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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,

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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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), SCRCP; 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]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, 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 Salmonsen 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* Salmonsen, 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* Salmonsen, 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

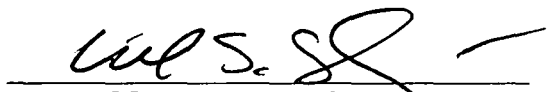
As is shown in Exhibits 3 and 4, Pulte has recently attempted to do exactly what it is attempting to do here, appeal an Order that is plainly and on its face not appealable. On May 1st, Judge Baxley made it clear that his Orders were interlocutory and on June 1st, this Court told Pulte that class certification 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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Dated: June 19, 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.

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I, Michael S. Seekings, Esq., do hereby certify that on June 19, 2012, I served opposing counsel with a copy of the Respondents' Motion to Dismiss Appellant Del Webb/Pulte's Appeal and Motion for Rule 269 Inquiry via regular first class United States mail, postage prepaid, addressed as follows:

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June 19, 2012
Charleston, South Carolina

EXHIBIT 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	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), SCRCP; 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.	)

This matter comes before the Court pursuant to Plaintiffs' Motion to Certify a Class in accordance with the provisions of Rule 23, SCRCP, and is on remand from the South Carolina Supreme Court after its majority decision that the class action provisions of Rule 23, SCRCP, 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), SCRCP.

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), SCRCP, follows.

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

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. Ripply 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." SCRCP, 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. 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), SCRCP.

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").

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

Rule 23(a) also requires that "the representative parties will fairly and adequately protect the interests of the class." SCRCP, 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), SCRCP, 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.

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

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, SCRCP, 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

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), SCRCP, 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.

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 or 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.

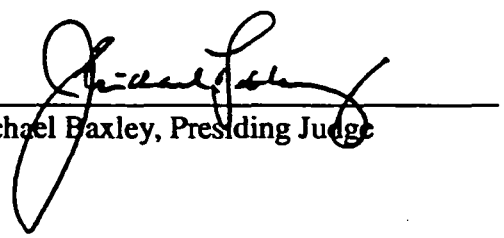
The Court is aware that the original purpose of the Act is to provide an opportunity for a claim to settled between parties without litigation occurring. To this end, the Court neither requires counsel to attend home inspections that occur as a result of Section 40-59-850(a) of the Act, nor is counsel 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

EXHIBIT 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**

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), 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

EXHIBIT 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. §§

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[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.)

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[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

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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

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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 Salmonsen 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, SCRCP, 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, SCRCP 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 nonparty[4] 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* Salmonsen, 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* Salmonsen, 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

By: _____

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Dated: 4/19/12

EXHIBIT 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

FILED
Carter 6/1/12

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.

EXHIBIT 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,

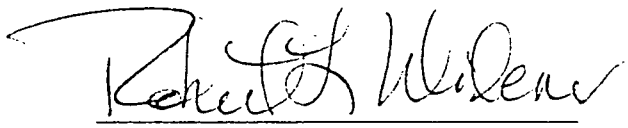
v.

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.



Robert L. Widener
A. Victor Rawl, Jr.
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Pulte Homes, Inc

Columbia, SC
June 7, 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:

Everett A. Kendall, II, Esq.
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Ann Shuler

EXHIBIT 6

DAVID RAMSAY HOUSE
c 1740

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.

Yours truly,

LEATH, BOUCH & SEEKINGS, LLP

Michael S. Seekings

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

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.

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FOR THE COURT

Columbia, South Carolina

FILED
Carter 6/1/12

cc:
Arthur Thomas Meeder
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Robert L. Widener
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William L. Howard, Sr.

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LEATH, BOUCH & SEEKINGS, LLP

COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

June 19, 2012

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Respondents' Motion to Dismiss Appellant Del Webb/Pulte's Appeal and Motion for Rule 269 Inquiry, along with a Proof of Service in the above-referenced matter. Also enclosed please find a firm check in the amount of $25.00 for the filing fee. Please return a filed stamped copy to us in the enclosed envelope. By copy of this letter, I am serving one copy of each upon opposing counsel.

Thank you and with best regards, I am

Yours very truly,

LEATH, BOUCH & SEEKINGS, LLP

Michael S. Seekings /dmc

Michael S. Seekings

MSS/dmc
Enclosures
cc: Victor Rawl, Jr., Esq.
Robert L. Widener, Esq.
Everett A. Kendall, II, Esq.
Christy E. Mahon, Esq.
David S. Cobb, Esq.
John T. Chakeris, Esq.
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