that RTC notices are served, South Carolina State Plastering will have 60 days to exercise its rights to seek clarification of the notice, make an inspection of the property, and submit any offer of settlement to individual class members. In total, this provides a period of 195 days from the first receipt of RTC notices to address the concerns of potentially 4300 class members.
5. The RTC notices are to be signed by class counsel, acting as the representative of the class member. Each notice must be specific to the particular property.
6. Responses to the notices are to be served on class counsel.
7. Class members, acting through class counsel, have 30 days to respond to any offers of settlement.
8. At some future date, the Court will review the RTC notices and make any refinement of the class definition, including the possibility of creating subclasses. Presumably, this would require new Notices to be sent.

This process, however well intentioned, suffers from several fatal defects that have an immediate and long-term impact on the due process and statutory rights of SCSP and absent class members. For example,

- The process puts the cart before the horse by impermissibly compelling individuals to engage in litigation before first complying with the RTC Act.

- The process requires that property owners submit to the RTC process before a class has been finally certified if they have any interest in participating in the potential class, thus not knowing what class they might be involved in, and what rights will be protected or waived in the action.
- The process effectively denies SCSP a meaningful opportunity to inspect and offer to resolve claims by forcing SCSP to respond to RTC notices in a timeframe and manner never contemplated by the legislature.
- The process creates an involuntary, direct attorney-client relationship between class counsel and individual class members with inherent and non-waivable conflicts of interest.
- The process denies SCSP the right to negotiate directly with property owners who are not represented by counsel with inherent conflicts of interest in the subject matter of the litigation.
- The process creates a *de facto* two-step "opt-in" procedure because a potential class member's failure to comply with Right to Cure process will necessarily require the exclusion of the potential class member in order to allow the litigation to proceed.

A maxim that has been repeated throughout this litigation is that the class action procedure cannot be used to expand or abridge the statutory or due process rights of the litigants. However, in an effort to conform the procedures of the Right to Cure Act with the peculiarities of class litigation, the Court has done just that.

First, the Court is allowing those who have not complied with the Act to be participants in this litigation. The explicit requirements of the Act are that a claimant

serve the builder with a notice of defect 90 days prior to filing the lawsuit. Here, by allowing homeowners to become members of the class before complying with these requirements, the Court is rewriting an essential aspect of the statute.⁵ In addition, the Act provides that if the Act is not complied with pre-suit, the matter must be stayed until compliance. The Court has not taken into consideration how it will determine that the Act has been complied with and does not address the very real possibility that not all of the putative class members will comply. Therefore, the Act is rendered meaningless and the rights and protections afforded by the act are nullified.

Second, the Act provides a 15-day period to seek clarification. S. C. Code Ann. § 40-59-840. The Court has abrogated SCSP's right to seek clarification of the notice of defect in the event there is any uncertainty. This right is an integral part of the Act, and the protection afforded by this provision is being denied to the Defendants.

Third, although the Court nominally gives SCSP 60 days to inspect the residences in response to a notice of defect, given that it could receive as many as 1000 every 45

⁵ The General Assembly has expressly stated that the purpose of this Act is to provide for pre-litigation dispute resolution.

WHEREAS, the General Assembly finds that South Carolina needs an alternative method to resolve legitimate construction disputes that would reduce the need for litigation, while adequately protecting the rights of homeowners; and

WHEREAS, the General Assembly declares that an effective alternative dispute resolution mechanism in certain construction defect matters should involve the claimant filing a notice of claim with the construction professional that the claimant asserts is responsible for the defect and providing the construction professional with the opportunity to resolve the claim without litigation. . . .

Act 82, 2003 S.C. Acts and Jt. Resolutions, p. 943.

days, the Court is effectively allowing only about 20 minutes per house over this span of time. The statute allows 30 days to conduct an investigation and make an offer to compromise. S.C. Code Ann. § 40-59-850 (A).

Finally, the process outlined by the Court denies SCSP the opportunity to negotiate and resolve claims in the manner intended by this legislation. For example, SCSP would not have the ability to reach a direct settlement with a homeowner who had not opted out because the Court would have to determine whether an individual homeowner's settlement does prejudice to the rights of the other members of the class and may require court approval/input for each settlement which is incompatible with the Right to Cure Act. Also it would negate the efficiency under Rule 23. See Premium Inv. Corp. v. Green, 283 S.C. 464, 324 S.E.2d 72 (Ct. App. 1984) (Individual members of a class may settle their claims against a party to the class action provided they are not class representatives, assumed no fiduciary duty to the class and their settlement does not prejudice the rights of other members of the class"). Also there may be ethical considerations to contact the homeowners and to settle their claims.

These modifications are in direct contravention of the Court's obligation to protect these statutory rights when seeking to create a class. Moreover, at the end of it all, the conflict of interest between class counsel and class members arising from the RTC process will deprive SCSP of the *res judicata* benefit of the class action. In the event that a class member is dissatisfied with the outcome of the class litigation (possibly because the ultimate distribution is less than an offer of settlement), the class member could point to the conflict as a means of nullifying his decision to participate in the class

B. Requiring Class Members to Provide Notice of Defect Creates a *de facto* Opt-In Class

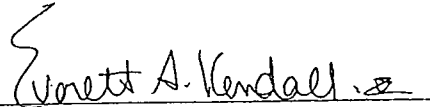
Opt-in class actions are not allowed under South Carolina Law. Salmonsens v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008) (under Rule 23, South Carolina law specifically prohibits a class action to be an opt-in). Compliance with the Right to Cure Act cannot be done after class certification because it would require action on the part of the class members which would be identical to an opt-in class action instead of an opt-out class action. The Court's procedure of requiring notice after the expiration of the opt-out period is no remedy for this fatal defect. Assuming that it is possible to determine who has not complied, the result of non-compliance will be to either stay the entire case until there has been 100% compliance, or dismiss these claims with prejudice. Any other action is an illegal opt-in procedure.

This Class Order by the circuit court picks up where the Supreme Court left off in Grazia. In the previous appeal, the Supreme Court addressed a question of law based purely on the pleadings. The holding overturned the trial court on the narrow issue of whether the Right to Cure Act made class action unavailable to all litigants in cases alleging defects in residential construction. The Court explicitly left open the question of how the two inter-related in the event a class were certified. Etc.

CONCLUSION

For the reasons set forth herein, the Respondent's Motion to Dismiss should be denied and this Court should consider the entire Class Order. South Carolina State Plastering joins in and incorporates the arguments made by Dell Webb Communities, Inc. and Pulte Homes, Inc. in the related appeal arising out the same orders.

Respectfully Submitted,

A handwritten signature in dark ink, reading "Everett A. Kendall, II". The signature is written in a cursive style with a large, stylized "E" and a small "II" at the end. It is positioned above a horizontal line.

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State Plastering, LLC

July 23, 2012
Columbia, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396
Case Tracking No.: 2012-212212

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated
Plaintiffs, ... Respondents,

v.

South Carolina State Plastering, LLC, ... Appellant.

South Carolina State Plastering, LLC, ... Appellant,

v.

Del Webb Communities, Inc., Pulte Homes,
Inc., and Kephart Architects, Inc. . . Third-Party Defendants.

**RESPONDENTS' REPLY TO APPELLANT SCSP'S RETURN TO
RESPONDENTS' MOTION TO DISMISS APPEAL**

RECEIVED
AUG 01 2012
SC Court of Appeals

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Attorneys for the Respondents

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

INTRODUCTION

Appellants in their Return advance no arguments which could cause this Court to overturn years of jurisprudence stating that Class Certification Orders are interlocutory and not appealable. They wholly fail to distinguish this Court's Order in the companion Class case of *Lancaster v. Del Webb, et al*, which stated clearly the non-appealability of a virtually identical Certification Order involving Del Webb/Pulte and which was served on Pulte's counsel prior to its initiating the instant Appeal.

A. The Class Certification Order does not affect a mode of trial so as to be appealable nor does it deprive Appellants of substantial rights.

Appellants can cite no precedent which states that an interlocutory Class Certification Order is appealable pursuant to one or both of their above theories. The *Salmonsens* decision (377 S.C. 442, 661 S.E.2d 81 (2008)) cited was appealable only because it was defective in the manner of certification of the Class itself-creating an impermissible "opt-in" Class. Such is manifestly not the situation here, indeed the next step in this process is service on all putative class members of a Notice and

Exclusion form - to permit opt-OUTS not opt-IN's. The notion advanced by SCSP that compliance with the subsequent Right to Cure Statute creates an "opt-in" Class is unsupported by any case law, logic, or indeed, anything other than an opinion of defense counsel.

The concept of "Mode of Trial" is usually addressed to jury or non-jury trials. This has not yet been addressed but there is nothing in this record to indicate that the Class Certification Order deprives any party of a jury trial.

Del Webb/Pulte cites no precedent for its proposition that the Certification Order is appealable as affecting "Substantial Rights." Indeed, this section of its Return seems to consist of an attack on the Trial Court - wholly unwarranted.

B. SCSP's Complaints concerning the management of the Right to Cure notice and response are directed to an interlocutory case management mechanism - not an appealable final Order.

As it has consistently done below, SCSP complains about the case management procedure for providing it the opportunity to offer a settlement to the Plaintiffs. Of course, SCSP has had six years and nothing has prevented it from offering a resolution to this class - the result has been zero. Now, it just does not like the proposed

mechanism by which the Court proposes that Plaintiffs can notify SCSP, SCSP can inspect and offer to settle. This hardly rises to the level of an appellate issue even if there were any problems with this proposed mechanism - which there is not, as a facial reading of the Order will demonstrate.

C. There is no Authority supporting Del Webb/Pulte's theory that an Appellate Court can combine a first-filed defective Appeal with a later filed separate Appeal in order to bootstrap jurisdiction over the defective Appeal.

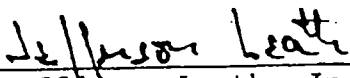
Del Webb/Pulte and SCSP have filed subsequent Appeals (Del Webb/Pulte Case Tracking No.: 2012-212364, filed July 9, 2012; and SCSP Case Tracking No.: 2012-212212, filed July 12, 2012) of the Trial Court's vacating of an injunction preventing Respondents' counsel from communicating with putative class members. Understanding that it is on shaky ground in attempting the Appeal of the Certification Order, Del Webb/Pulte seeks to create a theory of "Pendent Jurisdiction" asking this Appeals Court to consolidate the separate appeals for purposes of saving this first defective Appeal. No precedent cited supports this jurisdictional stretch. In the matters cited, legitimate Appeals were filed which had as an ancillary matter, a non-appealable issue, which the Appeals court considered. The Appeals Court noted that in such

circumstances, the ordinarily non-appealable ancillary issue can also be considered for reasons of judicial economy. No decision has stated what Del Webb/Pulte urges on this Court - to take a wholly non-appealable Appeal, then somehow combine it with a subsequently filed separate Appeal of a different Order so as to create jurisdiction over the first defective Appeal.

CONCLUSION

As noted in Respondents' initial filings, the present Appeal is an intentional delay tactic, and should be dismissed. Coming as it does on the heels of an Order from this Court directly on point in the Lancaster matter, this Court should additionally conduct an inquiry pursuant to Rule 269, SCRAP.

Respectfully Submitted,


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Dated: July 30, 2012

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396

RECEIVED
SEP 17 2012
SC Court of Appeals

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs,..... Respondents,

v.

South Carolina State Plastering, LLC,..... Defendant,

and

South Carolina State Plastering, LLC,..... Defendant,

v.

Del Webb Communities, Inc. Pulte Homes, Inc.
and Kephart Architects, Inc., ... Third-Party Defendants,

Of whom Del Webb Communities, Inc., and
Pulte Homes, Inc. are Appellants.

PETITION FOR REHEARING

This Court's Order of August 31, 2012, grants the Respondents' motion to dismiss the above-captioned appeal. This Court ruled that the appealed "orders are not immediately appealable" without mentioning or specifically ruling upon the grounds raised by Appellants Del Webb and Pulte in their Return to Motion to Dismiss. This Court also did not mention or specifically rule upon the grounds raised by South Carolina State Plastering in its Return to

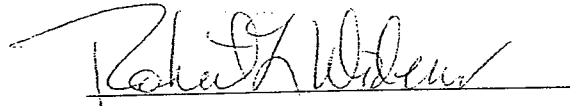
Motion to Dismiss its appeal of the same orders – Del Webb and Pulte had incorporated State Plastering's grounds in their Return.

Del Webb and Pulte respectfully request this Court to issue an amended order that rules specifically upon the grounds raised in the returns to the motions to dismiss so that they may file a more informed petition for rehearing. Absent such an order, Del Webb and Pulte hereby renews as grounds for rehearing the arguments made in the Return of Del Webb and Pulte, as well as the Return of State Plastering, copies of which are attached hereto and incorporated herein by reference.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should grant rehearing and deny the motion to dismiss.

Respectfully Submitted,



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ATTORNEYS FOR APPELLANTS,
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Columbia, SC
September 17, 2012

ATTACHMENTS

Del Webb /Pulte's Petition for Rehearing included two attachments, which have been excluded here to avoid duplication and appear in this Joint Appendix (JA):

Del Webb / Pulte's Return to Motion to Dismiss Appeal (JA 072-156)

State Plastering's Return to Motion to Dismiss Appeal (JA 180-189)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396
Case Tracking No.: 2012-212364

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs, ... Respondents,

v.

South Carolina State Plastering, LLC, ... Defendant.

South Carolina State Plastering, LLC, ... Defendant,

v.

Del Webb Communities, Inc., Pulte Homes,
Inc., and Kephart Architects, Inc. Third-Party Defendants.

Of Whom Del Webb Communities, Inc., and
Pulte Homes, Inc. are Appellants.

**RESPONDENTS' RETURN TO DEL WEBB/PULTE'S
PETITION FOR REHEARING AND
MEMORANDUM IN SUPPORT OF RULE 269 SCRAP MOTION**

INTRODUCTION AND SUMMARY

This brief is filed in opposition to Pulte's Petition for Rehearing. For the reasons stated below, not only should Pulte's Petition be denied but this Court should issue an Order pursuant to SCRAP 269 finding that this Appeal and Petition is frivolous and filed solely for the purpose of delay and fashion an appropriate remedy. After receiving notice of this Court's dismissal of its Appeal of the Court's Class Certification Order, Del Webb/Pulte has now petitioned for a rehearing. In so doing, it cites nothing new but rather relies on arguments which were fully briefed by both sides prior to the Dismissal. In their Motion to Dismiss the Appeal filed on June 21, 2012, Respondents also moved this Court to conduct a Rule 269 SCRAP inquiry into the issue of whether, instead of filing legitimate Appeals, Webb/Pulte's actual motive was delay in violation of that Rule. As is shown below, Pulte's entire strategy in this case is centered on delay, not only in this Appeal, but also in a companion Class Appeal in the matter of *Lancaster, et al vs. Del Webb, et al*, Appellate Case No. 2012-210927. Del Webb/Pulte's conduct in filing Notices of Appeal of orders which it knows do not constitute final adjudications and therefore are not appealable, and its continual pursuit of these improper Appeals will reveal to this Court a pattern of behavior which must be dealt with in accordance with the requirements of Rule 269.

THE SUN CITY STUCCO AND TRIM CLASS CASES

As this Court is fully aware, there exist two Class cases involving the Del Webb/Pulte Sun City development. The instant *Grazia* case involving 4,300 homes with

allegations of defectively designed and installed stucco exteriors, and the *Lancaster* case, involving fewer homes with allegations of defective trim manufactured by Georgia Pacific Corporation and sold by Del Webb. Lower Courts have certified classes in both cases, and Del Webb has filed Appeals of these orders. Additionally, there are approximately 140 cases on the Beaufort County docket filed by individual homeowners against Del Webb/Pulte, Del Webb filed an Appeal in one of them (*Carlson, et al v. South Carolina State Plastering, LLC, et al*, Case No. 2008-CP-07-3386) following the Lower Court's Order that Pulte had waived any right to arbitration contained in its sales contract by waiting to seek enforcement of arbitration and instead utilizing the Court system.

DEL WEBB/PULTE'S APPELLATE ACTIVITIES IN THE STUCCO CASES

As noted above, Del Webb/Pulte has appealed virtually every Order issued by the Lower Court, whether or not appealable. In the instant Appeal, Pulte filed an Appeal of a Class Certification and case management order. When Pulte filed its Appeal, it had actual notice that the Lower Court's Order was not appealable, but filed the Appeal in spite of that knowledge. By this Petition Pulte now seeks to perpetuate that conduct. Its Appeal was filed on June 7, 2012. Prior to that date, it had received the Order from this Court in *Lancaster, et al v. Georgia-Pacific Corporation, et al*, Case No.: 2007-CP-07-3166, in which this Court reiterated that Class Certification Orders are not immediately appealable. As further evidence of this knowledge of non-appealability, Pulte also filed a document entitled, "Motion to Determine Appealability" - presumably attempting to

excuse its conduct in filing this patently improper Appeal, having just been told in a companion case that such an Appeal was subject to dismissal.

Respondents filed their Motion to Dismiss this Appeal, both sides fully briefed the issues raised by Appellant, and this Court issued its Order Dismissing this Appeal having considered those arguments. Now once again, Del Webb/Pulte attempts to keep the stucco class in the Appellate Courts and out of the Lower Court, where Class Notices will issue, discovery will be conducted, and a trial can take place. In its Petition for Rehearing, Pulte raises nothing new, nothing not already considered by this Court, and advances no reasoning entitling it to a rehearing. What it appears to be seeking is to require this Court to issue specific rulings on each of its complaints regarding the Class procedure as embodied in the case management section of the Order presumably for use either in the Lower Court or for further Appellate attempts. This procedure has never been the practice of this Court.

Concurrently, in Appeal No. 2012-212364 in the *Grazia* case, Pulte filed another Appeal from the Lower Court's dissolving an injunction prohibiting Class Counsel from discussing the Class case with class members. A review of this Appeal will demonstrate it lacks merit, and represents, at best, a minor, collateral issue, having little or no bearing on the ultimate decision to be made at the trial of the Class case.

In Appeal No. 2012-202907 in the *Carlson* case, this Appellant asserted a right to arbitrate rather than litigate, pursuant to language in its sales contract. It has appealed the Lower Court's finding of waiver, and again, an examination of that Appeal will demonstrate a highly questionable position.

DEL WEBB/PULTE'S APPELLATE ACTIVITIES
IN THE LANCASTER TRIM CASE

Following its pattern of seeking delay at all costs, in the *Lancaster* case, Pulte has appealed essentially every Order of the Lower Court, from Class Certification orders, to case management Orders - none of which are appealable, as this Court has found. Now it has, as here, petitioned for Reconsideration of the Dismissal of that Appeal. In *Lancaster*, Judge Roger Young certified the Class, then issued case management orders. Significantly, below, this Appellant asked the Lower Court to conduct discovery of each Class Member and asked for a stay which, if granted would have prolonged almost indefinitely, any ultimate Class trial. The Lower Court declined. Thereafter, Del Webb appealed from six Orders. After the Appeal of the six interlocutory Orders, Del Webb then requested a conference call to ask the Lower Court to confirm Del Webb's position that all of its six Orders issued were stayed because of these Appeals. The Lower Court declined to so rule, stating, "I find that a legitimate question exists as to whether any of the interlocutory orders appealed by Del Webb and Georgia-Pacific is immediately appealable, and I am concerned that they are not. If the appeals are improperly taken, they should have no rightful impact upon the continued progress of this now four-plus-year old case. " (See attached Exhibit "A").

Del Webb's response to this Order? Appeal it, after asking the Lower Court to reconsider it. This Court dismissed the latter two Appeals as moot on June 1, 2012.

Del Webb's true motive - delay - can be seen in its activities in the Lower Court prior to its Appeal of the eight Orders of the Lower Court, especially, its Appeal of the preliminary case management and scheduling order. It did not like the Court's Scheduling Order, as such Order puts the case on track for a trial on the merits, which

Pulte hopes to indefinitely postpone. Indeed reference to the Proposed Discovery Scheduling Order it submitted to the Lower Court in the *Lancaster* case presents an accurate picture of its strategy (attached as Exhibit "B"). Therein, Pulte proposes a ten (10) year Discovery schedule and a trial which will take place in 2024, setting trial 16 years after initiation of the claims. Presumably, by that time, most of the claimants in this retirement community -and even counsel - will no longer be able to prosecute these claims.

DELAY SIGNIFICANTLY HARMS THE GRAZIA CLASS

The Lower Court's Order, the subject of this Appeal, sets up a procedure wherein the Defendants have the right to Notice of Defects, and an opportunity to settle these claims pursuant to the Right to Cure Construction Dwelling Defect Act. For six years, Pulte has vigorously asserted the importance of that Act. The Order at issue envisions a procedure wherein after a Class is formed after Notice and opt-outs, Del Webb/Pulte can inspect, and make offers. The homeowners will be aware of their rights by then, having been represented by Class Counsel and oversight provided by the Court.

With this Appeal, and the delay it causes at the trial level, Del Webb/Pulte has felt free to ignore and contravene the procedure the Lower Court has ordered. Instead, it has embarked upon a course of conduct designed to eliminate as many Class members as possible by unilaterally soliciting "opt-out agreements" in advance of Class Notice publication where homeowners are not represented by counsel and do not know their rights under the Class Order. They cannot know of their rights, as the stay caused by these frivolous appellate proceedings has prevented the notice forms from being

approved and issued. Having learned of these activities, Respondents filed a Rule to Show Cause on Jan 23, 2012, (attached as Exhibit "C," caselaw exhibits D and E omitted) and this Appeal has effectively stayed a hearing on this Motion.

The document which Del Webb/Pulte requires an unrepresented homeowner to sign, in exchange for patch repairs to their residence (attached as Exhibit "D") is entitled: "Sun City Hilton Head Homeowner Request for Stucco Repairs and Agreement Not to Participate in Class Actions." This document is designed as a release and is designed to reduce or eliminate the Class. Upon information and belief, this partial repair/Class Exclusion outside of the judicial framework, and in total derogation of the Lower Court's Class Order is ongoing, and has become a large operation, the true scale and effect of which will not be revealed until the Lower Court conducts a hearing on this Rule to Show Cause and issues a Class Notice.

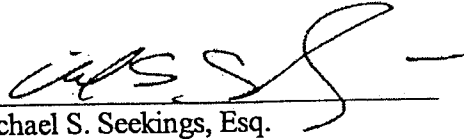
CONCLUSION

If, by means of continued Appeals, a defendant can avoid discovery and trial while divesting the Lower Court of jurisdiction, it maintains a huge litigation advantage. If, during this time of delay, it is able to implement a plan to reduce or eliminate the size of the potential Class claims it is facing, it not only has an advantage, it has also scored a large partial victory, never having to face justice in a courtroom.

Very respectfully, Respondents ask this Court to examine the overall situation here and decide, as Rule 269, SCRAP, indeed requires, what is the proper role of an Appellate Court. Is it to correct errors of law in matters requiring judicial oversight, or is it to serve - by means of delay - as an adjunct to litigation strategy?

One of the key phrases in Rule 269 is the following: "and discouragement of like conduct in the future may require." Without the inquiry by this Court that the Rule requires, it is probable that the strategy outlined above will continue, and every case management order - or indeed, any other pre-trial order - will end up before this Court within 30 days of its issuance. The drafters of Rule 269 understood the pernicious effects of delay in litigation. This is especially true here, where the population of the Class is made up of aging retirees, who, quite, understandably, are hoping for a speedy resolution to the problems with their homes. This Court should accordingly grant the Respondent's Rule 269, SCRAP Motion.

Respectfully Submitted,



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Attorneys for the Respondents

Dated: Sept. 25, 2012

Charleston, South Carolina

EXHIBIT
A

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO. 2007-CP-07-3166

JIM LANCASTER, NANCY)
LANCASTER, ART HOLLAND,)
JEANNETTE HOLLAND, WENDELL)
TURNER, PHYLLIS TURNER, JACK)
BENNETT, JOAN BENNETT, ON)
BEHALF OF THEMSELVES AND)
OTHERS SIMILARLY SITUATED,)

PLAINTIFFS,)

vs.)

GEORGIA-PACIFIC CORPORATION)
AND/OR GEORGIA-PACIFIC LLC,)
GRAYCO HOME CENTER, INC., DEL)
WEBB COMMUNITIES, INC., AN)
ARIZONA CORPORATION, RAZOR)
COMPONENT SYSTEMS, INC., A)
SOUTH CAROLINA CORPORATION,)
RAZOR ENTERPRISES, INC., A)
TEXAS CORPORATION, AND DJ)
CONSTRUCTION CO., LLC,)

DEFENDANTS.)

**ORDER REGARDING
INTERLOCUTORY APPEALS**

2012 MAY 14 AM 11:51
RUSSELL
BEAUFORT COUNTY, S.C.
CLERK OF COURT

THIS MATTER COMES BEFORE THE COURT via Defendant Del Webb Communities, Inc.'s ("Del Webb") request for a conference call. The requested conference call was held on May 11, 2012, during which the impact of the appeals recently taken by Del Webb and Defendant Georgia-Pacific Corporation and/or Georgia-Pacific LLC ("Georgia-Pacific") was discussed.

Both Del Webb and Georgia-Pacific have appealed six interlocutory orders that the Court has entered in the conduct of this class action. The Plaintiffs have filed motions in the Court of Appeals to dismiss the appeals taken by Del Webb and Georgia-Pacific on the grounds that the orders identified in their respective notices of appeal are interlocutory and not immediately

appealable. The Plaintiffs have also moved the Supreme Court to certify and expedite the appeals for its direct and immediate review; particularly, immediate and expedited consideration and disposition of their motions to dismiss the appeals.

Del Webb asks this Court to rule that all of the orders identified in its notice of appeal are stayed because of its appeal, to include the present May 15, 2012 opt-out deadline set forth in the class notice, which notice was mailed to the putative class members by the Plaintiffs' counsel following this Court's order approving and authorizing class notice. Georgia-Pacific does not ask that the opt-out deadline be stayed, but asks for a stay of the Court's preliminary case management and scheduling order with respect to matters after the opt-out deadline.

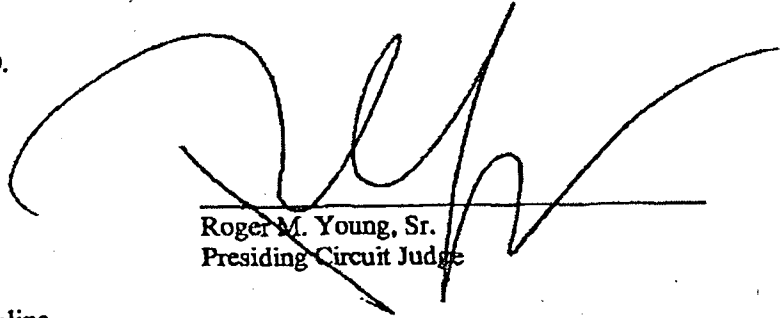
After due consideration of this matter, I find that a legitimate question exists as to whether any of the interlocutory orders appealed by Del Webb and Georgia-Pacific is immediately appealable, and I am concerned that they are not. If the appeals are improperly taken, they should have no rightful impact upon the continued progress of this now four-plus-year old case. See S.C. Pub. Serv. Auth. v. Arnold, 287 S.C. 584, 340 S.E.2d 535 (1986) ("Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay proceedings in the lower court.") Moreover, I find that a stay of the appealed orders is not necessary to preserve the jurisdiction of the appeal or to prevent a contested issue from becoming moot. Further still, I find that, under the circumstances, a stay of the appealed orders is not in the interests of justice or judicial economy. Accordingly, I find that the orders identified in Del Webb and Georgia-Pacific's notices of appeal are and should be operative and decline the requests to stay these orders.

<SIGNED ON THE FOLLOWING PAGE>

Page 2 of 3

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AND IT IS SO ORDERED.



Roger M. Young, Sr.
Presiding Circuit Judge

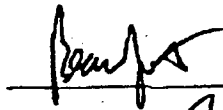
 South Carolina
Dated: 5/14/12

**EXHIBIT
B**

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

Jim Lancaster, Nancy Lancaster,
Art Holland, Jeanette Holland,
Wendell Turner, Phyllis Turner, and
Jack Bennett, Joan Bennett,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

Georgia-Pacific Corporation and/or
Georgia Pacific, LLC,
Grayco Home Center, Inc.,
Del Webb Communities, Inc.,
an Arizona Corporation;
Razor Component Systems, Inc.,
a South Carolina Corporation,
Razor Enterprises, Inc., a Texas
Corporation, and
DJ Construction Co., LLC,

Defendants.

Case No. 2007-CP-07-03166

**PROPOSED DISCOVERY
SCHEDULING ORDER**

1. Plaintiffs shall send court-approved class notice to all putative class members by April 15, 2012.
2. The opt-out/exclusion shall expire on June 1, 2012.
3. Each class member shall be required to comply with the provisions of the South Carolina Notice and Opportunity to Cure Residential Construction Defects Act. (Each class member must provide written notice under the Act to include the specific construction defects alleged to be found on the house, the specific location of said alleged defects, and the specific damage and locations of said damage that is a result of the alleged defects on that particular house.) The written notice must be signed by the homeowner. Any class member that has not

provided written notice to the Defendants pursuant to the Act by November 30, 2012 shall have his/her case dismissed with prejudice.

4. Defendants shall have until May 30, 2013 to complete house inspections pursuant to the Act and to make any offers to repair and/or settle the individual claims with the individual homeowners. On or before June 15, 2013, plaintiffs' counsel shall provide to the court and to the defendants the list of remaining class members (that neither opted out nor settled pursuant to the Right to Cure Act).

5. Defendants shall have until July 30, 2013 to file motions to dismiss individual class members' cases (*i.e.* motions pertaining to compelling arbitration, pursuant to the statute of repose and other similar legal issues) or to amend pleading to add additional parties or cross claims.

6. Plaintiffs shall have until August 31, 2013 to file any responsive pleadings to the motions to dismiss.

7. The court shall rule on said motions to dismiss by October 15, 2014, and plaintiffs' counsel shall have ten days from the date of the order to update the list of class members as to each defendant.

8. Defendants' counsel shall work with plaintiffs' counsel to attempt to agree on uniform written discovery requests to go to each class member. If the parties cannot agree to the written discovery requests, then, no later than December 15, 2014, the defendants shall file with the court the written discovery requests being sought from each class member, and the court shall have a hearing to approve the content of the proposed written discovery.

9. Plaintiffs shall designate all expert witnesses to be used at trial, and shall provide to the opposing counsel a report signed by the expert containing all opinions to be offered by the

expert with regard to liability and damages as to every remaining class member on or before July 15, 2015.

10. All class members' responses to the uniform written discovery requests shall be due on or before July 15, 2015. Any class member who does not fully respond by this date shall have his/her claim dismissed with prejudice.

11. The parties may have until July 15, 2023 to complete discovery with regard to all parties and with regard to plaintiffs' experts (including but not limited to depositions of class members, depositions of other witnesses, depositions of defendants and/or their employees, written discovery requests to defendants and/or to individual class members, and depositions of plaintiffs' experts, etc.).

12. Defendants shall designate all expert witnesses to be used at trial, and shall provide to the opposing counsel a report signed by the expert containing all opinions to be offered by the expert with regard to liability and damages as to every remaining class member on or before September 15, 2023.

13. Plaintiffs shall complete the depositions of defendants' experts by November 15, 2023.

14. The parties shall have until January 15, 2024 to submit motions for summary judgment as to any individual class member.

15. The parties shall be ready to try the case no sooner than two (2) months after the court rules on the parties' motion(s) for summary judgment.

IT IS SO ORDERED.

Roger Young, Circuit Court Judge

WE AGREE AND CONSENT:

Joseph E. DaPore, Esquire

Amanda K. DeMato, Esquire
YOUNG CLEMENT RIVERS, LLP
Post Office Box 993
Charleston, SC 29402

By: _____

Counsel for the plaintiffs

G. Mark Phillips, Esquire
Ryan A. Earhart, Esquire
NELSON MULLINS RILEY & SCARBOROUGH
Post Office Box 1806
Charleston, SC 29402

By: _____

Attorneys for the defendant Georgia-Pacific Corporation

McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, SC 29211

By: _____
A. Victor Rawl, Jr.

Attorneys for the defendant Del Webb Communities, Inc.

BROWN & BREHMER
Post Office Box 7966
Columbia, SC 29202

By: _____
Karl S. Brehmer, Esquire

Attorneys for Grayco Home Center, Inc.

PRITCHARD & ELLIOTT
129 Broad Street
Charleston, SC 29401

By: _____

James H. Elliott

Attorneys for Razor Component Systems, Inc.

McANGUS, GOUDELOCK & COURIE

Post Office Box 12519

Columbia, SC 29211

By: _____

Sterling G. Davies, Esquire

Attorneys for defendant DJ Construction

EXHIBIT
C

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
C/A NO. 07-CP-07-1396

2017 JAN 23 PM 4:03
CLERK OF COURT

ANTHONY AND BARBARA GRAZIA,
individually and on behalf of all other
similarly situated Plaintiffs,

Plaintiffs,

vs.

SOUTH CAROLINA STATE
PLASTERING, LLC.

Defendant.

**PLAINTIFF CLASS' RULE TO SHOW
CAUSE AND REQUEST FOR
IMMEDIATE INJUNCTIVE RELIEF**

SOUTH CAROLINA STATE
PLASTERING, LLC,

Third-Party Plaintiff,

vs.

DEL WEBB COMMUNITIES, INC.,
PULTE HOMES, INC., and KEPHART
ARCHITECTS, INC.,

Third-Party Defendants.

INTRODUCTION AND SUMMARY

The Class Certification Order was issued by this Court and filed in Beaufort County on December 19, 2011. Prior to the issuance of that Order, SINCE the issuance of the Order and in direct contravention of the Order, Pulte has engaged and continues to engage in the improper conduct of contacting represented parties and attempting to subvert the Class Action process stated in this Court's Order. The sole objective of this improper contact is to influence these parties to opt-out of the Class before a Class Notice has even been distributed. The only remedy

available which will curb these improper tactics is an injunction, and a further hearing with an Order so that the Court can discover the extent of this conduct and its effects. Additionally, Pulte has been engaged and is engaged in a process of destroying and spoliating evidence by attempting patching of the stucco systems on some houses belonging to putative class members. Again, this practice must be halted.

DISCUSSION

This case has been pending for five years. Plaintiffs believe that Pulte has been engaged in making spot patches of residences, resulting in the destruction of evidence, the entire time. In the Order, the Class is clearly defined as:

All individuals, corporations, unincorporated associations, or other entities that currently own stucco-clad homes in Sun City Hilton Head to which SCSP applied the exterior stucco in whole or in part prior to July 31, 2007, which allegedly are damaged due to (a) the lack of head flashing above doors and windows, (b) the failure to install stucco control joints, and/or (c) the presence of moisture encapsulation by the failure to leave a gap between the stucco exterior and the structure slab.

Once this Order took effect, since there is no opt-in Class, ALL homeowners at Sun City meeting this description became Class Members unless and until they exclude themselves, and since Class Counsel represent the Class, they, as putative Class members are represented by Class Counsel.

As a result of information obtained about Pulte's ongoing activities as set forth above, Class Counsel put Pulte's counsel on notice of our representation, and asked Pulte to cease the improper conduct and contacts. The exchange of letters attached documents this notification process, and at no time did Pulte agree to cease in its efforts to contact or influence Class members, indeed it refused to do so. (Attached see Exhibit "A").

On January 18, Class Counsel was informed that agents representing at least one and possibly both Defendants were making contact with Class members seeking to induce them to opt-out of the Class in exchange for what is believed to be spot repairs, in derogation of the Court's Order and the process outlined therein. Counsel was able to obtain a copy of the document furnished to the Class Member which it is believed is routinely being furnished to other Class Members as well as part of an ongoing scheme to influence Sun City homeowners to opt out of the Class Action before receiving any Notice or explanation of their rights from the Court or Class Counsel. The contents of this document, attached as Exhibit "B," are startling.

First, is the acknowledgement in paragraph two that the homeowner with whom the Defendants are meeting is represented by counsel - thereby acknowledging an improper contact up front;

Second, is the notification of the Class Action - not the Notification which this Court has yet to approve;

Third, is the implicit and incorrect assertion that Pulte, after making its patch repairs, would be subject to a "double recovery" if the Class Member exercised their rights to pursue full recovery pursuant to the Class mechanism;

Fourth, is the General Release, that the Class Member agrees not only not to participate in "any way" (refusing to testify as a subpoenaed witness?) in the present Class Action;

Fifth, a General Release not to participate in "any future class action" (no matter what the subject);

Sixth, the confusing misrepresentation regarding the notion of an "opt-in" Class; and, especially;

Seventh, the General Release of any inclusion in the existing Class with no notification of the alternatives, or any explanation of the options available to the homeowner.

This is no more than an intentional end-run around the Order of this Court by sophisticated corporate Defendants, seeking, and indeed gaining, improper advantage in this litigation. As such it cannot be tolerated.

On Monday, January 16, 2012, almost four weeks after the Class Certification Order had been filed, Class Counsel received the attached e-mail from a client (attached as Exhibit "C") indicating that a Pulte representative, Allison Tucker, had addressed a group of putative Class members (with no prior notification to Class Counsel), at a meeting of the NRC at Sun City. At this meeting, the Pulte representative made representations about this litigation, made representations about counsel, and additionally, sought to influence this group of Class members to opt out of the litigation.

**REMEDIAL ACTION IS WARRANTED AND NECESSARY TO PRESERVE THE
RIGHTS OF THE PARTIES AND SUBSTANTIAL JUSTICE**

***ONCE A CLASS IS CERTIFIED, CLASS COUNSEL IS DEEMED TO HAVE AN
ATTORNEY-CLIENT RELATIONSHIP WITH EACH CLASS MEMBER.
ACCORDINGLY, COMMUNICATIONS BY THE OPPOSING PARTY ARE GOVERNED BY
THE APPLICABLE ETHICAL RULES, WHICH INVARIABLY REQUIRE THAT SUCH
COMMUNICATIONS GO THROUGH CLASS COUNSEL.***

(Greer: A Practitioner's Guide to Class Actions ABA 2010 at p. 37)

Attached are copies of the U.S. District Court's decision in the matter of *Kleiner v. First National Bank of Atlanta*, 102 F.R.D. 754 (USDC ND Georgia 1983) and its affirmance by the 11th U.S. Court of Appeals (751 F.2d 1193) in 1985 (Attached as Exhibits "D" and "E"). In *Kleiner*, a class of bank customers had been certified, but the Notices had not yet been sent out. In that interim, the bank, with advice of counsel, embarked on a campaign to seek opt-outs from the putative Class Members. After -apparently - full discovery on the facts surrounding what

happened, and who caused it, the Court ultimately issued sanctions fining the Bank, and disqualifying both outside counsel and the bank's general counsel. On Appeal, the Court's actions were affirmed by the 11th Circuit, with the exception of disqualification of the bank's general counsel who had not acted as lead counsel.

The Defendants' Appeal of these sanctions involved First Amendment challenges to the lower Court's previously issued orders which had directed the Defendants not to communicate with the putative Class. This was rejected. At the time of these decisions, Rule 23 was only 17 years old, having been introduced in 1966. A First Amendment challenge was therefore at least a colorable argument. Forty-six years later, however, there is no excuse for advising a client that it is permissible - and indeed a good idea - to solicit opt-outs from putative Class Members once Class Certification has taken place and before a Notice has even been issued.

On December 22, 2011, after the Court's Certification Order was filed, Plaintiffs' counsel wrote Pulte's counsel, advising it of the Order and consequences, and demanding: "Please confirm that no further stucco work will be done by Pulte AND NO ADDITIONAL DIRECT CONTACT WILL BE MADE WITH OUR CLIENTS BY PULTE" (emphasis supplied). (Exhibit "A").

The response to this demand by Pulte was in the letter from Attorney Rawl of January 12, 2012, in the next to last paragraph, "Accordingly Pulte and/or Webb will not ignore their customers' service requests or warranty requests. If a homeowner contacts Pulte and/or Del Webb regarding an actual or perceived problem, Pulte and/or Del Webb will address the service if they can." (Exhibit "A").

Remarkably absent from this response was any mention that in connection with these contacts would be the solicitation of opt-outs, and a notification campaign by Pulte employees

such as Allison Tucker at the NRC meeting on January 12, 2012, effectively soliciting opt-outs in exchange for patch repairs. After this January 12 letter, both the Tucker meeting and the opt-out document attached as Exhibit "B," took place. Whether or not counsel advised Pulte that this conduct was permissible is a matter of which Plaintiffs have no knowledge, but which clearly should form the basis of an inquiry by the Court.

Sun City is a tight-knit community of retirees, and Pulte's campaign to seek opt-outs is obviously designed to have the word spread around the community that if any relief is forthcoming, it will be through Pulte and its patching work in exchange for an opt-out of the Class. Imagine the appeal of such a campaign to 80 year-old homeowners who simply want their houses fixed in some fashion - whether correctly or not - and who have waited out the processes of the Court System through five years of delay. The impact of such a one-sided campaign will be - and is designed to be - huge. It has already tainted the judicial process, and promises to do much more damage if not curtailed immediately and sanctioned.

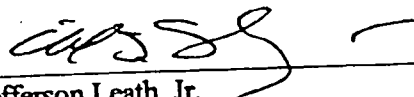
This Court's Order Certifying the Class contemplates an arms-length process whereby homeowners can understand just what potential problems they have, and can have a free and unpolluted decision making process regarding their biggest investment. Pulte's actions are designed to deliberately subvert this process and must be stopped. The process envisioned is one of inspection, and compliance with the Right to Cure Statute so that following inspections if repairs are offered, such offers can be transmitted THROUGH CLASS COUNSEL, with the opportunity for advice and understanding of the options available. The destruction and alteration of evidence by Pulte and its subcontractors cannot be countenanced if an orderly and fair administration of justice is indeed the goal.

This Court has not in the past hesitated to issue appropriate sanctions where merited. (*Wieters v. Bon Secours-St. Francis Xavier, et al*, Case No.: 2006-CP-10-1397). Case law cited in the Court's Order of June 21, 2010, in awarding sanctions against the hospital are equally applicable here, although the Class submits that the conduct at issue here is far more egregious, intentional, and aimed at the subversion of the rights of a large group of homeowners than was the case in *Wieters*.

Therefore at a minimum, the Class, through counsel, urges this Court to take the following action to protect the status quo prior to trial, and to prevent improper conduct and destruction of evidence in the future:

1. Issuing an Injunction preventing any contact by the Defendants with any putative Class Members until further Court Order;
2. Holding a hearing compelling testimony as a precursor to sanctions;
3. Issuing an Order compelling the Defendants to identify all houses on which they or their subcontractors have effected stucco work since original construction and to produce its (and its subcontractors) entire file on each house, and to further identify the author of Exhibit "B" and produce that individual together with Allison Tucker, a Pulte employee, for testimony at the hearing.

LEATH, BOUCH & SEEKINGS, LLP

By: 
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SEGUI LAW FIRM, LLC
Phillip W. Segui, Jr.
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(843) 884-1865

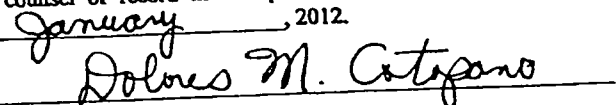
Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: January 20, 2012

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was e-mailed to
all counsel of record in this proceeding this 20th day of
January, 2012.


Dolores M. Catapano

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

Anthony and Barbara Grazia, et al,
[X] Plaintiffs,

CASE NO.
07-CP-07-1396

2012 JAN 23 PM 4:03

v.
South Carolina State Plastering, LLC,
Defendant.

MOTION AND ORDER INFORMATION FORM
AND COVER SHEET

check box above indicating submitting party

Name, S.C. Bar no. and address of plaintiff's attorney
W. Jefferson Leath, Jr. SC. Bar No.: 003244
Leath, Bouch & Seekings, LLP
P. O. Box 59, Charleston, SC 29402

Name S.C. Bar no. and address of defendant's attorney
A. Victor Rawl
McNair Law Firm
P.O. Box 11390, Columbia, SC 29211

Telephone: 843-937-8811 fax: 843-937-0606
e-mail: jl@leathbouchlaw.com

Telephone: 803-799-9800 fax: 803-753-3278
e-mail: vrawl@mcnair.net

- ☒ MOTION HEARING REQUESTED (attach written motion and complete sections I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

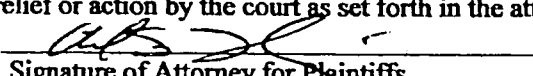
SECTION I: Hearing Information

Nature of Motion: Plaintiff Class' Rule to Show Cause and Request for Immediate Injunctive Relief
Estimated Time Needed: Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

- ☐ Written Order:
☐ Form Motion:

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for Plaintiffs

January 20, 2012
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

- EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE

CODE: _____

Date: _____

CLERK'S VERIFICATION

DATE FILED

Collected by: _____
(print name)

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____



LEATH, BOUCH & SEEKINGS, LLP

COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

December 22, 2011

VIA E-MAIL ONLY

A. Victor Rawl, Jr., Esq.
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211

RE: Anthony and Barbara Grazia, et al v. South Carolina State Plastering, LLC
Case No.: 07-CP-07-1396
LBC No.: 1351.0001

Vic:

It has come to our attention that Pulte has embarked on a course stucco patchwork on a number of homes in Sun City. The effect of the work, and the presumed objective, is to cover over the originally and incorrectly installed stucco. In addition, we believe this work is inconsistent with Judge Baxley's recently entered Order that specifically outlines the procedure for any curative work that might be proposed on any of the 4300 houses that are subject to the Court's directive. Please confirm that no further stucco work will be done by Pulte and no additional direct contact will be made with our clients by Pulte. Thank you for your immediate attention to this correspondence.

Yours truly,

LEATH, BOUCH & SEEKINGS, LLP

Michael S. Seekings

Michael S. Seekings

MSS/sas

cc: John T. Chakeris, Esq.
Phillip W. Segui, Jr., Esq.

MENAIR
ATTORNEYS

December 22, 2011

A. Victor Rawl, Jr.

vrawl@menair.net
T (803) 799-8800
F (803) 753-3278

Michael Seekings
Leath, Bouch & Seekings
P.O. Box 159
Charleston, SC 29402

Re: Grazia, et al. v. South Carolina State Plastering, et al.;
Case No. 2007-CP-07-1396

Dear Mike:

I just received your letter dated December 22, 2011 requesting that Pulte cease all communications with and repairs for its homeowners. I would just like to clarify a few issues with you:

1. Are the lawyers for the Grazias and the putative class in the *Grazia* case requesting that Pulte or Del Webb not return (or ignore) service request calls from Sun City Homeowners with stucco on their houses?
2. Are the lawyers for the Grazias and the putative class in the *Grazia* case requesting that Pulte or Del Webb not conduct any repairs requested by Sun City Homeowners with stucco on their houses?
3. Are you requesting that Pulte or Del Webb tell homeowners that you (the lawyers in the *Grazia* case) have asked Pulte or Del Webb not to talk with them, not to respond to service calls, not to conduct inspections of their house when asked, and not to perform requested repairs?
4. Please specifically describe what you think Pulte and/or Del Webb can/should or can't/shouldn't do with regard to "your clients."
5. How do you claim Judge Baxley's Order in the *Grazia* case affects Pulte or Del Webb with regard to service requests and repairs?
6. Please provide the list of those who you claim to be "your clients" that have claims against Del Webb or Pulte so that I may provide that list to my client and discuss your request with them.

McNair Law Firm, P.A.
1221 Main Street
Suite 1800
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

menair.net

Thank you for your immediate attention to this correspondence.

Michael Seekings
December 22, 2011
Page 2

M C N A I R
ATTORNEYS

Very truly yours,

A. Victor Rawl, Jr.

A. Victor Rawl, Jr.

AVR,jr/plj



LEATH, BOUCH & SEEKINGS, LLP

COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

January 3, 2012

VIA E-MAIL ONLY

A. Victor Rawl, Jr., Esq.
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211

RE: Anthony and Barbara Grazia, et al v. South Carolina State Plastering, LLC
Case No.: 07-CP-07-1396
LBC No.: 1351.0001

Dear Vic:

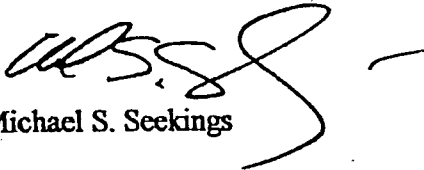
In response to your letter of December 22, 2011, the short answer to your first three (3) questions is yes. Any work done by Pulte on stucco exteriors at Sun City is nothing more than spoliation of evidence and an attempt to bypass the Court's Right to Cure directive and the residents' ability to get complete repair for their stucco problems. Should Pulte be contacted by any Sun City Owner about stucco problems, it is incumbent on you and Pulte to tell us immediately.

To date, we have not advised the residents of Sun City about their rights and obligations as class members because to do so before the issuance of an Order by the court would have been improper. It is certain that many are unaware of their substantial rights. We assume that Pulte has specifically adopted a policy of not informing homeowners of the pending litigation in an effort to bypass their obligation of full repair. This must now stop. Before any repairs are made, you are to contact us with all relevant information about the owner, address and plan of repair and await a response before doing any work.

Thank you for your compliance.

Yours truly,

LEATH, BOUCH & SEEKINGS, LLP


Michael S. Seekings

MSS/sas

cc: W. Jefferson Leath, Esq.
John T. Chakeris, Esq.
Phillip W. Segui, Jr., Esq.
Everett A. Kendall, II, Esq.
Christy E. Mahon, Esq.
David S. Cobb, Esq.

MENAIR
ATTORNEYS

A. Victor Rawl, Jr.

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T (803) 738-8800
F (803) 753-3278

January 12, 2012

Michael Seekings
Leath, Bouch & Seekings
P.O. Box 159
Charleston, SC 29402

Re: Grazia, et al. v. South Carolina State Plastering, et al.;
Case No. 2007-CP-07-1396

Dear Mike:

I received your letter dated January 3, 2011 requesting that Pulte cease all communications with and repairs for its homeowners/customers.

In that letter you indicated that:

1. The lawyers for the Grazias and the putative class in the *Grazia* case are requesting that Pulte or Del Webb ignore service request calls from any Sun City Homeowners with stucco on their houses.
2. The lawyers for the Grazias and the putative class in the *Grazia* case are requesting that Pulte or Del Webb not conduct any repairs requested by Sun City Homeowners with stucco on their houses.
3. The lawyers for the Grazias and the putative class in the *Grazia* case are requesting that Pulte or Del Webb tell homeowners that you (the lawyers in the *Grazia* case) have asked Pulte or Del Webb not to talk with them, not to respond to service calls, not to conduct inspections of their houses when asked, and not to perform requested warranty repairs.

However, you have not answered the following questions that were addressed to you:

1. Please provide the list of those who you claim to be "your clients" that you represent with regard to their claims against Del Webb or Pulte.
2. How do you claim Judge Baxley's Order in the *Grazia* case (in which your clients are not suing Pulte) affects Pulte or Del Webb with regard to responding to homeowners' service requests and requests for repairs?

At this point, you have less than 140 clients that are directly suing Pulte or Del Webb. When those plaintiffs request repairs from Del Webb, they are informed

McNair Law Firm, P.A.
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Mailing Address
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Columbia, SC 29211

menair.net

Michael Seekings
January 12, 2012
Page 2

M C N A I R
ATTORNEYS

that any such request needs to come from counsel (you or your co-counsel). Then, normally, I receive an e-mail from one of your co-counsel requesting that Pulte go inspect and make requested repairs. However, you have not provided to us a list of anyone who you claim to represent that has a claim against Pulte or Del Webb other than those who you have filed a complaint on behalf of (the 140). With regard to the Order in Grazia regarding "preliminary certification", it is unclear as to whether you are class counsel or not. Even if you are deemed to be class counsel, your representation would be limited to the claims alleged by your client against SCSP. You would not represent any of the class members with regard to any of their claims (if they have any) against Pulte or Del Webb (as no such claims have been asserted). Further, with Judge Baxley's new class definition, it is completely unclear what homeowners (if any) are in your "preliminary" class.

Accordingly, Pulte and/or Del Webb will not ignore their customers' service requests or warranty requests.. If a homeowner contacts Pulte and/or Del Webb regarding an actual or perceived problem, Pulte and/or Del Webb will address the service request if they can.

However, if you represent homeowners with individual claims against Pulte and/or Del Webb (other than the 140), please provide us with a list of their names and addresses. Otherwise, you have no basis to try to stop homeowners from requesting and receiving appropriate attention and/or repairs from Del Webb and/or Pulte.

Thank you for your immediate attention to this correspondence.

Very truly yours,



A. Victor Rawl, Jr.

AVR,jx/pkj



LEATH, BOUCH & SEEKINGS, LLP
COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL
January 17, 2012

VIA E-MAIL ONLY

A. Victor Rawl, Jr., Esq.
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211

RE: Anthony and Barbara Grazia, et al v. South Carolina State Plastering, LLC
Case No.: 07-CP-07-1396
LBC No.: 1351.0001

Dear Vic:

In response to your self-serving letter of January 12, 2012, I refer you to pages 11 and 12 of Judge Baxley's Order wherein the class in this case is very clearly defined:

All individuals, corporations, unincorporated associations, or other entities that currently own stucco-clad homes in Sun City Hilton Head to which SCSP applied the exterior stucco in whole or in part prior to July 31, 2007, which allegedly are damaged due to (a) the lack of head flashing above doors and windows, (b) the failure to install stucco control joints, and/or (c) the presence of moisture encapsulation by the failure to leave a gap between the stucco exterior and the structure slab.

These people are our clients and any contact with them by you or Pulte would be and is improper. In my letter of January 3, I make it very clear, and do so again today, that it is incumbent on you to keep us informed about any contact you and your client have with any person or entity that fits within the class definition, regardless of who initiates that contact, and that any repairs be scheduled and completed within the framework of the S.C. Right To Cure Statute and Judge Baxley's Order.

With all due respect, this process should not be too complicated. Those who fall within the class definition have rights that are being circumvented each time you and Pulte make contact with them and do any work that is less than a strip and re-clad.

Pulte is a party to this case and has participated in every hearing and other proceeding leading up to the issuance of the Court's Order. Pulte is now bound by that Order. The homeowners within the defined class are represented by Counsel and are entitled to be fully advised of their rights before any work is done on their homes.

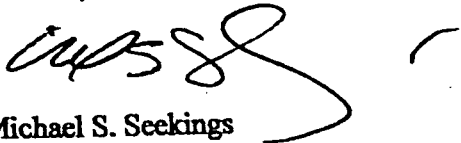
It has been brought to my attention that as recently as last week, a Pulte representative was dispensing legal advice about this case to class members. Included in this advice was the following:

- Judge Baxley has yet to issue an Order on the Class (plainly untrue);
- This matter will take years to resolve (your strategy as exactly stated in the attached excerpt from Oros);
- Lawyers will be first to be compensated (this plainly is an effort to promote opting out);
- Pulte is willing to "fix" (i.e., cover up) problems with stucco if owners "opt-out" (interesting term for a lay person to use in a case where she stated no ruling has been made on the Class issue); and
- All owners will be included in the Class whether they opt-out or not (nonsensical).

I certainly hope that Pulte's legal team did not support or condone this type of contact and dissemination of inaccurate information which is outrageous. While we all applaud zealous advocacy, this activity is beyond the limits of our rules and the Class Order of the Court. We will file a motion promptly.

Yours truly,

LEATH, BOUCH & SEEKINGS, LLP



Michael S. Seekings

MSS/dmc

Enclosure

cc: W. Jefferson Leath, Esq.
John T. Chakeris, Esq.
Phillip W. Segui, Jr., Esq.
Everett A. Kendall, II, Esq.
Christy E. Mahon, Esq.
David S. Cobb, Esq.

1 putative plaintiffs, the putative class members, the
2 people that the Oroses claim to be prosecuting this case
3 on behalf of, they also have to comply with the statute.

4 The defendant has the right, before they're
5 sued, to have notice of what the claim is and have a
6 right to try to cure the claim.

7 And, so, technically, pursuant to the statute,
8 the case cannot be prosecuted against any other or on
9 behalf of any other homeowners until that homeowner has
10 complied with the statute.

11 Now, what does that realistically mean? That
12 means that the case is stayed until all putative class
13 members comply with the statute. And we just argued this
14 exact same motion on Monday, before Judge Dukes, in
15 another class action, these same gentlemen brought
16 against my client. And the problem is that these
17 gentlemen don't represent all 4,000 homeowners in Sun
18 City/Hilton Head. But they are attempting to in a
19 representative capacity. And, so, by actually staying
20 the case, until all putative homeowners comply with the
21 statute, which they have to do, pursuant to South
22 Carolina law, how long is the case going to be stayed?
23 Most likely indefinitely. These are all homeowners that
24 are have to be over 55 to live there. By the time all
25 4,000 comply, which they probably never will, half of

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Charleston (843) 556-2923 1-800-822-8711 FAX (843) 821-6756

1 them will be already be dead.

2 And, so, which leads us to the next rational
3 statement, which other courts around the country have all
4 set down, that the right to cure statute in class actions
5 are incompatible. Since a procedural rule cannot abridge
6 a substantive right and substantive law, you know, the most
7 rational decision would be to say, at this point, to
8 strike the class allegation so that the individuals
9 plaintiffs, who actually do have a problem, can go
10 forward with their own litigation.

11 MR. WILLS: You could never have a class
12 action in a construction litigation.

13 MR. RAWLS: In a construction defect case
14 against a contractor.

15 MR. WILLS: Yes.

16 MR. RAWLS: And

17 MR. WILLS: Or developer.

18 MR. ETHERIDGE: Or architect.

19 MR. WILLS: Or architect.

20 MR. RAWLS: You can have one against a
21 manufacturer. For example, if the claim was that the
22 stucco that was developed by MasterWall, that was put on
23 the house out there, was somehow defective, then the
24 plaintiffs could maintain a class action against the
25 manufacturer, and that happens. You know, you may stop

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Sun City Hilton Head Homeowner Request for Stucco Repairs
and
Agreement not to Participate in Class Actions

I am a homeowner in Sun City Hilton Head, and I am requesting that repairs be made to the stucco system on my house.

I am either represented by legal counsel with regard to stucco issues, and/or I understand that I have the right to consult with legal counsel of my choosing prior to signing below.

I understand that at least two homeowners have filed lawsuits with class action allegations relating to stucco on homes in Sun City Hilton Head.

I understand that Del Webb and/or Pulte does not want to pay for or make repairs to my home if I chose to stay in a class action lawsuit which is seeking money for stucco repairs. In other words, Del Webb/Pulte is not willing to pay me twice for stucco repairs.

If Del Webb Communities, Inc., Pulte Homes, Inc., or one of their stucco subcontractors makes repairs to my stucco, then I agree not to participate in any way in any present or future class action lawsuit against Del Webb Communities Inc., Pulte Homes, Inc., or any stucco subcontractor that has applied stucco to homes in Sun City Hilton Head (including, but not limited to, South Carolina State Plastering). My agreement not to participate in class actions includes, but is not limited to, the following: 1) I agree not to be a named plaintiff or class representative; 2) I agree not to accept any funds from a class action lawsuit (whether by way of a class settlement or by judgment); 3) I agree that if an "opt in class" is certified, then I will not "opt in" to the class; 4) I agree that if an "opt out class" is certified, then I will "opt out" of the class; and 5) I agree that this document may be provided to any tribunal and/or filed with any court as evidence and notice of my intent not to participate in a/the class action (to either not "opt in" or to "opt out").

I understand that this agreement does not affect my right to file an individual lawsuit or arbitration if I discover construction defects in the future.

Homeowner Address

Print Homeowner Name

Witness

Homeowner Signature

Date

----- Forwarded message -----

From: **Stephen Grossberg** <grossb2@gmail.com>

Date: Fri, Jan 13, 2012 at 12:25 PM

Subject: [Hidden Cypress] NRC MEETING STUCCO AND OVER ISSUES

To: Hidden Cypress <hiddencypress@islc.net>

NRC Monthly Meeting:

Yesterday's meeting was a short one due to activities from a political candidate visiting Sun City.

However there were **several important issues** that were raised that you need to be made aware of :

- **Sales of homes by Pulte for 2011:**

- While Pulte almost never reveals this sort of information, they have told us that they sold 106 homes on the North side last year. However they closed on 134 homes. Which means that they had a backlarge of 28 homes that they needed to complete from the year before. It would also indicate to me that the previous year had significantly greater amount of sales.
- They also told us that the average sale price for 2011 was \$277K up from 2010 which was \$273.
- Finally they indicated that the Loft models were the best sellers, and that they will be introducing new models in all the series this next year

- **Golf sales for 2012 and New Golf Director:**

- Sales for this year were at 85% of what was projected, however Wentworth indicated they are still getting sales and they have also introduced programs for part timers which they believe will increased the amount of rounds that they feel they need to obtain.
- They indicated that they need to sell 80,000 rounds of 18 holes at \$36 to make their required goal.
- At one time they use to sell a 100,000 rounds at a lessor cost, but they indicated that they didn't believe they could maintain the courses properly if the sold that many rounds.
- The New Golf Director was introduced, he is at this point meeting with groups to discuss their concerns about golf and it make take several months to see if he will be beneficial.

- If our neighborhood golfers would like to sit down and meet with him as a group to discuss your concerns please see if you can form a group and we will attempt to arrange a meeting. Please let Roger know and we set up a meeting.
- **Purrysburgh Pool Issues:**
 - Allison Tucker speaking for the BOD indicated that they did not believe that they had any recourse in obtaining any money back from Contractors.
 - I agreed with her position but I questioned the BOD to explore going after the Architect and Engineers who designed the building. They hold what is known as Errors and Omission insurance. E/O issues have no expiration date as does contractor warranties.
 - I raised the issue as to whether the dehumidifying system ever worked properly for this type of system since when I was involved on the Property and Grounds committee several years ago this was raised as problem that had been on going for numerous years. Allison didn't feel this was possible.
 - I then raised the issue that the ground water issue that caused them to have to completely rebuild the pool should have been addressed when the pool was designed originally, after all this was a wetlands property that they were building on and they were aware of the magnitude of change and growth that was planned for and this should have been addressed by them.
 - I was shocked that instead of exploring these two issues they(BOD) choose to make excuses for the conditions.
 - My experience as an Arbitrator for the American Arbitration Association for Design and Construction Cases(Something that I have been involved with for over 25 years). Have sat on numerous cases of this type of problem and these are valid issues that should be addressed. I was told to take this discussion off line.
 - I guess the BOD needs to hear from the residents if they want anything done.
- **STUCCO Issues:**
 - Allison Tucker informed us that while the Class Action Suit has not be determined yet by the Judge involved in the matter. If he decides that this suit should move forward as a Class Action suit. There will be a number of changes that will effect all of us.
 - All home owners whose homes were built from 1998 to 2007 will be included in the case regardless unless you Opt out of the case.

- The case is not directly against Pulte, but against the Subcontractor who performed the work, but Pulte has been drawn into the suit as a third party.
- This suit will take years to resolve, which is true and the attorneys will be the first to be compensated. The end result will be in the form of financial compensation and not in correction of the problems. Which will not cover corrective actions. I believe this to be so from my experience in these type cases.
- Finally if the judge decides the case goes forward Pulte will stop doing corrective work on the homes. They feel that it would not make sense to spend money for repair and then possibly have to pay for suit and verdict.
- **How does this impact us presently?**
 - Pulte is presently continuing to come out and inspect homes based on the results of the inspection reports.
 - However they are only willing to fix problems if the homeowner will to sign an OPT OUT letter to the Class Action Suit.
 - I would advise home owners to continue to get their homes inspected, if based on those inspections they should consider on getting them inspected by Pulte and if Pulte agrees their is a problem get them to correct the problem. After all that is what we really want done, even if that requires you to sign an OPT OUT form.
 - I am also concern that Pulte corrective action is now focused on Mold and moisture issues only. But when I had my home inspected I discovered another problem on my home that wasn't related to moisture or mold that need corrective action.
 - My home had a horizontal crack about 5' above the slab on the wall (It ran most of the length of the wall). This type of crack made no sense to me. So I requested that Pulte open up two small pockets in the wall to see why I had these type of cracks.
 - The cracks were caused because the Lathe wire mesh which is part of the stucco system which is suppose to be secured to the plyscore is attached to the wall by staples. The staples should be attached every 6"-8" but instead stapled was every 24" thus causing the mesh to slack by gravity and causing the

cracks, if you were to caulk this type of crack they would show up again shortly after caulking repair. This has been confirmed by Robert Flathery.

- In my case Pulte has corrected the situation but unless you made them aware of this they are ignoring the situation on other homes in our neighborhood.
- I have raised this with the NRC, and they are setting up a meeting with Pulte to discuss the issue. I will let you know of the results.
- In the meantime if your home has been inspected by Pulte and if you have these type of cracks, and they haven't done anything about it, go back to them and ask them to open up your wall to make sure that the mesh is properly secured to your plyscore, mentioned that you aware of what they had to do on my home.

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Unsubscribe by sending email to:
hiddencypress-leave@lists.islc.net

EXHIBIT D

**Sun City Hilton Head Homeowner Request for Stucco Repairs
and
Agreement not to Participate in Class Actions**

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I understand that this agreement does not affect my right to file an individual lawsuit or arbitration if I discover construction defects in the future.

Homeowner Address

Print Homeowner Name

Witness

Homeowner Signature

Date

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396

RECEIVED
OCT 09 2012
SC Court of Appeals

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs,..... Respondents,

v.

South Carolina State Plastering, LLC,.....Defendant,

and

South Carolina State Plastering, LLC,.....Defendant,

v.

Del Webb Communities, Inc. Pulte Homes, Inc.
and Kephart Architects, Inc., ... Third-Party Defendants,

Of whom Del Webb Communities, Inc., and
Pulte Homes, Inc. are Appellants.

REPLY TO RETURN TO PETITION FOR REHEARING

The Respondents make two arguments against rehearing. They first complain that the petition does not raise any issues not previously raised to this Court in the filings on the motion to dismiss. (See Return at 2, 4). This is true, but the SCACR requires any party intending to seek certiorari to first raise the issue to this Court in the initial proceedings (here – the motion to dismiss proceedings) and then raise the issue again in a petition for rehearing. See Rule

242(d)(2), SCACR (“Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.”) (emphasis added). Moreover, a petition for rehearing is limited to grounds previously raised to the court, because “[i]t is *axiomatic* that an issue cannot be raised for the first time on rehearing.” *McClurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011) (emphasis added), *aff’g* 671 S.E.2d 87 (S.C. App. 2008); *accord Herron v. Century BMW*, 719 S.E.2d 640, 644 (S.C. 2011) (“ . . . a party may not raise an issue for the first time in a petition for rehearing.”). Thus, the Respondents’ first argument is foreclosed by the specific provisions of the SCACR and axiomatic principles of appellate practice and procedure.

The Respondents’ second argument against rehearing is that the petition requests specific rulings on the issues presented by the Appellants in their opposition to dismissal of the appeal, but Respondents contend this “has never been the practice of this Court.” (See Return at 4). The Respondents cite no authority for this proposition, and Appellants are not aware of any supporting authority. Moreover, as noted earlier, the petition for rehearing serves an error preservation function for future certiorari proceedings and, therefore, Appellants are compelled to ask for a specific ruling. Finally, the Respondents mischaracterize Appellants’ argument. Appellants are not seeking “specific rulings on each of [Appellants’] complaints regarding the Class procedure as embodied in the case management section of the Order” (Return at 4). Rather, Appellants seek specific rulings on the issues regarding appealability of the Order(s).

The bulk of the Respondents’ Return is devoted to accusations that undersigned counsel has violated Rule 269, SCACR by pursuing a frivolous appeal. The Respondents request this Court to impose sanctions for those alleged violations. These accusations are false.

First, as set forth in the attached affidavit of undersigned counsel, there is a good faith basis for pursuing this appeal. Second, as noted by the Respondents, their motion to dismiss included a Rule 269 motion and requests for sanctions. (Return at 2). This Court implicitly denied that motion when it dismissed the appeal without mentioning Rule 269. The Respondents did not timely petition for rehearing and, therefore, their current arguments are not properly before this Court. In any event, their arguments have no merit.

The Respondents argue that Appellants knew their current appeal was frivolous, because this Court had already dismissed the appeal in the *Lancaster* case. (Return at 3-4, 5-6). The issues in the two cases are similar but not identical. A petition for rehearing has been filed in *Lancaster*. The respondents in that case did not file a return, but this Court recently directed the respondents to do so. The Appellants in *Lancaster* intend to seek certiorari if rehearing is not granted. In short, the *Lancaster* proceedings present different albeit related issues, and those proceedings are not yet final. Thus, they provide no support for the instant Rule 269 motion.

The Respondents accuse Appellants of engaging in improper contact with the putative members of the “preliminary” class and complain that the current appeal has precluded the trial court from addressing this issue. (Return at 6-7). The trial court, however, recently advised the parties that it will hear and decide this matter. Thus, the Respondents’ complaints in this appeal are not properly before this Court and will be decided by the trial court.¹ Appellants deny that they have engaged in any improper conduct.

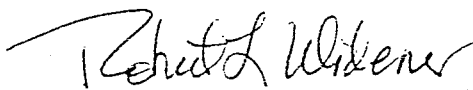
CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Petition for Rehearing, Appellants respectfully request this Court to grant rehearing and issue an order that

¹ The Respondents filed their Return on September 25, 2012. The trial court advised the parties on September 28, 2012, that it would hear this matter.

denies the motion to dismiss this appeal. In the alternative, Appellants request an amended order that specifically addresses the arguments and issues regarding appealability. Appellants submit that the Respondents' Rule 269 motion is without merit and not properly before this Court and, therefore, should be denied.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Robert L. Widener", is written over a horizontal line.

Robert L. Widener
A. Victor Rawl, Jr.
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

ATTORNEYS FOR APPELLANTS,
Del Webb Communities, Inc., and
Pulte Homes, Inc

Columbia, SC
October 9, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs,..... Respondents,

v.

South Carolina State Plastering, LLC,.....Defendant,

and

South Carolina State Plastering, LLC,.....Defendant,

v.

Del Webb Communities, Inc. Pulte Homes, Inc.
and Kephart Architects, Inc., ...Third-Party Defendants,

Of whom Del Webb Communities, Inc., and
Pulte Homes, Inc. are Appellants.

Affidavit of Robert L. Widener

Personally appeared before me, Robert L. Widener, who first being sworn to tell the truth, does depose and state as follows:

- (1) He is lead appellate counsel in the above-captioned appeal for Appellants Del Webb Communities, Inc., and Pulte Homes, Inc.
- (2) He files this affidavit in response to accusations by Respondents' counsel that the above-captioned appeal is frivolous and warrants sanctions under Rule 269, SCACR.

(3) He has been licensed to practice law in South Carolina since November 1983 --- his practice has been limited primarily to appellate practice since 1994 – he has never filed an appeal with this Court or any court without a good faith basis for the appeal, including the appeal in this matter.

(4) As set forth in Appellants' Return to Motion to Dismiss Appeal and their Reply to Return to Petition for Rehearing, there is a good faith basis for the appeals dismissed by this Court.

(5) The Supreme Court has held that certain orders must be appealed immediately or the right to appeal is lost. The Supreme Court first applied this rule to cases involving orders that denied the right to a jury trial or the right to a non-jury trial. See *Creed v. Stokes*, 331 S.E.2d 351 (1985) (order denying right to jury trial); *Pelfrey v. Bank of Greer*, 244 S.E.2d 315 (1978) (order denying right to non-jury trial). For a number of years, it appeared the Supreme Court would limit this immediate appeal requirement to only those types of orders. See, e.g., *Flagstar Corp. v. Royal Surplus Lines*, 533 S.E.2d 331 (S.C. 2000); *Hannah v. United Refrigeration Servs., Inc.*, 409 S.E.2d 360 (S.C. 1991); *Rowe Furniture Corp. v. Carolina Wholesale Furniture Co.*, 357 S.E.2d 725 (S.C. 1987). More recently, however, the Supreme Court has expanded the immediate appeal requirement to include various types of orders under various situations. See, e.g., *Neeltec Enterprises, Inc. v. Long*, 725 S.E.2d 926 (S.C. 2012) (order substituting a party must be appealed immediately), *rev'g* 705 S.E.2d 57 (S.C. App. 2011); *Salmonsens v. CGD, Inc.*, 661 S.E.2d 81, 87 (S.C. 2008) (class action order creating an opt in class must be appealed immediately); *Hagood v. Sommerville*, 607 S.E.2d 707 (S.C. 2005) (order disqualifying an attorney in a civil case must be appealed immediately). These recent decisions, however, do not establish the parameters of this expansion, nor do they set forth a unified analytical framework for determining when the immediate appeal requirement applies to a particular order. Here, the Appellants cannot risk that the failure to immediately appeal the appealed orders would later be ruled a waiver of the right to appeal given that Plaintiffs claim damages exceeding Three Hundred Million Dollars.¹ This is particularly true when, as here, the trial court deviated from the mode of trial mandated by the Supreme Court in remanding the prior appeal in this case.

FURTHER AFFIANT SAYETH NOT



Robert L. Widener

SWORN TO AND SUBSCRIBED BEFORE ME
this 9th day of October, 2012.



Notary Public for South Carolina

My commission expires: 5-14-2020

¹ Plaintiffs (Respondents) contend the class contains approximately 4,300 homes that must be repaired at a cost of \$75,000 per home for a total of \$322,500,000.00.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396

RECEIVED
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Anthony and Barbara Grazia, individually and on behalf of all other similarly situated
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South Carolina State Plastering, LLC, ... Appellant,

v.

Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects,
Inc., ... Third-Party Defendants.

PETITION FOR REHEARING

This Court's Order of August 31, 2012, grants the Respondents' motion to dismiss the above-captioned appeal. This Court ruled that the appealed "orders are not immediately appealable" without mentioning or specifically ruling upon the grounds raised by Appellant South Carolina State Plastering, LLC in their Return to Motion to Dismiss. This Court also did not mention or specifically rule upon the grounds raised by Del Webb Communities, Inc., and Pulte Homes, Inc. in their Return to Motion to Dismiss

its appeal of the same orders – South Carolina State Plastering, LLC had incorporated Del Webb Communities, Inc., and Pulte Homes, Inc.’s grounds in their Return.

South Carolina State Plastering, LLC respectfully request this Court to issue an amended order that rules specifically upon the grounds raised in the returns to the motions to dismiss so that they may file a more informed petition for rehearing. Absent such an order, South Carolina State Plastering, LLC hereby renews as grounds for rehearing the arguments made in the Return of South Carolina State Plastering, LLC, as well as the Return of Del Webb Communities, Inc., and Pulte Homes, Inc., copies of which are attached hereto and incorporated herein by reference.

The Appellant, South Carolina State Plastering, LLC (hereinafter “SCSP”), herewith petitions the Court for a rehearing and reconsideration of its Order, filed August 31, 2012 dismissing the Appeal. This petition is made under the provisions of Rule 221, SCACR, on the grounds that:

(1) The circuit court’s orders dated December 19, 2011 (the “Class Order”) and May 7, 2012 are immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2) because together they deprive the Appellant, SCSP of a substantial right for which it will have no recourse after final judgment. Specifically, the orders deprive SCSP of the ability to meaningfully exercise its rights under the South Carolina Notice and Opportunity to Cure Residential Defect statute, S.C. Code Ann. §§ 40-59-810 *et seq.*, by impermissibly modifying the statutory requirements and creating attorney-client relationships that undermine the legislative intent. In addition, the orders create a *de facto* “opt-in” class, which immediately violates the due process rights of the absent class

members and threatens to abrogate SCSP's due process right to a final judgment with *res judicata* protections.

(2) The Class Order requires class members to provide notice of defect which creates a *de facto* opt-in class. Salmonsens v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008) (under Rule 23, South Carolina law specifically prohibits a class action to be an opt-in).

(3) The Class Order is immediately appealable, because it affects a mode of trial to which the Appellant is entitled as a matter of right. *E.g.*, Salmonsens v. CGD, Inc., *supra*. This case "presents a novel question of law which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar." Salmonsens, 661 S.E.2d at 87 (allowing immediate appeal to address novel question of opt-in classes under South Carolina law). The trial court's attempt to use the Right to Cure Act as a vehicle for determining whether class certification is possible deprives the Appellant of the mode of trial established by the Supreme Court in *Grazia v. South Carolina State Plastering, LLC* and, therefore, the Class Order is immediately appealable. The issues raised by in the Court in the Class Order affects the mode of trial and thereby renders the Order immediately appealable, or at the very least the totality of the issues deprives the Appellant of a mode of trial and thereby renders the Class Order immediately appealable.

(4) The Class Order is immediately appealable because it affects the merits of the class action. S.C. Code Ann. § 14-3-330(1).

(5) The Class Order is immediately appealable because it affects the substantial rights of the Appellant. S.C. Code Ann. § 14-3-330(2). In *sua sponte* changing the definition of the class to save it from the Plaintiffs' failure of proof, the trial court effectively

struck the class definition and the Appellant's defenses thereto. Thus, the Class Order is immediately appealable under S.C. Code Ann. § 14-3-330(2)(c) as an order that affects a substantial right and "strikes out an answer or any part thereof *or any pleading in any action.*" (Emphasis added).

(6) Assuming the Class Order is not immediately appealable for the foregoing reasons, this Court should grant the Petition for Rehearing if there is any ground for an immediate appeal of the Class Order. See Travelscape, L.L.C. v. S.C. Dep't of Revenue, 705 S.E.2d 28, 38 n.10 (2011).

(7) Assuming the Class Order is not immediately appealable for the foregoing reasons and for those set forth in its prior submissions, this Court should have exercised pendent appellate jurisdiction over the Class Order in conjunction with the appeal from the order denying injunction. An interlocutory order denying an injunction is immediately appealable under § 14-3-330(4). The appellate courts have discretion to exercise pendant appellate jurisdiction and review an unappealable order in connection with an appeal from an order that is immediately appealable. E.g., Edge v. State Farm Mut. Auto. Ins. Co., 623 S.E.2d 387, 390 (2005) (court will entertain appeal of unappealable order when doing so will promote judicial economy and avoid need for a future appeal after final judgment). Here, Appellant has appealed the denial of an injunction prohibiting class counsel from contacting putative class members until after the end of the opt-out period. Considering the appeal of the Class Order in connection with the appeal of the injunction order will promote judicial economy and avoid the need for a future appeal after final judgment. Edge, 623 S.E.2d at 390. Moreover, this case "presents a novel question of law

which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar.” Salmonsens, 661 S.E.2d at 87.

The Court did not specifically rule on Appellant’s and the arguments made by Del Webb Communities, Inc. and Pulte Homes, Inc., and the Appellant requests a ruling on the arguments which are *supra* and briefed fully.

Appellant herein incorporates by reference the arguments it made in its earlier submissions to the Court of Appeals and the arguments made by Del Webb Communities, Inc. and Pulte Homes, Inc. and asks the Court to rule on the arguments fully briefed in this matter.

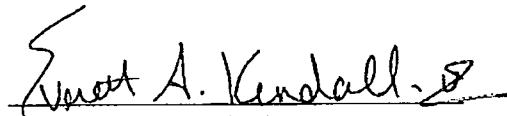
For all of the foregoing reasons, and for the reasons set forth in the Petition for Rehearing of Del Webb Communities, Inc. and Pulte Homes, Inc., which are incorporated herein by reference, it is respectfully submitted that this Court should grant the Petition for

CONCLUSION

The Court should grant the Petition for Rehearing and allow the appeal to proceed and establish a briefing schedule.

For all of the foregoing reasons, it is respectfully submitted that this Court should grant rehearing and deny the motion to dismiss and that a full opinion be issued.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Everett A. Kendall, II", with a stylized flourish at the end.

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September 11, 2012
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396
Case Tracking No.: 2012-212212

Anthony and Barbara Grazia, individually and
on behalf of all other similarly situated Plaintiffs, ... Respondents,

v.

South Carolina State Plastering, LLC, ... Appellant.

and

South Carolina State Plastering, LLC, ... Appellant,

v.

Del Webb Communities, Inc., Pulte Homes,
Inc., and Kephart Architects, Inc. Third-Party Defendants.

**RESPONDENTS' REPLY TO SCSP'S
PETITION FOR REHEARING**

Respondents, Anthony and Barbara Grazia, as Class Representatives, oppose the Petition for Rehearing filed by South Carolina State Plastering. The Petition seeks a rehearing of this Court's dismissal of SCSP's attempted Appeal of the Lower Court's Class Certification and other interlocutory case management orders.

In its Petition, SCSP advances nothing not already briefed and argued by both sides prior to the dismissal. Rather, it restates previous positions considered and rejected by this Court. Respondents incorporate their arguments against these positions previously stated in their Reply to SCSP's Return to Respondents' Motion to Dismiss Appeal (attached as Exhibit "A").

Interestingly, SCSP seems to be asking this Court for an advisory opinion. It asks this Court, "to issue an amended order that rules specifically upon the grounds raised in the returns to the motions to dismiss so that they may file a more informed petition for rehearing." The purpose of such a request is not readily understandable to the Respondents, although several possibilities present themselves. First, if this Court were to agree to this procedure, presumably then SCSP would file another Petition for Rehearing, thus serving the purpose of delay. Secondly, SCSP may be looking to gain some collateral advantage in the Lower Court's case management by a pronouncement by this Court. Third, SCSP may wish to flesh out a record for further delaying Appeals.

None of these reasons, nor indeed any others, present this Court with any reason to grant SCSP's Petition, and such Petition should be denied, so that the Lower Court can move forward with the management of the Class in this six year old case.

Respectfully Submitted,


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2007-CP-07-1396

Anthony and Barbara Grazia, individually and on behalf of all other similarly situated
Plaintiffs, ... Respondents,

v.

South Carolina State Plastering, LLC, ... Appellant.

South Carolina State Plastering, LLC, ... Appellant,

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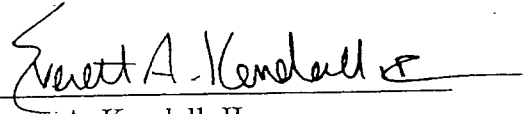
Del Webb Communities, Inc., Pulte Homes, Inc., and Kephart Architects,
Inc., ... Third-Party Defendants.

REPLY TO RETURN TO PETITION FOR REHEARING

The Appellant South Carolina State Plastering, LLC, hereby incorporates all arguments set forth in the Reply to Return to Petition for Rehearing of Del Webb Communities, Inc. and Pulte Homes, Inc. and Affidavit in support of their Reply, which are incorporated herein by reference, and for all the reasons set forth therein, it is respectfully submitted that this Court should grant the Petition for Rehearing and issue an order that

denies the motion to dismiss this Appeal.

Respectfully Submitted,

A handwritten signature in dark ink, reading "Everett A. Kendall, II", with a horizontal line drawn underneath it.

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